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# ANALYTICAL DIGEST

OF CASES PUBLISHED IN

# THE LAW JOURNAL,

AND IN

ALL THE REPORTS,

FROM

1822 TO 1828.

AN

# ANALYTICAL DIGEST

OF THE CASES PUBLISHED IN

## THE LAW JOURNAL,

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1822 to 1831

## ALL THE REPORTS

OF DECISIONS IN THE

## COURTS OF COMMON LAW AND EQUITY,

IN

The Ecclesiastical and Admiralty Courts,

BY THE TWELVE JUDGES,

ON APPEAL BEFORE THE HOUSE OF LORDS,

*AT NISI PRIUS,*

AND IN THE

Court for the Relief of Insolvent Debtors,

FROM MICHAELMAS TERM, 1822, TO TRINITY TERM, 1828,

INCLUSIVE.

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LONDON:

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# PREFACE.

THE title-page of this work sufficiently explains its object and contents. Having been originally intended solely for the use of Subscribers to the first Six Volumes of the LAW JOURNAL,* and as a substitute for the Annual Digests supplied with that publication, it has not been brought down to so recent a period as might perhaps be desirable for general use; but the extent, novelty, and convenience, of a Digest of Cases decided in *all the English Courts* during so long a period of time, has induced the Proprietor to believe that it will be acceptable to the Profession, and he has therefore printed an additional number of copies to be disposed of to Non-subscribers.

Of the manner in which the Editor has performed his task of preparing the work for the press, use alone can afford the means of forming a correct judgment. He has spared no pains to secure accuracy, to guard against the omission of any cases, and to arrange his materials in such a manner as to give every facility of reference.

* Published in the years 1823, 1824, 1825, 1826, 1827, 1828.

As the 11th and 12th Volumes of BAYLY MOORE's Reports were not published when the early sheets were put to press, references have been given in the Table of Cases at the end of the volume to the cases contained in them, which are also reported in MR. BINGHAM's Reports and in the LAW JOURNAL; and such cases as have not been noticed in the latter reports, are inserted in the Addenda.

In conclusion, it may not be unimportant, and may perhaps add to the value of this work, to observe, that upwards of 1000 cases *exclusively* reported in the LAW JOURNAL, are here abstracted.

INNER TEMPLE,
*June 22nd*, 1831.

# A LIST OF THE ABBREVIATIONS

## USED IN THIS DIGEST.

| *Abbreviations.* | *Reporters.* | *Courts.* |
|---|---|---|
| Add. | Addams's Reports | Ecclesiastical. |
| B. & C. | Barnewall & Cresswell's Reports | King's Bench. |
| Bing. | Bingham's Reports | Common Pleas. |
| Bligh | Bligh's Reports | House of Lords. |
| Bligh, N.S. | Bligh's Reports, New Series | |
| B. & B. | Broderip & Bingham's Reports | Common Pleas. |
| B. Mo. | J. Bayly Moore's Reports | Common Pleas. |
| C.C.R. | Crown Cases Reserved | Exchequer Chamber. |
| Campb. | Campbell's Nisi Prius Reports | K.B. & C.P. |
| C. & P. | Carrington & Payne's Reports | K.B. & C.P. |
| Chit. | Chitty's Reports | King's Bench. |
| Co. | Cooke's Reports | In the Court for the Relief of Insolvent Debtors. |
| Cress. | Cresswell's Reports | |
| Dod. | Dodson's Reports | Admiralty. |
| D. & R. | Dowling & Ryland's Reports | King's Bench. |
| D. & R. N.P.R. | Dowling and Ryland's Nisi Prius Reports | King's Bench. |
| G. & J. | Glyn & Jameson's Reports | Bankruptcy. |
| Hag. | Haggard's Reports | Admiralty. |
| Jac. | Jacob's Reports | Chancery. |
| J. & W. | Jacob & Walker's Reports | |
| Ken. | Kenyon's Reports | K.B. & Chancery. |
| M'Clel. | M'Cleland's Reports | Exchequer. |
| M'Clel. & Y. | M'Cleland & Younge's Reports | Exchequer. |
| Mad. | Maddock's Reports | Chancery. |
| M. & R. | Manning & Ryland's Reports | King's Bench. |
| M. & S. | Maule & Selwyn's Reports | King's Bench. |
| M. & M. | Moody & Malkin's Nisi Prius Reports | K.B. & C.P. |
| M. & P. | Moore & Payne's Reports | Common Pleas. |
| Phill. | Phillimore's Reports | Ecclesiastical. |
| Price | Price's Reports | Exchequer. |
| Russ. | Russell's Reports | Chancery. |
| R. & M. | Ryan & Moody's Reports | K.B. & C.P. |
| S. & S. | Simons & Stuart's Reports | Chancery. |
| Sim. | Simons's Reports | |
| Stark. | Starkie's Reports | K.B. & C.P. |
| Taunt. | Taunton's Reports | Common Pleas. |
| Turn. | Turner's Reports | Chancery. |
| Y. & J. | Younge & Jervis's Reports | Exchequer. |

AN

# ANALYTICAL DIGEST

OF THE

## CASES REPORTED

IN THE

# LAW JOURNAL,

## From Trinity Term 1822, to Michaelmas Term 1828:

AND OF

## ALL THE CASES DECIDED OR PUBLISHED WITHIN THAT PERIOD,

COMPRISED IN THE REPORTS OF

Addams, in the Ecclesiastical Courts.
Barnewall and Cresswell, in K. B.
Bingham, in C. P.
Bligh, in the House of Lords.
Broderip and Bingham, in C. P.
Carrington and Payne, at N. P.
Chitty, in K. B.
Cooke, Cresswell, } in the Court for Relief of Insolvent Debtors.
Dodson, in the Admiralty Court.
Dowling and Ryland, in K. B.
Glyn and Jameson, in Bankruptcy.
Haggard, in the Admiralty Court.
Jacob, in Chancery.
Jacob and Walker, in Chancery.
Kenyon, in Chancery, and K. B.
M'Cleland, in Exchequer.
M'Cleland and Younge, in Exchequer.
Maddock, in Chancery.
Manning and Ryland, in K. B.
Maule and Selwyn, in K. B.
Moody and Malkin, at N. P.
J. Bayly Moore, in C. P.
Moore and Payne, in C. P.
Phillimore, in the Ecclesiastical Courts.
Price, in Exchequer.
Russell and Ryan, Crown Cases.
Russell, in Chancery.
Ryan and Moody, at N. P., and Crown Cases.
Simons and Stuart, in Chancery.
Simons, in Chancery.
Starkie, at N. P.
Taunton, in C. P.
Turner, in Chancery.
Younge and Jervis, in Exchequer.

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### ABATEMENT.

(A) Of Suit.
(B) Pleas in.
(a) *Nonjoinder.*
(b) *Misnomer.*
(C) Time of Pleading.
(D) Form and Requisites of.
(E) Evidence.
(F) When Quashed.
(G) New Trial on.

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#### (A) Of Suit.

When a plaintiff dies after a verdict, and after the day in bank, he is entitled to have judgment entered of the term *subsequent* to the verdict, even though the costs have not been taxed, as they are incident to the judgment, and may be taxed after the party's death. *Parker* v. *Steers*, 1 Ken. 378.

If husband and wife bring a joint action for a debt due to the wife before marriage, and before judgment the wife die, the action will abate. *Checchi and wife* v. *Powell*, 5 Law J. K.B. 123, s. c. 6 B. & C. 253.

#### (B) Pleas in.

##### (a) *Nonjoinder.*

Where a plaintiff sued as executor, and defendant pleaded that the promises in the declaration were made jointly by him with the plaintiff:—Held, that this was in effect a plea in bar, and not a plea in abatement. *Moffatt* v. *Van Mullingen*, 2 Chit. Rep. 539.

The Court will not order a plaintiff to furnish a copy of an agreement, to enable the defendant to avail himself of the nonjoinder of co-contractors. *Beale* v. *Bird*, 2 D. & R. 419.

The nonjoinder of a secret partner cannot be pleaded in abatement. *Mullett* v. *Hook*, 1 M. & M. 88. [Tenterden]

*(b) Misnomer.*

A plea in abatement, and not a plea in bar, is the proper mode of taking advantage of a misnomer in plaintiff's name. *Jewett* v. *Charnock*, 6 M. & S. 45.

If a defendant be arrested by a wrong christian name, and give a bail bond, the Court will not order it to be delivered up to be cancelled, but leave the defendant to his plea in abatement. *Tritton* v. *Gardner*, 3 Law J. C.P. 184.

Where a party has been served with process by a wrong *christian name*, the Court will not grant a rule to set aside the proceedings with *costs;* but if the party will not take a rule without costs, the Court will leave him to his plea in abatement. *Lyon's case*, 2 Law J. K.B. 38.

Where a defendant was arrested by the name of Stephen T. Silk, and signed a bail bond in the name of Stephen Thomas Silk, the Court ordered the bond to be cancelled, on his entering a common appearance; but observed, that in future they would leave the party to his plea in abatement. *Lake* v. *Silk*, 4 Law J. C.P. 67, s. c. 3 Bing. 296.

The Court will not set aside the service of a writ, because the writ does not contain the *second* christian name of the defendant, but will leave him to his plea in abatement. *Davies's case*, 2 Law J. K.B. 34.

A misnomer in the defendant's surname, must be pleaded in abatement, and is no ground for setting aside the writ and declaration. *Sumner* v. *Betley*, 4 Law J. C.P. 51.

Nor will the court set aside the proceedings on motion if there be a misnomer in non-bailable process, but will leave the defendant to his plea in abatement. *Sarjant* v. *Gordon*, 7 D. & R. 258.

Where, in an action of trespass, brought jointly against four defendants, one pleaded his misnomer in abatement; and, in conclusion, prayed judgment of the writ, and that the same might be quashed :—Held, bad on general demurrer, as the misnomer only operates to abate the writ as to the party misnamed. *Wade* v. *Stiff*, 6 Law J. C.P. 10, s. c. 1 M. & P. 26.

(C) Time of Pleading.

If a defendant, who resides in the country, (Stafford,) be served with notice of declaration, before the first day of term, he may plead in abatement within four days after his appearance has been entered. *Kirby* v. *Hunt*, 13 Price, 178, s. c. M'Clel. 65.

(D) Form and Requisites of.

Where a declaration is filed as of one term, and the defendant pleads in abatement in the next, the plea must be prefaced by a special imparlance. And this rule applies, even where the declaration is filed or delivered in vacation as of the preceding term. *Woodthorp* v. *the Hundred of Lothinglend*, 5 Law J. K.B. 63.

A plea that A B, now living in the county of D, ought to have been a party in the suit, is a good plea in point of form; nor is it necessary to describe A B by his addition. *Moon* v. *Lea*, 2 Law J. Chanc. 171.

A plea in abatement in proceedings by bill in the K.B. concluding with a prayer that the *declaration* be quashed, is bad. *Moffatt* v. *Van Mullingen*, 2 Chit. 539.

So of misnomer of one of four defendants, praying that the *writ* may be quashed. *Wade* v. *Stiff*, 6 Law J. C.P. 10, s. c. 1 M. & P. 26, *supra* B. *b*.

(E) Evidence.

To support a plea in abatement, the supposed joint contractor was called, who swore that he was not a partner with the defendants. His answer to a bill in Chancery, in which he swore that he was a partner, was received as evidence of the fact of partnership. Two witnesses also proved the fact of his being a partner; and the jury found a verdict for the defendants :—The Court held, that the answer ought not to have been received; and directed a new trial. *Ewer* v. *Ambrose*, 3 Law J. K.B. 115, s. c. 3 B. & C. 746, s. c. 5 D. & R. 629.

A plea of non-joinder in abatement, is not supported by evidence of a secret partnership, especially if the plaintiff be unacquainted with the fact. *Stansfield* v. *Levy*, 3 Stark. 8. [Abbott]

On a plea in abatement of the nonjoinder of A. B. as a defendant, his declarations made before action brought, are evidence in support of the plea. *Clay* v. *Langslow*, 1 M. & M. 45. [Abbott]

(F) When Quashed.

An informality in a plea in abatement is no ground to induce the Court to quash it on motion. *Rex* v. *Cooke*, 2 B. & C. 618, s. c. 4 D. & R. 114.

Where several persons, unknown to the plaintiff, are named in a plea of abatement, the Court will order the defendant to furnish particulars in writing of the places of residence and additions of the persons named; and for non-compliance with such order, will quash the plea. *Newton* v. *Verbeke*, 1 Y. & J. 257.

(G) New Trial on.

The Court observed, that there was no instance of a new trial on a plea in abatement, not even on payment of costs. *Shaw* v. *Hislop*, 2 Law J. K.B. 168, s. c. 4 D. & R. 241.

But a new trial granted in *Ewer* v. *Ambrose*, 3 Law J. K.B. 115, s. c. 3 B. & C. 746, s. c. 5 D. & R. 629, *supra*, E.

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## ACCOMPLICE.

On counsel stating that it appears from the depositions taken before the magistrate, that there is not sufficient evidence without the aid of the testimony of an accomplice, his evidence will be admitted. *Rex* v. *Barnard*, 1 C. & P. 87. [Hullock]

A prisoner may be convicted on the evidence of an accomplice, even though it be unsupported in any material fact. *Rex* v. *Barnard*, 1 C. & P. 88. [Hullock]

If on the trial of A and B, the evidence of C, an accomplice, be confirmed as to A, but not as to B, the Jury may, if they believe the facts disclosed by C, convict B on his testimony only. *Rex* v. *Dawber*, 3 Stark. 34. [Bayley]

If an accomplice be charged with any other felony than that on the trial of which he is to be a witness, he will not, in general, be admitted as king's evidence. *Memorandum*, 2 C. & P. 411. [Park and Garrow]

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## ACCORD AND SATISFACTION.

In an action of assumpsit by the plaintiffs, assignees of H, a bankrupt, the declaration alleged that the defendant was indebted to the bankrupt, before his bankruptcy, in the sum of 1,000*l.* for goods sold, &c. which promise was stated to have been made before his bankruptcy: plea, that after the making of the promises, and before H became a bankrupt, and before the commencement of the suit, upon an account stated between H and the defendant, of and concerning the sum in the declaration, the defendant was found to be indebted to H in the sum of 400*l.*, for which said sum defendant gave the bankrupt a bill of exchange, which he accepted for and on account of the said several promises and undertakings in the said counts mentioned; and by reason whereof the defendant became liable to pay the bill; the plaintiff having replied over, and the defendant having demurred, it was holden to be an insufficient plea, because the mere acceptance of 400*l.* does not necessarily operate in point of law as an extinguishment of the debt of 1,000*l.* *Thomas* v. *Heathorn*, 2 B. & C. 477, s. c. 3 D. & R. 647.

In an action for an excessive distress of rent, the precise sum laid in the declaration under a *scilicet*, need not be proved; the material allegation to be supported, being that of a smaller sum than distressed for being due; and after an excessive distress taken, the parties coming to an amicable arrangement respecting a sale, will not divest the tenant's right of action for such distress, unless that arrangement be by an agreement, which may be pleaded as an accord and satisfaction. *Sells* v. *Hoare*, 2 Law J. C.P. 56, s. c. 1 Bing. 401, s. c. 7 B. Mo. 36, s. c. 1 C. & P. 28.

To an action on a deed, the plea of accord without satisfaction is no bar. *Parker* v. *Ramsbottom*, 3 B. & C. 257, s. c. 5 D. & R. 138, s. c. 3 Law J. K.B. 16.

If A pay for B a smaller sum in satisfaction of a greater, it is a bar to the plaintiff's claim, because, by suing B he commits a fraud on A, whom he induced to advance his money on the faith of such advance being a discharge of the debtor. *Welby* v. *Drake*, 1 C. & P. 557. [Abbott]

## ACCOUNTANT GENERAL.

Where the taxed costs of the plaintiffs have been paid in a creditor's suit, specialty creditors, among whom the whole of the fund in court has been apportioned, are entitled to the production of the order and office copies of reports, necessary to enable them to get the money out of court, without contributing to the extra costs of the plaintiffs. *Lechmere* v. *Brazier*, 4 Law J. Chanc. 95, s. c. 1 Russ. 72. See stat. 1 Geo. 4. c. 35.

## ACCOUNTANTS.

A and B are employed as accountants to manage the affairs of a bankruptcy, after a dividend has been declared. B makes out the checks for the debts proved, and also for a claim made, and all of them are signed by the assignee. B receives the dividend on the claim and keeps it, afterwards the claim is substantiated, and the assignees pay the dividend over again, and bring an action to recover the same amount from A, as surviving partner: —The Court held, that the action was well brought. *Hughes* v. *Borrodaile*, 1 Law J. K.B. 74.

## ACCOUNT.

(A) Bill for.
(B) Action of.
(C) Account Rendered.
(D) Account Stated.

### (A) Bill for.

An infant administratrix may be compelled in equity to account. *Hindmarsh* v. *Southgate*, 1 Law J. Chanc. 24.

Where a plaintiff suing *in formâ pauperis* establishes title to an account from the defendant, it is no objection to his obtaining a decree for an account, that the defendant has produced evidence uncontradicted by the plaintiff, to shew that the balance of the account will be against the plaintiff. *Smith* v. *Taggart*, 1 Law J. Chanc. 90.

H, a solicitor, advances monies for subsistence to R, an infant, who, upon attaining his full age, was entitled to certain property; R, shortly after he reaches the age of twenty-one years, signs a memorandum, by which he acknowledges himself indebted to H, in respect of those advances, in the sum of 1,218*l.*; and upon this memorandum, H recovers a verdict against him: Held, that, even though the memorandum could not be impeached as obtained by fraud, yet in consequence of the relation in which H placed himself towards R, it will not prevent R from having an account taken in a court of equity of the sums really advanced to him by H. *Revett* v. *Harvey*, 2 Law J. Chanc. 39, s. c. 1 S. & S. 502.

A, being at the time abroad, became a tenant in common with B, and died fifteen years afterwards, without having been during that period in England, and being all the time ignorant of her right as tenant in common; B continued all along in possession, and receipt of the rents and profits of the premises: Held, that B's possession did not amount to an ouster; and that A's representative could sustain a bill for an account against B, without previously recovering the possession. *Johnson* v. *Burslem*, 2 Law J. Chanc. 168.

A, B, C, being partners, A dies intestate; the partnership is continued by B and C, without any settlement of accounts; and B afterwards assigns his share of the profits to D: Held, that, D cannot sustain a bill for the necessary accounts, unless he cause a limited administration to be obtained, and make the limited administrator a party: That a bill, to which A's personal representative is not a party, is demurrable, notwithstanding that it contains an allegation, that A's next of kin refuses to take out administration, and prevents the plaintiff from doing so. *Cawthorne* v. *Chalie*, 3 Law J. Chanc. 125, s. c. 2 S. & S. 127.

A class of persons being empowered by act of parliament to regulate the application of the produce of certain rates levied on the class, the majority of them directed a sum to be applied to purposes not

warranted by the act; and the treasurer paid according to that direction: *Held*, that, notwithstanding the assent of the majority of the class to the wrong, one or more of the class could sustain a bill on behalf of himself or themselves, and the rest of the class, against the treasurer for an account: and that the Attorney General was not a necessary party to such a suit. *Bromley v. Smith*, 5 Law J. Chanc. 53, s. c. 1 Sim. 8.

A having admitted B to an interest in an adventure, B makes remittances to the agent of the concern in London, which he directs to be carried to the account of A, and he also remits money to A, for A to remit to the agent on his account; the agent kept the account with A only: Held, that B could not sustain a bill for an account against the agent. *Maxwell v. Greg*, 6 Law J. Chanc. 128.

It is not now necessary, that a bill for an account should contain an offer by the plaintiff to pay the balance if found against him. *The Colombian Government v. Rothschild*, 1 Sim. 103.

To a bill for an account, the defendant pleads in bar to the account, up to a certain date, deeds amounting to a release; but the sum, in respect of which the release was given, is not averred to comprise the whole of the monies received by him, in respect of the subject of account, prior to that date: Held, that the plea was bad, as not covering the whole of what it professed to cover. *Reeve v. Dunston*, 3 Law J. Chanc. 155.

A bill for an account alleged, that the matters in question had been submitted to arbitration, and that a pretended award had been made, but charged circumstances to invalidate the award; the defendant pleaded the submission entered into in pursuance of the statute, and the award made in consequence of it: Held, that such a plea is a good defence to the bill. *Yates v. Boinard*, 4 Law J. Chanc. 61.

The taking of an account will not be stayed pending an appeal.

It is not the habit of the court to direct security to be given for the result of an account. *Nerot v. Burnand*, 2 Russ. 56.

A defendant having stated in his answer, that, by carrying on business on a farm, and with stock, belonging to the assets of an intestate, he had made profit, but that, as he had not kept any accounts, and had blended the transactions of the farm with his other concerns, he could not set forth the amount of the profits, it was ordered, that, in taking the account against him, annual rests should be made, and interest calculated at 5 per cent. upon those annual rests. *Walker v. Woodward*, 1 Russ. 107.

Where an account, rolled on as a stated account, has not been signed, it is not enough to prove the delivery of it, the acquiescence of the other party in it must also be proved. *Irving v. Young*, 1 Law J. Chanc. 108.

Upon a bill for an account, evidence entered into by the defendant, to prove items of his discharge, cannot be entered on read. *Walker v. Woodward*, 1 Russ. 107.

Where the usual decree for accounts against a personal representative has been taken upon motion, the Master ought to require the vouchers to be produced, although the answer is not replied to. *Davenport v. Davenport*, 1 Sim. 518.

(B) Action of.

A rule for the appointment of auditors is absolute in the first instance. *Archer v. Pritchard*, 3 D. & R. 596.

Two principal officers of the court, appointed auditors in an action of account. *Smith v. Smith*, 2 Chit. Rep. 10: s. p. *Archer v. Pritchard*, 3 D. & R. 596.

(C) Account Rendered.

Where paymasters, having received intimation from the Board of Ordnance, that increased pay would not be allowed to certain officers, suffered one of them to draw the full allowance; and five years after the above order, delivered an account to the officer's representatives, admitting the acceptance of the full sum: it was holden, that such account was evidence to shew that they had received the money to his use, and that after such a lapse of time they could not be permitted to say it was a mistake, and have the money refunded. *Skyring v. Greenwood*, 1 C.& P. 517, s. c. 4 B.& C. 281, s. c. 6 D. & R. 401.

If a person be agent to two parties, who are indebted to each other, and render an account to one of them, that he has received money for his use from the other, he is bound by that account, although he never received the money; unless he can shew that the entry was made unintentionally and by mistake. *Shaw v. Picton*, 4 Law J. K.B. 29, s. c. 4 B. & C. 715, s. c. 7 D. & R. 201.

The agent for the grantee of several annuities, delivered him four accounts in the course of eighteen months, and gave him credit for all the half-yearly instalments of the several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, and paid the balance of the accounts as if they had been received, and, in the later accounts, never brought forward those sums, nor intimated that he expected them to be repaid: Held, upon a bill of exceptions, that the jury were properly told by the Judge, that they might infer an agreement, whereby the agent made himself personally responsible for the payment of those annuity instalments—in default of payment by the grantors. *Shaw v. Woodcock*, 5 Law J. K.B. 294, s. c. 7 B. & C. 73.

(D) Account Stated.

*Semble*—An account stated may be given in evidence without being stamped. *Wellard v. Moss*, 1 Bing. 134, s. c. 1 Law J. C.P. 18.

An absolute and not a qualified acknowledgment is indispensable, to enable the plaintiff to recover under the account stated. *Evans v. Verity*, 1 R. & M. 239. [Littledale]

Evidence of the admission by a defendant of certain facts, from which his legal liability may be only inferred, is not sufficient evidence in support of a declaration upon an account stated.

Nor, *Semble*, a compulsory admission made before Commissioners of Bankrupt.

Accordingly, where a defendant, in an examination before Commissioners of Bankrupt, admitted that he had received a sum of money on account of the bankrupt, with knowledge of a previous act of bankruptcy, it was held that this was not sufficient to maintain a declaration upon an account stated

between the defendant and the plaintiffs as assignees. *Tucker* v. *Barrow*, 6 Law J. K.B. 121, s. c. 7 B. & C. 623, s. c. 1 M. & R. 518, s. c. 3 C. & P. 85, 89, s. c. 1 M. & M. 137, 139.

One Lythgoe being indebted to the plaintiff, gave him an order upon the defendant, his (Lythgoe's) tenant, to pay the debt out of the rent next coming due. Plaintiff sent the order to the defendant, without directly communicating with him thereon. On settling the next rent between Lythgoe and the defendant, the defendant produced the order to Lythgoe, and promised to pay the amount to the plaintiff, upon which Lythgoe gave him a receipt for the whole rent, but received only the difference between the sum due to the plaintiff and the whole rent. Under these circumstances, the plaintiff cannot recover the amount of the order from Lythgoe, in an action for money had and received, or upon an account stated. *Wharton* v. *Walker*, 3 Law J. K.B. 183, s. c. 4 B. & C. 163, s. c. 6 D. & R. 288.

A verbal agreement was made for the purchase of some turnips growing in a field. After the purchaser had removed the principal part, the seller said to him, "You owe me 3*l.*;" to which he replied, "I will send it before I draw any more turnips." He afterwards drew all the turnips, but did not send the 3*l.*: Held, that it was recoverable on the account stated. *Pinchon* v. *Chilcott*, 3 C. & P. 236. [Best]

The defendant promised the plaintiff, that, if she would take a lease of certain premises, he would give her 20*l.* towards putting them in repair. The plaintiff, having accepted the lease and done the repairs, demanded the 20*l.* The defendant promised to pay it at a certain future time: Held, that, notwithstanding the special counts of the declaration could not be supported, the original agreement being for the conveyance of an interest in land,—the defendant's subsequent promise was sufficient to entitle the plaintiff to a verdict on the account stated. *Seago* v. *Deane*, 6 Law J. C.P. 66, s. c. 4 Bing. 459, s. c. 1 M. & P. 227, s. c. 3 C. & P. 170.

Proof of the acknowledgment of a debt upon a bill of exchange, is sufficient to maintain a count upon an account stated; though there may not have been any other dealing between the parties; and though the plaintiff and defendant were not original parties to the bill; and, consequently, though there was no original privity of contract between them. *Wagstaff* v. *Boardman*, 5 Law J. K.B. 139.

If, on a plea of a stated account, the defendant avers that the account was truly stated in writing, and admitted by the other party to be a full, true, and settled account, and then pleads the same as a stated account, the plea is bad. *Taylor* v. *Simson*, 2 Law J. Chanc. 123.

A plea of a stated account is not faulty, because it avers various circumstances relative to that account; provided that the amount is positively averred to be a stated account, and is pleaded directly to the bill. *Taylor* v. *Shaw*, 2 Law J. Chanc. 125.

An account stated cannot be pleaded in bar to an action of assumpsit. *Roades* v. *Barnes*, 1 Ken. 391, s. c. 1 Burr. 9, s. c. 1 W. Black. 65: s. p. *Adderley* v. *Evans*, 1 Ken. 250.

A stated account is a clear statement of accounts, testified by the signature of the parties, as evidencing their approbation of the settlement, so as to bring the proof to a single point, and not to require evidence by the examination of numerous witnesses. *Attorney General* v. *Brooksbank*, 2 Y. & J. 37.

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## ACTION.

(A) Where maintainable.
(B) Parties to.
(C) Form of.
  (*a*) *Assumpsit or Trover.*
  (*b*) *Case or Trespass.*
(D) Notice of.
(E) Commencement of.

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### (A) Where maintainable.

An action does not lie against a person, who has committed an injury by unavoidable accident; but if any, the least blame be imputable to him, although he be innocent of any intention to injure, an action is sustainable. *Wakeman* v. *Robinson*, 1 Bing. 213, s. c. 8 B. Mo. 63: s. p. 2 Chit. Rep. 639.

An action on the case lies against the executrix of an attorney for the negligence of her testator, in making insufficient inquiries as to the validity of a security, upon which the client advanced money. *Wilson* v. *Tucker*, 1 D. & R. N.P.C. 30, s. c. 3 Stark. 154. [Abbott]

A, an engineer employed by B, is liable to C for any damage done to him, by the works which he has constructed on the premises of B, as long as they are under his management. *Witte* v. *Hague*, 1 Law J. K.B. 9, s. c. 2 D. & R. 33.

Case lies for an excessive distress for rent; the tenant having tendered the rent to his landlord before the distress was levied. *Branscomb* v. *Bridges*, 1 Law J. K.B. 64, s. c. 1 B. & C. 145, s. c. 2 D. & R. 256, s. c. 3 Stark. 171.

If a statute prescribes a particular remedy for an offence, the party's remedy by action is not necessarily abrogated; hence where an act prohibited other persons than the scavenger from carrying away dust from certain houses under a penalty, to be recovered before a justice of the peace: Held, that the scavenger might nevertheless maintain an action. *Ward* v. *Bird*, 2 Chit. Rep. 582.

An action on the case will not lie for detaining the plaintiff's cattle in the pound, after tender of amends made subsequently to the impounding. *Sheriff* v. *James*, 1 Bing. 341, s. c. 8 B. Mo. 334, s. c. 2 Law J. C.P. 5, and see note.

A court of justice will not assist a party to a fraud who is proceeding against his companion in fraud.—Neither party is to be assisted.

But where a fraud had only been contemplated, in order to make a pretended transfer of goods, and had not been carried into effect, either by a formal instrument, or by change of possession,—it was held, that the owner of the goods was not precluded from maintaining an action of trespass against a third person who had forcibly taken possession of the goods. *Weare* v. *Deare*, 5 Law J. K.B. 125.

A plaintiff cannot recover for goods sold, which he knows are to be applied to an illegal purpose, though he be not active himself in their being so applied, and be no sharer in the advantage to be

derived therefrom. *Hutton* v. *Wey*, 5 Law J. K.B. 220.

A publican cannot recover for beer furnished to third persons, by the order of an individual who has previously become intoxicated by drinking in his house. *Brandon* v. *Ord*, 3 C. & P. 440. [Best]

A person forged a power of attorney, under which, stock, which stood in the names of certain trustees, was sold out and transferred to the buyers. The sum produced by the sale was carried to a fund belonging jointly to the person who forged, and his partners. Two of his three partners knew of the money thus produced being carried to their partnership fund; but did not know that it was produced by a forgery. The person who committed the offence was afterwards convicted and executed for another forgery; no laches or connivance being attributable to the trustees: Held, that they might adopt the transfer, (though as against them it would not have been binding; and though it originated in a forgery;) and recover the amount of the produce from the other partners. *Stone* v. *Marsh*, 5 Law J.K.B. 201, s. c. 6 B. & C. 551, s. c. 1 R. & M. 364.

An action lies in the English Courts, on a Scotch judgment of *horning*, against a Scotchman born. *Douglas* v. *Forrest*, 6 Law J. C.P. 157, s. c. 4 Bing. 686.

An action will lie upon the decree of a Colonial Court of Equity, for the balance of an account between partners. And in such an action, the Court will look at the substance, without regarding the form of the proceedings upon which the decree is founded. *Henley* v. *Soper*, 6 Law J. K.B. 210, s. c. 8 B. & C. 16, s. c. 2 M. & R. 153.

An action does not lie for the amount of the plaintiff's distributive share of an intestate's estate, admitted by the administrator to be in his hands. *Jones* v. *Tanner*, 6 Law J. K.B. 71, s. c. 7 B. & C. 542, s. c. 1 M. & R. 420.

The plaintiff declared in case against the defendant, for not repairing his fences, *per quod* the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a hay-stack: Held, that the damage was not too remote, and that the action was maintainable. *Powell* v. *Salisbury*, 2 Y. & J. 391.

(B) Parties to.

*Quære*—Whether a person, using his own carriage and hiring a pair of horses and a job coachman for the day, is liable for any damage occasioned through negligent or careless driving by the job coachman? —Held in the negative, by the Lord Chief Justice Abbott and Mr. Justice Littledale; in the affirmative, by Mr. Justice Bayley and Mr. Justice Holroyd. *Laugher* v. *Pointer*, 4 Law J. K.B. 309, s. c. 5 B. & C. 457, s. c. 8 D. & R. 556.

Where a person went in his own carriage to Ascot races, having hired the horses and postilions, and, through the negligence of the latter, the carriage was driven against the horse and gig of another person,—it was held, that the owner of the horses and master of the servants, was liable to an action, at the suit of the party injured, and that the owner of the carriage was not liable. *Smith* v. *Lawrence*, 2 M. & R. 1, s. c. as *Smith* v. *Roberts*, 6 Law J. K.B. 268.

If certain commissioners under a private act of Parliament, may sue and be sued by their clerk, it is not necessary, at the trial of an action brought in the name of the clerk, to prove that he sues by their authority. *Truwhite* v. *Depree*, 2 C. & P. 557. [Abbott]

An action upon a contract may be maintained in the name of a party who has transferred his interest therein, if there is not good evidence to shew that such transfer was agreed to by the other party or parties concerned in the contract. *Holland* v. *Webb*, 6 Law J. K.B. 92.

An action cannot be maintained jointly by two plaintiffs, where the wrong done to one is no wrong done to the other. Where, therefore, an action was brought, and a verdict obtained by two plaintiffs against a defendant for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them:—The court ordered the judgment to be arrested. But the jury having by their verdict, confined the damages to the expenses which the plaintiffs had been jointly put to in procuring their liberty, the Court ordered the *postea* to be amended. *Barratt* v. *Collins*, 10 B. Mo. 446.

A, being appointed the managing director of two companies, who had power to sue in his name, ordered a stove to be put up in the house in which the business of the two companies was carried on, at their joint expense: the Court held, that for a breach of that contract he might sue for damages, and describe himself as *their* managing agent. *Beaumont* v. *Sylvester*, 2 Law J. K.B. 10.

By an act of Parliament the justices at the Quarter Sessions assembled, or at any adjournment, were empowered to build, or cause to be built, a bridge, and it was enacted, that they might contract for the building of the same, and that every contractor for such work should give sufficient security for the due performance of his contract to the clerk of the peace, and that the said justices, at any General Quarter Session, or adjournment of the same, might appoint such of the justices as they should think fit to superintend the building, &c. The expenses were to be provided for out of the county rate; and it was enacted, that in all actions or proceedings at law, the said justices might sue, or be sued, in the name of the clerk of the peace, and that no actions should abate by the death of any such clerk, but that the clerk of the peace for the time being should always be deemed the plaintiff, defendant, or respondent, &c. in all such actions, &c. or proceedings at law respectively; and it was provided, that every such clerk of the peace should be reimbursed all damages, &c. and expenses which he should have paid, or be subject or liable to, on account thereof out of the money to be raised by virtue of the act. The plaintiff covenanted with the defendants, who were the superintending justices, and were described in the indenture as the major part of the justices assembled at the General Quarter Sessions, to build the bridge; and the defendants covenanted, that they, or the treasurer for the county, should pay him a certain sum of money by instalments. The plaintiff having declared in covenant against the defendants for the non-payment of two instalments, it was determined, that the defendants were not liable, and that the remedy given by the statute was against the clerk of the peace.

*Allen* v. *Waldegrave*, 8 Taunt. 566, s. c. 2 B. Mo. 621.

In error upon a declaration in an action on the case against several defendants as common carriers, for negligently conveying the plaintiff as a passenger, whereby, &c.: Held, that the action being framed upon a breach of duty imposed by the custom of the realm, which, therefore, was a breach of the law, and the declaration being framed as upon a misfeasance, a verdict and judgment given against some of the parties only was not erroneous, and was afterwards affirmed in the Exchequer Chamber. *Bretherton* v. *Wood*, 3 B. & B. 54, s. c. 6 B. Mo. 141, s. c. 9 Price, 408.

(C) Form of.

*(a) Assumpsit or Trover.*

The servant of A, a farmer, having been ordered by his master to sell some sheep for ready money, sold them on trust to a person to whom he was indebted, and who refused to deliver them back to the real owner, or to pay for them, without deducting the money due to himself from the servant. The master brought an action for goods sold and delivered, and the court held, that the plaintiff had a right to waive the tort and sue in assumpsit. *Jones* v. *Batch*, 1 Law J. K.B. 106.

The plaintiff's servant took to the defendant a carriage-spring to repair, who undertook to return it by a certain time, which he did not do: upon being applied to for the spring, he refused to give it up until he was paid: Held, that trover would not lie, it being the breach of a contract; and, therefore, assumpsit was the proper remedy. *Fairman* v. *Grimble*, 2 C. & P. 266. [Abbott]

If there appears to be in the hands of the defendant, a certain quantity of goods, which he has undertaken to deliver, the plaintiff may maintain trover, since he is not obliged to bring a special action of assumpsit. *Smith* v. *Cook*, 2 C. & P. 277. [Best]

*(b) Case or Trespass.*

Case, and not trespass, lies for the negligent, careless, and improper driving of a horse and chaise, against the plaintiff, though the evidence proved the act to have been violent and immediate—(Graham B. *dissent.*) *Lloyd* v. *Needham*, 11 Price, 608.

Taking from a churchyard a tombstone, and obliterating the inscription on it, is the subject of an action of trespass, and not case. *Spooner* v. *Brewster*, 3 Bing. 136, s. c. 1 C. & P. 34.

Falsely, maliciously, and without any probable cause, procuring the warrant of a justice to search the premises, and apprehend the person of A, on suspicion of felony, and thereby causing his premises to be searched and his person imprisoned, is properly the subject of an action on the case, and not trespass. *Elsee* v. *Smith*, (in error,) 2 Chit. 304.

(D) Notice of.

Where a notice of action was in the form of a declaration, the Court held it sufficient, it expressing the cause of action so as to be understood. *Gimbert* v. *Coyney*, 1 M'Clel. & Y. 469.

It is not necessary that the Christian names of two attornies, who are partners, should be indorsed on the back of a notice of action against a magistrate for a false imprisonment. *James* v. *Swift*, 4 Law J. K.B. 43, s. c. 4 B. & C. 681, s. c. 6 D. & R. 625, s. c. 2 C. & P. 237.

A notice of action to a magistrate, under 24 Geo. 2. c. 1, must fully describe the cause of action; but need not state the form of action intended to be brought.

But if it mention one form of action, the plaintiff cannot resort to any other, even though the notice shew that the mention of that particular form of action is under a mistake. *Ford* v. *Abdy*, 5 Law J. M.C. 41, K.B. 66.

A notice of action to a person entitled to notice under any act of parliament, which notice complains of an injury committed in the house of the party complaining, is sufficient if it give a correct though not a legal description of the house. And, accordingly, a notice of action for a trespass committed in a house described as in "West-Square, Lambeth," which would be a correct description of the house in popular meaning, was held to be sufficient; although the strictly legal and correct description would be "in the parish of Saint George the Martyr," and which description the plaintiff gave it in his declaration. *Gibbs* v. *Stead*, 6 Law J. K.B. 378, s. c. 8 B. & C. 528.

In the notice of action, to a Justice of the Peace, for illegally issuing a distress-warrant against the goods of the plaintiff, the warrant was stated to have been directed to J. B., and, on its being produced at the trial, it was found to have been directed to E. H.: Held bad. *Aked* v. *Stocks*, 6 Law J. C.P. 106, ib. C. M. 62, s. c. 4 Bing. 509, s. c. 1 M. & P. 346.

A statute enacted, that no plaintiff should recover in any action commenced against any person, for anything done or performed in execution or under the authority of the act, unless notice thereof in writing should be previously given twenty-eight days before the commencement of the action: Held, that a notice was necessary in those cases only, in which the party against whom the action was brought, had reasonable ground for supposing that the thing done by him, was done in execution of or under the authority of the Act. *Cook* v. *Leonard*, 6 Law J. M.C. 99, s. c. 6 B. & C. 351.

(E) Commencement of.

The date of filing the plaintiff's bill is, *primâ facie*, the date of the commencement of an action. *Woolridge* v. *Bishop*, 6 Law J. K.B. 101, s. c. 7 B. & C. 406.

It is not necessary that the writ be produced, in order to shew when the action was commenced. Therefore, where the cause of action accrued on the 1st of February, after the first day of Hilary term, (the declaration being entitled generally of Hilary term,) and the attorney on the trial proved that he received no instructions to commence the action until after the 1st of February, but the writ was not produced—this was held to be sufficient evidence that the action was not commenced until after that day. *Lester* v. *Jenkins*, 6 Law J. K.B. 324, s. c. 8 B. & C. 339.

## ADMINISTRATION.

(A) To whom granted.
(B) Of the Administration Bond.
(C) Practice.

[See also EXECUTOR AND ADMINISTRATOR.]

### (A) To whom granted.

Where the power of granting administration is discretionary with the Court, administration *cæteris paribus* is always granted to the claimant having the greatest interest. *Tucker* v. *Westgarth*, 2 Add. 352.

A widow who has married again, is nevertheless to be preferred to a next of kin, in the granting of administration. *Webb* v. *Needham*, 1 Add. 494.

Administration of the property of a public functionary of the Emperor of Morocco, was granted to a party specifically empowered to take it on behalf of the national treasury, by the Mahomedan law, on proof of the Emperor's title (which was not questioned by the crown, or otherwise). *In re Beggia, deceased*, 1 Add. 340.

Where one of three administrators became a lunatic, the Court granted administration *de novo* to the other two. *In the goods of Phillips*, 2 Add. 335.

Administration will not be decreed to *substituted* trustees in the absence of the consent of all parties beneficially interested in the trust properties, until such properties are vested in such trustees. *Creswell* v. *Creswell*, 2 Add. 342.

A, B, and C, being partners, A dies intestate; the partnership is continued by B and C without any settlement of accounts; and B afterwards assigns his share of the profits to D:

*Semble*—That D, though he has an interest in accounts which involve the personal estate of A, cannot as a creditor of A, cite his next of kin to accept or refuse administration to him.

*Semble* also—That the Ecclesiastical Court, if A's next of kin, upon being cited, refuse to accept administration, and if D shew the necessity of there being a personal representative of A, will grant a limited administration to D's nominee. *Cawthorne* v. *Chalie*, 3 Law J. Chanc. 125, s. c. 2 S. & S. 127.

Where the only surviving executor became incapable of acting or of executing the necessary legal instruments to enable others to act, the Court granted administration with the will annexed to the residuary legatee, no opposition being offered by the next of kin. *In re Crump*, 3 Phil. 497.

Administration, with the will annexed, may be committed to a residuary legatee, during the lunacy of a surviving executor and residuary legatee, in trust; at least by and with the consent (given, or implied,) of the committee of the lunatic. *In the goods of James Milnes*, 3 Add. 55.

Administration, under certain limitations, of the goods of a foreigner, decreed to the substituted attorney of his executors, with an official copy annexed of "extracts" (only) "from his will," such extracts consisting of the beginning and ending of the will, and of two clauses therein; the one containing the appointment of executors; and the other a bequest of the testator's (only) property in this country. *In the goods of Don Francisco Rioboo*, 2 Add. 461.

The ordinary practice, where an executor fails to represent a testator, is, to grant administration, with his will annexed, to the residuary legatee, *in trust*, if any; and failing such residuary legatee *in trust*, then to grant the same, not to his or her representative, but to such person or persons as have the *beneficial* interest in the residuary estate, under the will.—Administration decreed, however, in this case, to the representative of a surviving trustee, in preference to either, or both, of two other claimants, styling themselves "residuary legatees," simply, but without any violation of the ordinary practice, as explained above; such other claimants being, in fact, residuary legatees for life only, each in a fifth of the residue; she, the representative of the surviving trustee, having also, as such, herself a beneficial interest in the residuary estate greater than that of either of the other claimants: and the will of the testator plainly excluding the interference or controul of those other claimants, or either of them, in the general management of his estate. *Hutchinson* v. *Lambert*, 3 Add. 27.

Administration can only be granted to a creditor upon the failing of all other representatives—the circumstances of the next of kin being creditor, is a reason against his being preferred, in a contest for administration, either with the widow or any other next of kin. *Webb* v. *Needham*, 1 Add. 494.

The 48 Geo. 3. c. 87. applies as well to an executor out of the jurisdiction of the courts of law and equity as out of the realm; consequently a limited administration was granted to the nominee of a creditor. *In the goods of Jouet*, 2 Add. 504.

Where the relative renounced, the Court granted administration to creditors, notwithstanding the former prayed to be re-appointed before the administration passed the seal. *West* v. *Willby*, 3 Phil. 374.

A limited administration was granted to a creditor pending process, calling on all parties entitled to distribution, to accept or refuse administration. *Woolley* v. *Green*, 3 Phil. 314.

If the executor declines administration, and there be no next of kin, it may be granted to a legatee or creditor; and the same rule holds if the next of kin declines, but in that case, notice must be given to the next of kin, of the legatees' or creditors' application. *Kooystra* v. *Buyskes*, 3 Phil. 531.

The executor of a residuary legatee is preferred to the executor of a creditor, in the granting of administration. *Jones* v. *Beytagh*, 3 Phil. 635.

When a sole next of kin refuses to take administration, the Court, on cause shewn, will decree letters *ad colligendum bona defuncti*, limited according to the special circumstances of the case. *In the goods of Mary Radnall*, 2 Add. 232.

### (B) Of the Administration Bond.

In order to induce the Court to dispense with securities when required by the practice of the court, very special circumstances must be produced;—and if the Court decree a general grant, and require securities as to part only, it will not allow separate bonds, so that other sureties than those justifying may enter into the common bond. *Howell* v. *Metcalf*, 2 Add. 348.

*Quære*, whether even on grants of administration, to foreigners, of the property of foreigners, generally, the administrator is compellable to give bond here,

in England, with two sureties, British subjects, for the due administration of the effects? *Cambiaso* v. *Negretto*, 2 Add. 439.

If the Court be prayed, at the instance of parties in distribution, to pronounce an administration bond forfeited, &c. in order to its being put in suit, against the sureties to that bond, at common law, the question for the Court is not, properly, the ultimate responsibility of the sureties; it is, generally speaking, the mere fact of whether the conditions of the bond have, or have not, been fulfilled. If unfulfilled, it will be the Court's duty, generally speaking, to pronounce for the forfeiture of the bond, without any reference to that other question of whether the sureties are, or are not, ultimately responsible; leaving it to the sureties to plead and prove elsewhere, if they are capable of so doing, that the parties putting it in suit, are still, as by their own laches or otherwise, not in a condition to recover upon the bond, notwithstanding its forfeiture. *Dewey* v. *Edwards and Tappen*, 3 Add. 68.

(C) Practice.

Principles by which the Court is governed in granting administrations pending suit.

Administration *pending suit* is never granted on motion, without the prior consent of the parties. *Northey* v. *Cock*, 1 Add. 326.

The Court granted a conditional administration of the goods of a party *until his last will* (stated by the deceased himself a few days before his death, to be in India,) or an authentic copy thereof should be transmitted from India to this country. *In re Metcalfe*, 1 Add. 343.

The Court will not grant letters of administration to a creditor, in the absence of an affidavit stating the amount of property to be administered, where there has been no personal service of the usual citation on the parties entitled in the first instance. *Martineau* v. *Rede*, 2 Add. 455.

An ecclesiastical court had granted letters of administration *de bonis non* to two sons of a widow lady. A third son instituted a suit in that court to repeal them. On a motion for a prohibition to the Archdeacon not to proceed in that suit, the Court refused to grant it. *The King* v. *the Archdeacon of Chester, in the cause of Pratt and another* v. *Swain*, 1 Law J. K.B. 161.

If the party entitled to administration be resident abroad, due notice must be given to him before it will be granted to any other person; and the mere service of notice of the decree on the Royal Exchange is of no avail. *Goddard* v. *Cressonier*, 3 Phil. 637.

On an application to grant probate, on admissions of the adverse party, the answers must be on oath. *Lyon* v. *Furness*, 3 Phil. 316.

The Court refused to open a cause on the application of a party calling on the residuary legatee and administratrix to prove the testator's will, on the ground that he was abroad at the time, where, although he shewed he returned to this country with due expedition, he did not establish, that he had used due diligence in giving notice of his intention after his return, to dispute the will. *In re Robinson*, 3 Phil. 511.

*Quære*, whether the production of a conviction of bigamy against A, who had married C, living B, his first wife, divests A, on C's death, from propounding his interest as lawful husband of C, in a suit in the Ecclesiastical Court, touching the administration of C.'s effects. *Wilkinson* v. *Gordon*, 2 Add. 152.

It is the practice of the office not to receive the renunciation of an executor, &c. without the original will. Hence the Court, when applied to for letters of administration, limited to assign a satisfied term of years to the nominee of the owner of the fee, (in which case, it is not the practice of the office to annex the original will,) on the renunciation of the party entitled to the admininistration of the deceased's effects, with her will annexed, in preference to receiving the renunciation with the original will, (this not being to be had,) decreed the party entitled to be cited to accept or refuse, &c. promising to grant the administration to the nominee of the owner of the fee, on the others' default. *In the goods of Martha Fenton*, 3 Add. 35.

Special certificates to the facts of the case, necessary to found the grant, superadded to the oath of the applicant, in the instance of every administration applied for, (the obvious, and only general scheme suggested for preventing frauds in obtaining letters of administration,) would involve a general inconvenience, less tolerable than the particular evil in question. But the Court may direct such special certificates in certain cases, and if, being exhibited, they are unsatisfactory to the Court, [for instance, as failing to certify the principal facts by the testimony of third persons, speaking of their own knowledge; or, as the case may be,] the Court will, at least, suspend, and may probably, in the end, altogether reject the application for the grant itself in such case. *In the goods of Christopher Coke*, 3 Add. 22.

## ADJUSTMENT.

[See Insurance.]

Parol evidence is admissible to explain the intended forms of an adjustment indorsed on the back of a policy. *Russel* v. *Dunskey*, 6 B. Mo. 233.

If two persons jointly enter into a speculation, which ultimately proves unproductive, and the one furnishes the other with an estimate of the loss, who, on being requested to pay the moiety, undertakes to call and pay: In an action to recover the moiety, this is sufficient evidence of an adjustment of the amount between the parties. *Clark* v. *Glennie*, 3 Stark. 10. [Abbott]

## ADMIRALTY, COURT OF.

A special contract for seamen's wages, cannot be enforced in the Admiralty Court, that tribunal having no jurisdiction over special agreements. *Sydney Cove*, 2 Dods. 11.

The jurisdiction over a prize cause, continues in the Prize Court of Admiralty, although the prize may have been taken after the time limited for the cessation of hostilities. *Harmony*, 2 Dods. 78.

A prize, taken by British and allied force, and brought within the British territory, is subject to

the jurisdiction of the Admiralty Court. *French Guiana*, 2 Dods. 151.

The Court of Admiralty has authority to inquire into the title, under which British subjects claim a right to a vessel coming into this country, which is in the possession, and appears to be the property of foreigners. *Experimento, formerly Experiment*, 2 Dods. 38.

A surgeon to a ship, it would appear, cannot sue for wages in the Admiralty Court. *Lord Hobart*, 2 Dods. 104.

The Court of King's Bench will not grant a prohibition to restrain the Admiralty Court from proceeding in a suit, instituted by several part-owners of a ship, against one for the possession of the ship's register. *Anon.* 3 D. & R. 178 n., s. c. 2 Chit. 359.

The Court of Admiralty is not permitted to entertain questions of disputed title, but it still retains jurisdiction over causes of possession. *Warrior*, 2 Dods. 288.

Jurisdiction of Vice Admiralty Courts in revenue cases, is of mere statutory institution; and by stat. 49 Geo. 3, questions of this sort must be tried either where the offence was committed or the seizure made. *Hercules*, 2 Dods. 353.

Question, whether a foreign ship of war lying in a port of this country, is liable to the civil process of the Court of Admiralty, in a cause of *salvage*, at the suit of British subjects. *Prins Frederic*, 2 Dods. 451.

The Court of Admiralty has authority to arrest and detain a ship, upon the application of a part owner who dissents from her intended employment, until security be given for the other part owners to the full value of his share. *Apollo*, 1 Hag. 306.

## ADULTERY.

[See Baron and Feme, and Divorce.]

The commission of adultery, by husband or wife, may, at any time before sentence, be pleaded, even after seven years have elapsed from the publication of the occurrence, if it be certified that a reasonable time has only expired since it came to the proponent's knowledge. *Brisco* v. *Brisco*, 2 Add. 259.

The concurrence of cruelty and adultery, though the former be unaccompanied with personal violence, is a good ground for a separation. *Hulme* v. *Hulme*, 2 Add. 27.

To a suit by a husband for the restitution of conjugal rights, the wife's responsive allegation suggesting facts, neither amounting to a charge of cruelty, nor to adultery, admitted to proof. *Molony* v. *Molony*, 2 Add. 249.

Where adultery has been committed by the wife, but pardoned by the husband, it does not preclude him from suing for a separation. *Dunn* v. *Dunn*, 3 Phil. Rep. 6, overruling the same case in 2 Phil. Rep. 403.

But where the adultery of the wife has been acquiesced in by the husband, coupled with circumstances of misconduct on his part, the Court will not decree divorce. *Best* v. *Best*, 1 Add. 436.

Adultery may be pleaded by the defendant in a suit for restitution of conjugal rights. *Best* v. *Best*, 1 Add. 411.

A suit for adultery is not barred by proof of cruelty. *Arkley* v. *Arkley*, 3 Phil. 500.

In pleading the statute of limitations to an action for criminal conversation, it should be, not guilty within six years. *Cook* v. *Sayer*, 2 Ken. 371, s. c. 2 Wils. 85, s. c. 2 Burr. 753, Bull. N.P. 28.

In an action of adultery, the marriage was proved by an examined copy of the register, and the person who examined it, being acquainted with the handwriting of the plaintiff and his wife, stated that the signatures in the register were their hand-writing; this was holden good proof of identity. *Bain* v. *Mason*, 1 C. & P. 203. [Abbott]

## ADVANCEMENT.

[See Extinguishment.]

A fund, bequeathed by will, was directed to accumulate till infants should attain 21, deducting annually from the interest, such portion as might be necessary for their education, and other expenses; with benefit of survivorship in case of either dying under 21; the shares to be vested at 21: the Court (the parties to whom the fund was given over consenting,) directed an advancement for the purchase of a commission for one of the infants, but with considerable hesitation. *Evans* v. *Massey*, 1 Y. & J. 196.

## ADVOWSON.

In a devise, an advowson in gross passes under the description of "tenement." *Gully* v. *the Bishop of Exeter*, 5 Law J. C.P. 178, s. c. 4 Bing. 224.

The words in a will, "I do give to my son R the perpetual advowson of H. B. in L. and my manor of L. and all my lands in it," were held by three Judges, (*Park J. dissentiente*) to give an estate for life in the advowson, although at the period of making the devise, he was residuary legatee, and incumbent of the living. *Pocock* v. *Bishop of Lincoln*, 3 B. & B. 27, s. c. 6 B. Mo. 159.

The testator, after devising all his manors, advowsons, &c. *conveyed* an advowson to trustees, to present F. J., when vacant; and then in trust for himself and his heirs: Held, that the devise of the advowson was revoked. *Sparrow* v. *Hardcastle*, 1 Ken. 67, s. c. 3 Atk. 798, s. c. Amb. 224.

Where a prebendary, having the advowson of a rectory in right of his prebend, dies whilst the church is vacant, his personal representative has the right of presentation for that turn. (*Per Bayley, Holroyd*, and *Littledale*, Js. *Lord Tenterden*, C. J. *diss.*) *Rennell* v. *Bishop of Lincoln*, 5 Law J. K.B. 320, s. c. 7 B. & C. 113—overruling s. c. 4 Law J. C.P. 1, s. c. 3 Bing. 223.

The plaintiff claims the advowson of a vicarage, as mortgagor; insisting that it was inserted fraudulently in a particular of trust estate, directed by decree to be sold, for payment of debts: Held, that the equity of redemption of an advowson lapses, and the plea allowed without prejudice, &c. *Mallock* v. *Salter*, 2 Ken. Chanc. 49.

Where the advowson of a parish is vested in trustees for the benefit of the parishioners, an elec-

tion of a vicar by ballot is not valid. The election must be by voting openly. In such a case, the right of voting at the election of a vicar, may be limited by long usage to parishioners, who pay church rates and poor's rates. *Edenborough* v. *Archbishop of Canterbury*: *Carter* v. *Bishop of London*, 2 Russ. 93.

Where the presentation to a living is void by reason of simony, and the Crown thereupon present another who is duly inducted, and in other respects qualified, that other may maintain ejectment against him whose presentation is void, and is not compelled to resort to *Quare impedit*.

If a person who had obtained a benefice by simony, were to enjoy it until his death, the Crown might still present afterwards. *Doe d. Watson* v. *Fletcher*, 6 Law J. K.B. 282, s. c. 8 B. & C. 25, s. c. 2 M. & R. 206.

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## AFFIDAVIT.

(A) How and when entitled.
(B) Before whom to be sworn.
(C) Form and requisites of.
(D) When to be filed.
(E) Defective and irrelevant.
(F) Production of.

### (A) How and when entitled.

An affidavit entitled J. S. and another, is irregular. *Anon.* 1 Law J. K.B. 52.

Affidavits produced to obtain a rule *nisi* for a *certiorari*, if entitled in any cause, are irregular, and cannot be read. *Ex parte Nohro*, 1 Law J. K.B. 112, s. c. 1 B. & C. 267.

In all actions against bail, the affidavits must be entitled in the action against them, and not in the original action. *Ham* v. *Philcox*, 1 Law J. C.P. 21, s. c. 7 B. Mo. 521, s. c. 1 Bing. 142.

The affidavit for an attachment against the sheriff, should be entitled, *The King* v. *the Sheriff of* ——, in the cause of —— v. ——, with the *christian* names of the parties. *Rex* v. *the Sheriff of Middlesex*, 2 Law J. K.B. 38.

The title of the affidavit for judgment against the casual ejector, should state by whom the demise is made. *Doe* v. *Roe*, 3 Law J. K.B. 57.

The Court rejected an affidavit to set aside a judgment of *non pros.*, it being entitled in two several causes against separate defendants, but written on one sheet of paper, and with one stamp only. *Worley* v. *Ryland*, 8 B. Mo. 238.

An affidavit entitled in the cause, against the sheriff by reason of his contempt, need not of necessity add the title of the cause out of which the contempt grew; but it is usual and convenient in practice to add it. *Rex* v. *Sheriff of Middlesex*, 4 Law J. K.B. 207, s. c. 5 B. & C. 389, s. c. 8 D. & R. 149.

On motion to set aside proceedings on error, the affidavits must be entitled in the cause in error, and not in the original cause. *Gandell* v. *Regier*, 4 B. & C. 862, s. c. 7 D. & R. 259.

An affidavit entitled "In the common place," Held sufficient. *Rolfe* v. *Burke*, 5 Law J. C.P. 99, s. c. 4 Bing. 101.

Affidavits made to found a motion for setting aside proceedings by *scire facias*, against bail for an irregularity in the *ca. sa.*, should be entitled in the original action. *Green* v. *Richardson*, 6 Law J. K.B. 102.

An affidavit, entitled "A against B and another," is bad; for the defendants should be described by their christian names and surnames. *Doe dem. Spencer* v. *Want*, 8 Taunt, 647, s. c. 2 B. Mo. 722.

Where affidavits had been wrongly entitled, the Court gave leave to file fresh ones, properly entitled, but they kept the others on the file, and said that no difference in the matter could be permitted to be made in the new ones. *The King* v. *Mead*, 1 Law J. K.B. 88.

### (B) Before whom to be sworn.

An affidavit, sworn before the attorney or solicitor in the cause, cannot be received. *Reg. Gen.* 9 Price, 478.

This rule is not to be construed literally, as applying only to the attorney whose name appears on the record in the Court of Exchequer, which must be one of the four attornies of the Court, but includes the immediate attorney or solicitor of the party: and, therefore, a plea in abatement set aside on this ground. *Cooper* v. *Archer*, 12 Price, 149.

An information obtained upon affidavits, sworn before the attorney in the prosecution, is not available. *Rex* v. *Gaoler of Ipswich*, 2 Ken. 421.

Affidavits of the service of declarations in ejectment, may be sworn before the attorney in the cause. *Doe d. Cooper* v. *Roe*, 2 Y. & J. 284.

In future no commission for taking affidavits is to be granted to a practising conveyancer, unless he be also an attorney duly enrolled and certificated. *Reg. Gen.* 1 Law J. K.B. 192, 1 B. & C. 288, 2 D. & R. 43.

This rule is extended to attornies practising in the Courts of Wales, and counties palatine. *Reg. Gen.* 1 Law J. K.B. 192, 1 B. & C. 656, 2 D. & R. 870.

The Court allowed an affidavit sworn before a Commissioner of the Court of Exchequer, in Ireland, to be read. *Kilby* v. *Stanton*, 2 Y. & J. 75.

### (D) Form and requisites of.

Where the deponent to an affidavit of debt is an illiterate person or *marksman*, it should be stated in the jurat that it was read over to him in the presence of the commissioners. *Anon.* 1 Law J. K.B. 50.

Office copies of affidavits are not to be received or read in the Exchequer, unless signed by some accredited person, who has examined them. *Reg. Gen.* 9 Price, 298.

An affidavit to postpone a trial, on the ground of the absence of a material witness, is good, although it does not state his name. *Smith* v. *Dobson*, 2 D. & R. 420; *Macullum's case*, 1 Law J. K.B. 113.

The affidavit to stay proceedings need not set forth what stage the proceedings are in. *Anon.* 2 Law J. K.B. 38.

Although an affidavit be informal, yet the Court, if they think proper, will look at it for their own information. *Anon.* 1 Law J. K.B. 52.

The affidavit to change the venue in an action on a specialty, under particular circumstances, must set forth the names of the witnesses. *Anon.* 3 Law J. K.B. 56.

An affidavit to postpone the trial of an information, on the ground that a material witness is absent, must state where he is. *The Attorney General* v. *Phillips*, 13 Price, 522, s. c. M'Clel. 251.

But such a rule does not apply to civil proceedings. *Buckingham* v. *Bankes*, 4 D. & R. 832.

An affidavit must not be written in a slovenly and illegible manner; and if it be so, the Court will give costs against the party producing it. *Bans* v. *Jones*, 8 D. & R. 114.

An affidavit, upon which a defendant moves to set aside the proceedings, on the ground of his being arrested by the initial of his christian name, must disclose his proper names in the title of the cause, as well as in the body of the affidavit. *Shaw* v. *Robinson*, 4 Law J. K.B. 295, s. c. 8 D. & R. 423.

A palpable mistake in an affidavit—as the wrong year in the jurat—used in support of an application to the Court, is not an insurmountable objection to the motion, as the Court will permit the error to be amended by a supplemental affidavit. *Cooper* v. *Archer*, 12 Price, 149.

An affidavit of the service of a rule, by which it is not intended to bring the party into contempt, need not state that the original rule was shewn at the time of service. *Farnstone* v. *Taylor*, 2 Y. & J. 30.

(D) When to be filed.

Affidavits which are to be used on special applications, must, in the Exchequer, be filed one clear day before the application is made; and where notice of motion is necessary, the filing of the affidavit is to be mentioned at the foot of the notice. *Reg. Gen.* 9 Price, 58.

An affidavit in corroboration is received, and filed before cause shewn. *The King* v. *Siberil*, 1 Ken. 356.

An affidavit must be filed in time to be read on the day when the application is to be made. *Watson* v. *Fairlie*, 4 Law J. Chanc. 53.

A rule being enlarged, as a matter of course, and a condition imposed on the plaintiff to file affidavits in answer to that of the defendant a week before the commencement of the succeeding term: it was holden, that under circumstances the plaintiff was not precluded from using his affidavits, though they were not filed within the time specified in the rule. *Harding* v. *Austen*, 8 B. Mo. 523.

But a different rule was holden to obtain, where, on a motion to set aside an award, the affidavit of the arbitrator was not filed within the time limited by the Court. *Cleesby* v. *Peece*, 8 B. Mo. 524.

(E) Defective and irrelevant.

If an affidavit, in support of an application for the postponement of the trial of an information filed by the Attorney General, on the ground of the absence of a material witness, does not shew, 1st, of whom the deponent made the inquiry, as to the material witness; 2d, the answer to such inquiry; 3d, that the person, of whom the defendant inquired, is a party to the affidavit; it is insufficient. *The Attorney General* v. *Tyson*, 11 Price, 229.

If, on deciding on the tenability of an affidavit, made in support of a rule for the postponement of the trial of an excise information, the Court are divided in opinion, as to the affidavit being sufficiently circumstantial, it will make the rule absolute. *Attorney General* v. *Dodsworth*, 11 Price, 232.

Mode of proceeding upon irrelevant or scandalous affidavit. *Ex parte Chisman*, 2 G. & J. 315.

Where affidavits contain irrelevant matter, the Court will direct the Master to ascertain what parts are material to bring the question in dispute before the Court, and in his taxation to allow costs to the parties making the affidavits, for such parts only as are material, and to the opposite party the costs occasioned by the irrelevant matter. *Cassen* v. *Bond*, 2 Y. & J. 531.

(F) Production of.

The original affidavit cannot be received by the Court, in lieu of an office-copy. *Blackmore* v. *Shirley*, 4 Law J. Chanc. 33.

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## AFFIDAVIT TO HOLD TO BAIL.

[See Bail.]

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## AGENT.

[See Principal and Agent.]

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## AGREEMENT.

[See Contract.]

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## ALIEN.

[See Descent.]

No act of the British Parliament, nor any commission derived therefrom, if inconsistent with the law of nations, can affect the rights or interest of foreigners. *The La Louis*, 2 Dods. 238.

*Semble*, that if a merchant expatriates himself, as a merchant, to carry on the trade of another country, he is to be deemed a merchant of that country.

Under the Revenue and Navigation Acts, particularly the Statute 12 Car. 2. c. 18, called "The Navigation Act," no trade is permitted with the colonies and plantations dependent on the crown of Great Britain, (certain specific exceptions being made,) otherwise than in vessels *bonâ fide* British owned, and with goods and commodities of a particular kind, being actually the property of the British subjects:—It was held, by the Court of Admiralty, that the 58 Geo. 3. c. 19. s. 3. and 4, which permits the re-exportation from Halifax of certain goods (that shall have been previously legally imported there, according to the conditions of the Revenue and Navigation Acts), to other of the said plantations in British bottoms, owned and navigated according to law, will not protect the property of an alien, who, though formerly resident in a British colony, where he had taken the oath of allegiance to the King, has acted as factor, in respect of such goods, for another alien, born and resident in a foreign country.

Under stat. 28 Geo. 3. c. 6 s. 12, and 58 Geo. 3. c. 19, an American merchant could not send from

Boston a cargo on his own account, to be imported into Halifax, and thence to be re-exported to Newfoundland; and, therefore, sentence of condemnation of such a cargo seized at Newfoundland, affirmed. *Matchless*, 1 Hag. 97.

But see 3 Geo. 4. c. 44, whereby those statutes are repealed; and also the consolidation of the navigation laws in 3 Geo. 4. c. 42, 44, 45, and 6 Geo. 4. c. 109.

A person born in America, since the treaty in 1783, by which England acknowledged the independence of the United States, cannot take lands in England by descent.

A person in England died intestate, seised of lands in England. The grand-daughter of her uncle claimed to be her heir-at-law. That uncle went to America before 1783, and continued to live there until the time of his death. His daughter, the mother of the claimant, was born in America, and married in America in 1781. The claimant was born in America since the year 1783:—The Court held, that by the treaty in 1783, the Americans were absolved from their allegiance to the Sovereign of Great Britain; that the claimant was an alien, and, consequently, not the heir-at-law of the intestate. *Doe d. Thomas* v. *Acklam*, 2 Law J. K.B. 129, s. c. 2 B. & C. 779, s. c. 4 D. & R. 394.

A, a native of America, and B, a native of England, had dealings by mutual consignments previous to 1812. In June, 1812, war was declared between the two countries, and on the 24th December, 1814, preliminaries of peace were signed at Ghent. A cargo of goods, consigned on account by A to B, arrived in England, in November, 1814, and were sent by B to France, and there sold, and he received bills for the amount which he got discounted. Another cargo, so consigned, arrived in England in January 1815, and was by B sold before the 15th of February. In March, 1815, B became bankrupt, and was appointed by his assignees their agent to wind up his affairs, in the course of which employment he received the proceeds of the second cargo, and transmitted accounts to A, in which he admitted him to be his creditor for a balance in respect of the proceeds of both cargoes. In an action by A against the assignees of B, to recover such balances: Held, that A was entitled to prove under B's commission for the balance due to him upon the second cargo only. *Ogden* v. *Peele*, 3 Law J. K.B. 100, s. c. 8 D. & R. 1.

## ALIMONY.

A further allowance of alimony was granted in respect of an increase in the husband's income, where it was proved that he had committed adultery subsequent to the separation. *Blaquiere* v. *Blaquiere*, 3 Phil. 258.

The absence of proof or an admission of marriage, deprives a wife of her claim to an allowance, even in the nature of alimony. *Smyth* v. *Smyth*, 2 Add. 254.

A decree by the local ordinaries, as to the amount of permanent alimony, will not be reversed by the Court of Arches, on the ground that the wife receives one-fourth of her husband's income. *Street* v. *Street*, 2 Add. 1.

Length of time between the issuing and return to a citation, forms no exception to the rule, that alimony allotted *pendente lite*, is to be paid from the return, and not from the issuing of the citation. *Bain* v. *Bain*, 2 Add. 253.

The Court will allow a wife alimony, although she has a competency bequeathed to her for life, and the husband's income be not much greater than her allowance. *Rees* v. *Rees*, 3 Phil. 387.

An allotment of alimony *pendente lite* reduced, on proof that the husband was no longer in a condition to allow the wife, at the rate originally assigned.

This, on motion, founded upon the mere affidavit of the husband, the husband's prayer being, in effect, unopposed by the wife. *Cox* v. *Cox*, 3 Add. 276.

## AMBASSADOR.

Upon an affidavit made by a secretary to a foreign ambassador, who had been arrested jointly with his wife, for a debt contracted by her whilst sole, "that he, before and at the time of the arrest, was in the actual employment of the ambassador, and in daily attendance upon him, writing dispatches and other official documents and communications:" Held insufficient, inasmuch as it did not state that he was a domestic servant, nor did it state anything to shew that he was within the reason of the privilege, when he was first employed, &c. *English* v. *Caballero*, 3 D. & R. 25.

## AMBIGUITY.

Although a declaration contains ambiguous expressions, yet they are cured by verdict, and must afterwards be taken to have been used in that sense which would sustain the verdict:—Therefore, an objection, that the evidence did not support that construction which would alone constitute an offence, held to be properly taken at the trial as a ground of nonsuit, and not in arrest of judgment. *Huntingtower* v. *Gardiner*, 1 Law J. K.B. 120, s. c. 1 B. & C. 227, s. c. 2 D. & R. 450.

## AMENDMENT.

### 1. *AT COMMON LAW.*

(A) Writs of Entry.
(B) Estreats.
(C) Certiorari.
(D) Declaration.
(E) After Issue joined.
(F) Verdict and Postea.
(G) Awards.
(H) Warrants of Attorney.
(I) Extents.
(K) Records.

[See Fines and Recoveries.]

### 2. *IN EQUITY.*

(A) Bills.
(B) Pleas.
(C) Orders.
(D) Decrees.
(E) Injunctions.

(F) RECORDS.
(G) PROCEEDINGS IN BANKRUPTCY.
(H) WITHIN WHAT TIME.
(I) EFFECT OF, IN GENERAL.
(K) EFFECT OF PROCEEDING WITHOUT MAKING THE AMENDMENT.
(L) WAIVER OF ORDER FOR, WHAT AMOUNTS TO.
(M) COSTS.

3. *IN CRIMINAL PROCEEDINGS.*

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## 1. *AT COMMON LAW.*

### (A) WRITS OF ENTRY.

Where a writ of entry was sued out in Michaelmas term, and an appearance entered in that term, but the count was entitled of Hilary term following, and not delivered till nearly the end of that term, —the Court set it aside; as the count ought to have been entitled of the term in which the writ was returnable; and they would not allow the demandant to amend. *Rowles, demandant; Lawrence, tenant,* 4 Law J. C.P. 140.

### (B) ESTREATS.

The Court gave leave to file a perfect estreat *nunc pro tunc*, instead of amending a defective one, which had been returned, and filed in a preceding term, under 3 Geo. 4. c. 46. and 4 Geo. 4. c. 37. *Anon.* M'Clel. 251.

### (C) CERTIORARI.

The Court will order a return to a certiorari to be amended, where it is insufficient, by reason of the returning officer not having signed it. *Rex v. the Justices of Lancashire,* 5 Law J. M.C. 131, s. c. 7 B. & C. 691.

### (D) DECLARATION.

A declaration in an action for breach of promise of marriage consisted of three counts: first, a promise to marry on request; second, to marry within a reasonable time; and third, to marry generally. An application to amend, by inserting a new count to marry on a particular day, was granted, although the declaration had been filed more than two terms, the costs of the application abiding the event of the cause. *Horston v. Shilliter,* 6 B. Mo. 490.

Where a declaration by an executor stated a promise to his testator, the Court permitted him to amend by laying a promise to himself. *Tenour v. Smith,* 1 Ken. 141.

In an action against the marshal for an escape, the bill was entitled generally of Michaelmas term, and the escape was alleged to have taken place on the 15th of November.

There was a special demurrer, for that the cause of action appeared to have accrued after the first day of the term to which the bill had relation. The Court allowed the plaintiff to amend on payment of costs, although it appeared by affidavit that the prisoner had returned into the custody of the marshal before any application for liberty to amend was made. *Brazier v. Jones,* 5 Law J. K.B. 123, s. c. 6 B. & C. 196.

### (E) AFTER ISSUE JOINED.

After issue joined and notice of trial given and countermanded, and two subsequent terms had elapsed, the Court, on payment of costs, permitted avowries in replevin to be amended, by altering the description and names of the *locus in quo*, and by inserting two new avowries. *Pryer v. the Duke of Buckingham,* 2 Law J. C.P. 78.

### (F) VERDICT AND POSTEA.

A verdict improperly delivered by mistake of the foreman of a jury, is amendable on the affidavits of the jury: as where the verdict was delivered for the defendant generally by mistake of the foreman, when the jury had found on one issue for the plaintiff and on the other only for the defendant. *Cogan v. Ebden,* 2 Ken. 24, s. c. 1 Burr. 383.

The first count of a declaration in trespass stated, that the defendant with force and arms, &c. struck and destroyed an iron scraper of the plaintiff's, affixed to his house, and also assaulted him; and the second count alleged that the defendant destroyed the scraper, without stating it to have been fixed to the freehold: Held, that as the jury had found a general verdict for the plaintiff, with two shillings damages, he was entitled to full costs, and the Court refused to amend the postea by entering a verdict for the defendant on the first count. *Reece v. Lee,* 7 B. Mo. 269.

Where a declaration of assumpsit contained several counts, some of which were bad, and the jury found a general verdict,—the Court allowed the *postea* to be amended by the Judge's notes, by entering the verdict on one count which was good, although the cause had been removed by writ of error to the Court of King's Bench, and argued there, before the application for the amendment was made. *Richardson v. Mellish,* 4 Law J. C.P. 68, s. c. 3 Bing. 334, s. c. 9 B. Mo. 579, s. c. 1 B. & C. 189.

### (G) AWARDS.

Where a consolidation rule has been entered into by several underwriters on the same policy, and the matter afterwards referred to arbitration, the Court will not order the award to be amended, because it does not contain directions as to what sum shall be paid by each individual underwriter, but the consolidation rule may be opened. ——— v. *Liddell,* 1 Law J. C.P. 100.

### (H) WARRANTS OF ATTORNEY.

A warrant of attorney, taken after the return of the writ, may be amended. *Anon.* 1 Law J. C. P. 113.

### (I) EXTENTS.

A writ of extent was amended by inserting the day of the month on which the extent issued, and on which the fiat bore date, a blank having been left in the same, which had not been observed until after the writ had been returned. *Rex v. Attwood,* 9 Price, 483.

### (K) RECORDS.

If a party allege diminution of record from a court of Great Sessions in Wales, as that the officer has

not certified the practice of that court so as to make the record complete, the Court of King's Bench will send it back to be amended. *Williams* v. *Lord Bagot*, 2 Law J. K.B. 152, s. c. 4 D. & R. 315.

An amendment of the record in ejectment may be demanded by the plaintiff on payment of costs of the application, against the defendant who refuses to give up the possession. But if the defendant consents to give up the possession, the plaintiff must pay the whole costs up to the time of the application. *Doe d. Lewis* v. *Coles*, 1 R. & M. 380. [Best]

The Nisi Prius record may be amended after verdict, by the insertion of a *similiter*. *Reeder* v. *Bloom*, 3 Law J. C.P. 52, s. c. 2 Bing. 384.

The amendment of a record is confined to the term in which it has been filed. *Anon.* 1 M'Clel. 251.

Where the issues are entered informally, a court of error will adjourn the hearing of the case, to afford an opportunity for the party to apply to the court below to amend the record, unless the counsel will consent to argue upon the presumption of such amendment. *Hawkey* v. *Borwick*, 1 Y. & J. 376.

In ejectment, the plaintiff declared for twenty messuages, twenty tenements, &c.; and after verdict, and a writ of error brought in the King's Bench, this Court allowed the record to be amended, by striking out the words "twenty tenements." *Doe d. Laurie* v. *Dybal*, 6 Law J. C.P. 86, s. c. 1 M. & P. 330.

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## 2. *IN EQUITY.*

### (A) BILLS.

Leave to amend by adding parties, implies liberty to introduce as much new matter as is requisite to shew the interest of those parties. *Hawkins* v. *Miles*, 1 Law J. Chanc. 76.

A mortgagee is not entitled to amend his bill, so as to convert it into a bill on behalf of himself and all the other creditors of the testator. *Morgan* v. *Burney*, 1 Law J. Chanc. 228, s. c. 1 S. & S. 358.

Where, after answer, the plaintiff applied for leave to amend his bill by adding a co-plaintiff: Held, that such an application is not a matter of course, except where the proposed co-plaintiff possesses the same interest as the plaintiff himself, or is merely joined in accordance with formality as a co-partner, co-executor, or co-trustee, in a suit for the benefit of the *cestui que trust*; but even in that case the production of an affidavit shewing the materiality of the amendment, and that the fact which requires the joinder of the party came to the plaintiff's knowledge after the filing of the bill, and the consent of the co-plaintiff, are indispensable requisites. *The Governors of Lueton School* v. *Scarlet*, 13 Price, 54.

A plaintiff cannot amend his bill after replication and subpœna to rejoin, unless on a special application, shewing that he has used all reasonable diligence. *Wright* v. *Howard*, 6 Mad. 106.

A bill will be ordered to be taken off the file for irregularity, if it is amended by interlineation, especially if neither the draft nor the engrossment of the amendment be signed by counsel. *Pitt* v. *Macklew*, 1 S. & S. 136.

Where an order has been obtained by the plaintiff, to amend, and that the defendants may answer exceptions and amendments at the same time, the defendant may move that the order be discharged or the amendments be made within ten days. *Whitehouse* v. *Hickman*, 1 S. & S. 105.

Where the counsel who signs the original bill signs also the draft amendments, and the amendments are such as not to make a new engrossment necessary, his name need not be affixed thereto. *Webster* v. *Threlfall*, 1 Law J. Chanc. 109, s. c. 1 S. & S. 125.

When a plaintiff amends a bill, the defendant is entitled to take out orders for time to answer, even though the plaintiff should require no answer, and the amendments should be such as to make no new answer necessary. *Kelsham* v. *Crowther*, 2 Law J. Chanc. 85.

After a plea allowed to part of the bill, the rest of the bill being answered, the plaintiff cannot amend his bill as of course, but must make a special application for leave to amend, stating the purport of the proposed amendment; and in such a case leave will not be granted to introduce any amendments which tend either to deny the truth of the plea or to avoid it. *Taylor* v. *Shaw*, 2 Law J. Chanc. 145.

After a plea has been allowed upon argument, the plaintiff will not be permitted to amend his bill, so as to destroy the effect of the plea. *Batho* v. *Fulton*, 2 Law J. Chanc. 196.

A files his bill against B and other defendants, and B files a cross bill against A; then A amends his bill; and subsequently, his answer to the cross bill being reported insufficient, B obtains an order to amend the cross bill, and that A shall answer the amendments and exceptions together: afterwards A amends his bill by an alteration in the christian name of a defendant: Held, that with respect to the right of obtaining an answer, B, by his amendment, lost his priority, and did not regain it in consequence of the immaterial amendment subsequently made by A. *Glassington* v. *Thwaites*, 3 Law J. Chanc. 208.

Pending an injunction, the Court refused to permit a bill of discovery to be amended, after answer, by adding a prayer for relief, and in other respects as might be deemed expedient. *Jackson* v. *Strong*, M'Clel. 245, s. c. 13 Price, 494.

After an order to dismiss, previous to an application to amend the bill, the amendments must be stated to the Court. *Scott* v. *Carter*, M'Clel. 517.

Upon the hearing of a petition of appeal presented by the defendants, leave was given to the plaintiffs to amend their bill by making it either a bill and information, or an information. *Magdalen College* v. *Sibthorpe*, 1 Russ. 154.

An order to amend, and for defendant to answer amendments and exceptions at the same time, obtained before the filing of the report allowing the exceptions, is irregular. *Rushton* v. *Troughton*, 2 Sim. 33.

Under a common order to amend, a plaintiff may introduce new plaintiffs on the record. *Hitchens* v. *Congreve*, 5 Law J. Chanc. 176.

Replication allowed to be withdrawn, and bill amended by striking out the name of a plaintiff, and making him a defendant, and by stating such facts and circumstances relating to certain transactions between that plaintiff and the defendant, as were material to shew that the other plaintiffs were not, and ought not to be, bound by the acts or misrepre-

sentations of that plaintiff respecting the property in the pleadings mentioned, or the purchase thereof, and as were material to shew that such acts and misrepresentations of the said plaintiff were evidence against the defendant: the plaintiffs who made the application giving security for costs, to the satisfaction of the Master, and undertaking to amend within a given time, paying the costs of the application, the usual costs of the amendments, and withdrawing the application: the *extra* costs of the amendments to be costs in the cause. *Small* v. *Attwood*, 2 Y. & J. 512.

(B) PLEAS.

The court refused to permit the defendant to amend his plea by embodying certain accounts, where they were of opinion, that if they were put upon the record, they would not constitute a good plea. *Attorney General* v. *Brooksbank*, 1 Y. & J. 57.

(C) ORDERS.

Where, in consequence of erroneous spelling in the orders of the Court, the name of a party has been mis-spelled in the entries of transfers in the books of the Bank of England, the Court will amend its own orders, but will not make an order upon the Bank to correct the entries in their books. *Newton* v. *Clark*, 1 Law J. Chanc. 168.

(D) DECREES.

Clerical errors in a decree will be amended. *Tomlins* v. *Palk*, 1 Russ. 475.

A decree having been drawn up according to the minutes, which omitted to state that issues were directed, a motion to amend the same by the insertion of such direction was refused. *Stuart* v. *Gresnall*, 9 Price, 480.

(E) INJUNCTIONS.

An amendment without prejudice to an *injunction*, is a motion of course, and may be made without notice, where the injunction has been obtained on the merits; but where the injunction has issued on account of delay, it is not only indispensable to give notice, but the proposed amendments must be disclosed in the notice. *Pratt* v. *Archer*, 1 S. & S. 433.

Amendment of bill, allowed without prejudice to an injunction which had been obtained on the merits. *King* v. *Turner*, 6 Mad. 255.

Upon an application for the plaintiff to amend his bill, without prejudice to an injunction previously obtained on the merits, the particular amendments must be specified. *Bell* v. *Brockbank*, 2 Y. & J. 181.

(F) RECORDS.

When a cause, being brought to a hearing, is ordered to stand over to amend by adding parties, a new plaintiff cannot be added.

If a new plaintiff be added improperly, and no other step taken, the Court will permit the record to be re-amended, by striking out the name of the newly-added plaintiff, and making him a defendant. *Sopers* v. *Myers*, 3 Law J. Chanc. 48.

(G) PROCEEDINGS IN BANKRUPTCY.

Where a commission of bankruptcy contained a fatal mistake, which the solicitor concealed, the Court refused to permit the commission to be amended, but ordered it to be superseded. *Ex parte Forshaw and others*, 1 G. & J. 368.

But where a petition in bankruptcy, impeaching the validity of the commission, was improperly entitled "In Chancery," the Court allowed it to be amended. *Ex parte Glandfield*, 1 G. & J. 387.

Where a bankrupt is brought up by habeas corpus to be discharged, the Lord Chancellor, before he enters upon the question of the validity of the committal, will ascertain whether the warrant be truly set forth in the return to the writ, and if it be not, he will order the return to be amended. *In re Power and Jackson*, 2 Russ. 583.

(H) WITHIN WHAT TIME.

Under an order permitting a plaintiff to amend within a month, the amendment must be made within a *lunar* month.

The Court will not relieve a plaintiff from the consequences of a mistake in acting under such an order, when his conduct shews that he had not in view the due prosecution of the suit. *Creswell* v. *Harris*, 4 Law J. Chanc. 94.

(I) EFFECT OF, IN GENERAL.

A plaintiff, after allowing more than three terms to elapse without taking any proceedings, amended his bill, under an order for that purpose, and obtained possession of the defendant's office-copy of the bill, in order to amend it also: Held, that the defendant, by delivering to the plaintiff his office-copy must be considered as having waived any right, which he might otherwise have had, to dismiss the bill for want of prosecution. *Kendall* v. *Beckett*, 1 Russ. 152.

(K) EFFECT OF PROCEEDING WITHOUT MAKING THE AMENDMENT.

Where an order to amend had been obtained, but no amendment was actually made, and many years afterwards, the executors, not knowing the amendment had not been effected, filed a bill of revivor, and proceeded as if the amendment had been made: Held irregular. *Hughes* v. *Dumbell*, 1 Russ. 317.

(L) WAIVER OF ORDER FOR, WHAT AMOUNTS TO.

Whether proceedings taken after an order to amend, previous to the amendments and order for that purpose being entered, amounts to a waiver thereof, is unsettled. *Hughes* v. *Dumbell*, 1 Russ. 317.

(M) COSTS.

If two out of three distinct amendments to a bill proceed from the negligence or error of the plaintiff, the Court will order the extra costs of the amendments to be paid to the defendant. *Watts* v. *Manning*, 1 S. & S. 421.

Where, after answer to a bill for setting aside a deed, the plaintiff amended the bill by seeking to establish the deed, the Court ordered him to pay the costs of the original bill. *Mavor* v. *Dry*, 2 S. & S. 113.

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### 3. *IN CRIMINAL PROCEEDINGS.*

The caption of an indictment may be amended. *Rex* v. *Davis*, 1 C. & P. 470. [Park]

A plea in abatement in a criminal proceeding is not amendable. *Rex* v. *Cooke*, 2 Law J. K.B. 152, s. c. 2 B. & C. 871, s. c. 4 D. & R. 592.

A judgment imposing a punishment for a longer period of time than the law authorizes, when impeached upon error, cannot be remitted to the inferior court to amend; it must be reversed. *Rex* v. *Ellis*, 5 Law J. M.C. 1.

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## ANIMALS.

[See TRESPASS.]

An action of trespass does not lie against the master of a dog, which voluntarily jumped into the plaintiff's field, without his consent. *Brown* v. *Giles*, 1 C. & P. 119. [Park]

On a plea to an action for shooting a dog, *that the dog attacked the defendants*, and was *accustomed to attack and bite mankind*: Held, that these allegations were material, and that production of testimony in support of them was indispensable.

To rebut the averment, that a dog *is accustomed to attack and bite mankind*, plaintiff may give evidence to shew that the dog is in general quiet. *Clark* v. *Webster*, 1 C. & P. 104. [Park]

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## ANNUITY.

(A) CONSTRUCTION OF INSTRUMENTS CONNECTED WITH.
(B) OF THE MEMORIAL.
(C) OF THE CONSIDERATION.
(D) OF VACATING.
(E) OF REDEEMING.
(F) WHEN GRANT OF, VOID OR VOIDABLE.
(G) PAYMENTS IN LIQUIDATION OF.
(H) ACTION FOR.
(I) PRINCIPAL AND SURETY.
(K) PROCEEDINGS IN CASES OF BANKRUPTCY.

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### (A) CONSTRUCTION OF INSTRUMENTS CONNECTED WITH.

An annuity, given by a will generally, commences from the death of the testator, and not from the end of the year after. *Houghton* v. *Franklin*, 1 Law J. Chanc. 231, s. c. 1 S. & S. 390.

If an annuity be a charge upon the whole of a testator's property, the annuitant is entitled to have any deficiency which has been occasioned by the conversion of stock, as the five per cents into the four, supplied out of the other funds, which were bequeathed to other persons. *Davies* v. *Wattier*, 1 S. & S. 463.

An annuity to Nathaniel Pitts, for twenty-one years, if the grantor should continue during that period possessed of certain estates, and in case of his decease within that term, to such child or children, as Nathaniel Pitts should appoint; and in default of appointment to all of them equally; and if no child, to the widow during her widowhood, is a personal grant only; and by the death of Nathaniel Pitts and his widow without surviving issue, the annuity immediately terminates. *Barford* v. *Stuckey*, 1 Law J. C.P. 73, s. c. 1 Bing. 225: affirmed in error, 3 Law J. K.B. 1, s. c. 3 B. & C. 308, s. c. 5 D. & R. 118.

Where the plaintiff by deed contracted to sell and convey to the defendant, certain estates left him under the will of his father, chargeable with the payment of four several annuities to his sisters; the defendant covenanted to pay such annuities as the same were by the will directed to be paid; and that he would at all times thereafter save and indemnify the plaintiff from and against all actions, suits, and demands, on account of the same annuities, or in anywise relating thereto: Held, that the defendant was liable to the payment of such annuities, although it was objected that the covenant for the payment of them, and indemnifying the plaintiff, was one entire covenant, and to be continued as a covenant to indemnify, by paying such annuities only as the plaintiff himself would have been bound to have paid; and that he was not personally liable to pay them. *Suward* v. *Anstey*, 3 Law J. C.P. 63, s. c. 2 Bing. 519: affirmed in error, 4 Law J. K.B. 1.

Whether, where timber has been cut by the grantor of an annuity, charged on the rents and profits of an estate, the annuitant has or has not a right to be paid out of the price, as a part of the profit of the estate charged with the annuity, is unsettled. *Fairfield* v. *Weston*, 2 S. & S. 96.

### (B) OF THE MEMORIAL.

To render an objection to the memorial of an annuity available, the defect must appear upon the pleadings and evidence. *Dunn* v. *Calcraft*, 2 S. & S. 56.

The memorial of an annuity deed must state the christian names of the witnesses. *Doe* v. *Brimley*, 6 D. & R. 292.

And if only the initials thereof be inserted, the Court will set aside the intruments given to secure the same. *Metcalf* v. *Bowes*, 5 B. & C. 258, s. c. 7 D. & R. 773.

Warrant of attorney set aside for that reason. *Cheek* v. *Jefferies*, 1 Law J. K.B. 244, s. c. 2 B. & C. 1, s. c. 3 D. & R. 185.

But the Court will not set aside a warrant of attorney given to secure the payment of an annuity, on a technical objection, as, that the initials of the christian names of the witnesses only appear in the memorial, if much time (as eighteen years) has transpired since the annuity was granted. *Const* v. *Phillips*, 2 Law J. K.B. 154, s. c. 4 D. & R. 344.

One of the instruments given to secure an annuity was an *underlease*. In the memorial it was stated to be "an *assignment* of certain hereditaments." The Court held, that it was not necessary to set out the legal operation of the deed, but that it was sufficient to use words in the same sense as they were commonly used and understood, and that the word assignment in the memorial, when the writing was an underlease, did not invalidate the annuity. *Butler* v. *Capel*, 2 Law J. K.B. 1, s. c. 2 B. & C. 251, s. c. 3 D. & R. 485.

The grantor of an annuity assigned several policies of insurance on his own life to the grantee,

whereby the latter was the better able to insure the life of the former. No mention of such an assignment appeared in the memorial: The Court held, that it was the pecuniary consideration only that need be stated in the memorial, and that there was not any occasion to mention the assignment. *Morris* v. *Jones*, 1 Law J. K.B. 243, s. c. 2 B. & C. 282, s. c. 3 D. & R. 263.

On the marriage of his daughter, a father agreed to pay 10,000*l.* for the trusts of the marriage settlement. He died in doubtful circumstances. The husband consented to take from his executors, in lieu of it, the sum of 5000*l.*, and an annuity of 125*l.* for his life: The Court held, that such an annuity was not within 53 Geo. 3. c. 141, and that it was not necessary to enrol a memorial of it. *Blake* v. *Attersoll*, 2 Law J. K.B. 193, s. c. 2 B. & C. 275, s. c. 4 D. & R. 549.

The 53 Geo. 3. c. 141. s. 2. does not extend to cases of fair and *bonâ fide* sale of an interest in land, where the consideration, in whole, or in part, may be an annuity to be paid to the vendor; therefore, where the plaintiff had assigned an interest in coal mines in consideration of an annuity for her life, and for the payment of which a bond was conditioned: Held, that such a bond did not require enrolment under this statue. *James* v. *James*, 5 B. Mo. 479, s. c. 2 B. & B. 702.

In debt on bond for the payment of an annuity of 10*l.*, granted by a son to his parents, in consideration of their giving up to him the possession of a farm, and the stock thereon, valued at 300*l.*: Held not to be such an annuity, as to require that the deed should be enrolled under the 53 Geo. 3. c. 141. *Tetley* v. *Tetley*, 5 Law J. C.P. 155, s. c. 4 Bing. 215.

An annuity bond, under the 17 Geo. 3. c. 26, need not be registered where it is stated to be given in consideration of the natural love and affection which a son bore towards his mother, and for making some provision for her support and maintenance, notwithstanding it was shewn that the mother had sold her trade, and had applied the money arising therefrom, together with whatever money she possessed, to place out her son, for the purpose of establishing him in business: Held, that it could not be considered as a pecuniary consideration. *Keats* v. *Hick*, 5 B. Mo. 629: affirmed in error, 3 Law J. K.B. 145, s. c. 4 B. & C. 69, s. c. 6 D. & R. 68.

Where the memorial of an annuity deed was enrolled within thirty days after its execution by the grantee, it is sufficient, although the grantor had not then executed it; and if the witnesses to the deed are actually set out in the memorial, it is unnecessary to shew that the deed was executed by all the parties in their presence. *Flight* v. *Buckeridge*, 4 Law J. C.P. 45, s. c. 3 Bing. 215: affirmed in error, 5 Law J. K.B. 21, s. c. 6 B. & C. 49, s. c. 9 D. & R. 113.

A deed granting an annuity, but not conveying any property to secure it, is properly described in the memorial as a "grant of annuity," although it contains a release to the grantor of a former annuity. *Crowther* v. *Wentworth*, 5 Law J. K.B. 159, s. c. 6 B. & C. 365.

A deed containing covenants for the payment of an annuity, and also assigning stock for securing such payment, is sufficiently described in the memorial as a "grant of annuity." *Brown* v. *Lee*, 5 Law J. K.B. 246, s. c. 6 B. & C. 689.

An assignment of 150*l.*, part of the dividends of a sum of stock to which the vendor was entitled for life, with a proviso, that the purchaser should not receive any part of the dividends then growing due, but a proportionable part of the 150*l.*, is a grant of an annuity to that amount, and must be memorialized. *Charretie* v. *Vause*, 5 Law J. Chanc. 127, s. c. 1 Sim. 153.

A, by indenture, in consideration of 11,000*l.*, granted to B an annuity for the life of A, charged upon A's estates and redeemable; by another indenture of the same date, A, for nominal consideration, assigned to B policies of insurance on A's life, to the amount of 11,000*l.*, which, having been effected several years previously, were, at the time of such assignment, of considerable pecuniary value, and in the indenture, B covenanted, in case the annuity should be redeemed, to re-assign the policies of insurance to A; the memorial of the annuity deed stated 11,000*l.* to have been the pecuniary consideration for the annuity, but made no mention of the assignment of policies, nor was there any memorial of that assignment: Held, by the Vice Chancellor, that part of the sum of 11,000*l.* must be considered as having been paid for the assignment of the policies; that the whole of the 11,000*l.* was not paid for the annuity; that, therefore, the memorial did not state the pecuniary consideration truly, and, consequently, that the annuity was void. *Morris* v. *Jones*, 1 Law J. Chanc. 143.

### (C) Of the Consideration.

It is the duty of a grantee, in the case of the grant of an annuity, to watch the conduct of his agent during the negotiation. Where, therefore, the agent retained part of the consideration money for a debt due to him from the grantor, as well as for the expenses attending the deeds by which the annuity was secured at the time of the execution,—the Court set aside the annuity on terms, although the grantee was not privy to the transaction. *Calten* v. *Porter*, 3 Law J. C.P. 43, s. c. 2 Bing. 370, s. c. 9 B. Mo. 703.

Where the agent retained part of the consideration money, for a debt alleged to be due to himself, the annuity was set aside on the terms of paying back to the grantee the principal, and interest at the rate of 5 per cent. *Gorton* v. *Champneys*, and *Coventry* v. *Champneys*, 1 Law J. C.P. 109, s. c. 1 Bing. 208, s. c. 8 B. Mo. 302.

So also, at the instance of the surety, the annuity deeds were set aside by reason of a retainer by the grantee's agent of a sum of money, to pay the first year's annuity. *Mence* v. *Hammond*, 6 B. Mo. 491.

Where the sum of 910*l.* was paid to the grantor of an annuity by the agent of the grantee, and immediately returned by the former to the latter, who then handed the latter 1*l.* only, and retained 165*l.* for his costs in negotiating the transaction, the Court ordered the annuity to be set aside, and the deeds delivered up to be cancelled. *Henry* v. *Taylor*, 3 Law. J. C.P. 225, s. c. 3 Bing. 177.

Where the grantee of an annuity, without participation or knowledge of any intended retainer of part of the consideration money by his attorney, attends himself and pays the whole of the considera-

tion money to the grantor, he will not be bound by any subsequent improper retainer of part of that money by his attorney.

But otherwise, if he employ his attorney to pay over the money. *Flight* v. *Greenway*, 5 Law J. K.B. 137.

The payment of the consideration of an annuity will be presumed after the lapse of twenty years, even though the attesting witness has no distinct recollection whether it was paid in his presence or not, and although there is no receipt indorsed on the deeds. *Haslam* v. *Diggles*, 1 C. & P. 398. [Best]

Where an annuity, granted by securities which are void under the Annuity Act, has been paid during the whole specified time, and the contract is therefore performed, no action can be brought to recover back the consideration money. *Davis* v. *Bryan*, 5 Law J. K.B. 237, s. c. 6 B. & C. 651.

A grants to his sister an annuity, in consideration of natural love and affection; she may prove that the grant was made also in consideration of her marriage, and she will then be entitled to claim as a specialty creditor of the grantor. *Tanner* v. *Byne*, 5 Law J. Chanc. 125, s. c. 1 Sim. 160.

A covenant by the husband to secure to his wife an annuity, during her life, in case she should survive him, is a sufficient consideration to support the grant of an annuity by the wife's father. *Ex parte Draycott*, 2 G. & J. 283.

### (D) Of Vacating.

The words in the 17 Geo. 3. c. 26. s. 4, "it shall and may be lawful for the Court to order and set aside," &c. are not imperative, but give the Court a discretionary power over annuities. *Girdlestone* v. *Allan*, 1 Law J. K.B. 18, s. c. 1 B. & C. 61, s. c. 2 D. & R. 150.

The Court will not order an annuity deed and other securities on which it is founded to be delivered up to be cancelled, although void under the statute 17 Geo. 3. c. 26; but will only set aside the warrant of attorney and judgment entered up thereon, although one of the grantors was an infant at the time of the grant, and although there were two grantees, and it appears on the face of the memorial that there was but one only. *Storton* v. *Tomlins*, 3 Law J. C.P. 101, s. c. 2 Bing. 475.

An annuity having been set aside, and the Prothonotary directed to ascertain what was due for principal and interest: Held, that the grantee was entitled to his expenses incurred, with reference to the conveyances of the annuity. *Williamson* v. *Goold*, 1 Bing. 316, s. c. 7 B. Mo. 579.

An annuity will be set aside, on the terms of paying back to the grantee the principal, and interest at the rate of 5 per cent. where it appears, that the agent of the grantee has kept back part of the consideration money, for a debt alleged to be due from the grantor to himself. *Gorton* v. *Champneys*, and *Coventry* v. *Champneys*, 1 Law J. C.P. 109, 1 Bing. 287, s. c. 7 B. Mo. 579.

If the agent of the grantees of an annuity retain a considerable portion of the consideration money, not only to defray the expense of preparing the instruments, but sufficient to pay the amount of the first year's annuity; the Court will, at the instance of the surety, set aside the deeds on his undertaking to return the principal with interest. *Mence* v. *Hammond*, 6 B. Mo. 491.

The lapse of a period of nine years, is not a conclusive objection against the Court entering into the question affecting the validity of an annuity deed, in respect of part of the consideration money having been retained:

Nor is the death of the grantee such a conclusive objection:

Nor that the grantee, who intrusted the money to his attorney to pay over, was ignorant of the fact that the attorney retained, or obtained a return of part of the consideration money.

And accordingly the Court, on the merits, set aside an annuity, although the case presented each of these objections. *Cole* v. *Gardner*—*Finley* v. *same*, 5 Law J. K.B. 79, s. c. 6 B. & C. 105.

The securities for an annuity were set aside after a lapse of six years, upon the ground of the consideration money not being the property of the party described in the securities, but the property of C, and the name of the person in whose behalf the money was paid, not having been correctly stated in the receipt, C being alive, and having claimed the consideration money, and stated the annuity to be his property. *Williams* v. *Hockin*, 8 Taunt. 435.

Where a considerable portion of the consideration money was retained by the agent of the grantee of an annuity, for the expense of deeds, journeys, &c. the Court, notwithstanding the lapse of ten years, set aside the annuity on the terms of an account being taken, and the defendant undertaking to pay what might be due, for principal and legal interest. *Williamson* v. *Goold*, 1 Law J. C.P. 78, s. c. 1 Bing. 234, s. c. 7 B. Mo. 579.

S, having occasion to raise 2800*l.* by way of annuity, desired the annuities to be divided into three; the consideration for all three was paid at one time and place to one person, who was agent to all the grantees, and he retained 300*l.* for the expenses of all three annuities: Held, that all three might be set aside on equitable terms on account of this retainer, although the 300*l.* was retained in a bank note, which formed part of the consideration money of only one of the grantees. *Jones* v. *Silberschilt*—*Chappell* v. *same*—*Worsley* v. *same*, 5 Law J. C.P. 24, s. c. 4 Bing. 26.

A party outlawed in the King's Bench, in an action to recover the arrears of an annuity, cannot be heard in the Common Pleas, on a motion to set aside the annuity. *Loukes* v. *Holbeach*, 6 Law J. C.P. 37, s. c. 4 Bing. 419, s. c. 1 M. & P. 126.

### (E) Of redeeming.

The son grants an annuity secured upon a living, of which he is incumbent and his father patron: The annuitant having proceeded to a sequestration of the living, for payment of his arrears, the father assures him, that he will sell the advowson, and redeem the annuity out of the proceeds of the sale; and the annuitant, relying on that assurance, withdraws the sequestration; subsequently, the advowson is sold, and the son vacates the living, so as to defeat the annuitant's security: Held, that the annuitant cannot compel the father to perform his agreement to redeem, inasmuch as that agreement was an agreement without consideration. *Simpson* v. *Hill*, 2 Law J. Chanc. 32.

(F) When grant of, void or voidable.

A bill by a woman against a defendant with whom she had cohabited, and who was known to her at the time of the cohabitation to be a married man, praying the specific performance of an agreement to settle an annuity upon her, (which agreement was contained in a letter written by him after their cohabitation was at an end,) and payment of the arrears of the annuity, cannot be sustained: but she and her children may sustain a bill which alleges that the defendant had made a provision for her and them, by a deed duly executed and delivered, and which prays for the production of the same.

The person to whom the deed was delivered need not be made a party, the bill containing an allegation that the defendant had gotten it back into his possession. ——— v. *Massey*, 1 Law J. Chanc. 18.

Where a testator directed a freehold to be sold, and the produce applied, together with so much of the personal estate, as should be necessary to secure an annuity of 30*l.* a year for the life of A B, and after the death of A B, the principal to descend to a charity: Held, that the charitable bequest was void as to the proceeds of the real estate, but valid as to the sum acquired from the personal estate to secure the annuity. *Waite* v. *Webb*, 6 Mad. 71.

A grant of an annuity is void, where a material circumstance, known to the grantee, was not communicated to the grantor. *Pepham* v. *Brooke*, 6 Law J. Chanc. 184.

If the purchase-money of an annuity be stock in the funds, and it is to be redeemed by replacing stock, it will be a question for the jury, under the circumstances of the case, to say, whether it was done with a view of eluding the laws against usury. *Doe dem. Wilkinson* v. *Rawlings*, 1 Law J. K.B. 77.

(G) Payments in liquidation of.

Where an agent, who had negotiated an annuity between the grantor and grantee, and was appointed receiver of the rents of the estate on which it was charged, advanced money to the grantee in anticipation of the receipt of arrears, receiving from the grantor, on the money thus advanced, the usual and ordinary commission of two and a half per cent. on annuity payments; but no assignment of the arrears was taken, nor was any stipulation made for the payment of interest: Held, that such advances must be considered as payments made in liquidation of the arrears of the annuity; and, notwithstanding the estates proved insufficient to pay the annuity, or reimburse the agent the money he had advanced, the grantee could not issue execution for more than was due, after deducting the money received from the agent. *Conrad* v. *Gould*, 1 Law J. C.P. 46, s. c. 1 Bing. 190, s. c. 7 B. Mo. 621.

The defendant, as surety for the grantor of an annuity, executed a warrant of attorney, to confess judgment as a collateral security for its due and regular payment. The annuity becoming considerably in arrear, the agents who negotiated the business between the grantor and grantee, advanced to the latter a large sum of money out of their own private funds, in anticipation of the accruing rents, deducting the usual commission charged by them on the receipt and payment of annuities. These advances were made under the supposition, that the securities to the annuitant would be available in their hands to the extent of the money advanced: Held, that such advances must be considered as payments made on account of the principal, and operate to the extinguishment of the liability of the surety; and that the agents had no equitable title to enforce, in the name of the grantee, the judgment obtained in his name, against the surety for the amount of the money so advanced. *Williamson* v. *Gould*, 1 Law J. C.P. 58, s. c. 1 Bing. 171, s. c. 7 B. Mo. 579.

(H) Action for.

The grantor of an annuity cannot maintain an action of debt, at common law, nor by the 8 Ann. c. 14, to recover the arrears of an annuity for life, issuing out of freehold lands. *Kelly* v. *Clubbe*, 6 B. Mo. 355, s. c. 3 B. & B. 180.

Where a contract recited, that it had been agreed to sell an annuity secured upon property in possession of the grantor, but did not contain words of present grant: Held, that an action could not be maintained upon it in a court of law, even though it had been enrolled. *In re Locke*, 2 D. & R. 603.

(I) Principal and Surety.

The surety, under an annuity deed, may maintain an action against the principal, for the value of an annuity redeemed by him subsequently to the bankruptcy of the principal. *Watkins* v. *Flanagan*, 1 Bing. 413, s. c. 3 B. & A. 186, s. c. 8 B. Mo. 480, s. c. 13 Price, 54.

A surety under an annuity deed, having redeemed the annuity after the bankruptcy of the grantor, sued the grantor on a bond of indemnity, and obtained judgment for arrears since the bankruptcy, and the price of redemption. The Court of Chancery would not restrain him by injunction, from suing out execution for the arrears: *Quere*, as to the price of redemption. *Watkins* v. *Flanagan*, 6 Mad. 280.

A defendant in execution, as surety for the payment of an annuity, cannot, after he has obtained an order to set it aside, on the condition of entering into an account and paying the balance, and where the principal afterwards succeeded in setting aside the deed itself, be discharged from custody, without previously complying with the condition of the first order obtained by him. *Williamson* v. *Gould*, 1 Law J. C.P. 100, s. c. 1 Bing. 274.

A grants an annuity to C, and the indenture by which he grants it contains an assignment of certain property, including, among other things, two ships, to D, as a trustee for C, as a security for the annuity, which is also secured by the joint and several bond of A, and of B, as his surety; C and D not having complied with the formalities required by the Registry Act, A sells the ships, receives the proceeds, and shortly afterwards becomes bankrupt; the remainder of the assigned property turns out not to be a sufficient security, and C calls upon B, the surety, for payment: Held, that so much of the loss as was occasioned by the sale of the ships, must be borne by the grantee of the annuity, and not by the surety. *Capel* v. *Butler*, 4 Law J. Chanc. 69, s. c. 2 S. & S. 457.

Two persons had by different deeds two annuities granted to them. A third person, for a consideration, covenanted that, if they were not paid their

annuities by the grantor, he would pay unto them (naming them both), *their executors*, or administrators, the said annuities: The Court held, that the representative of one of the annuitants could sue alone on that covenant, without joining the other in the action. *Withers* v. *Bircham*, 3 Law J. K.B. 30, s. c. 3 B. & C. 254, s. c. 5 D. & R. 106.

If one of three sureties for the payment of an annuity has paid the arrears thereof, and a second has become insolvent, the third will not, at law, be compelled to make contribution of more than one third of the money so paid.

But the plea of bankruptcy and certificate will be no defence by such third surety against an action for contribution, in respect of money paid on account of the annuity, by a co-surety, subsequent to the bankruptcy.

The assignment of an annuity for a valuable consideration to a person who is no party to the deed by which it is granted, part of the consideration being paid by that party, and part by one of the sureties who has covenanted, and also conveyed stock for the payment of the same,—an agreement being entered into between the assignee and such surety, that the assignee shall retain out of the annual payments, until he has been reimbursed the principal sum advanced by him, and interest thereon, and that afterwards the annuity shall be for the benefit of the surety,—will not operate as an extinguishment of the annuity, nor discharge the other sureties from their liability to make contribution. *Brown* v. *Lee*, 5 Law J. K.B. 276, s. c. 6 B. & C. 689.

### (K) Proceedings in cases of bankruptcy.

Where the title deeds of a bankrupt's real estate have been deposited for the security of an annuity, the Court will order the annuity to be discharged, and the arrears to be paid up to the date of the commission. *Ex parte Slack*, 1 G. & J. 346.

Before suing the surety of the grantor of an annuity, in respect of arrears of the annuity, where the grantor has become bankrupt, the value of the annuity must be ascertained by the commissioners, although the annuity was granted, and the grantor became bankrupt, previously to September 1825. *Bell* v. *Bilton*, 6 Law J. C.P. 141, s. c. 4 Bing. 615, s. c. 1 M. & P. 574.

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## APOTHECARY.

[See Surgeon and Apothecary.]

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## APPEAL.

(A) When and to what Courts it lies.
(B) Notice of.
(C) Limitation to.
(D) Nature and effect of.
(E) Evidence.
(F) In the Court of Admiralty.

[See Sessions; and Practice, in the House of Lords.]

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### (A) When and to what Courts it lies.

No appeal lies under a statute, unless it be expressly given by the same. *Rex* v. *the Justices of the hundred of Cashiobury*, 3 D. & R. 35.

The commissioners, appointed by the 59 Geo. 3. c. 31, and the Conventions for liquidating the claims of British subjects on the French Government, award a sum of money as a compensation to A, who claims as executor to B, to whom an estate in France, confiscated in 1792, is represented as having belonged; a plaintiff, who never made any claim before the commissioners, files her bill for the moiety of the sum awarded, upon the ground that a moiety of the estate belonged to the wife of B, upon whose death the right descended to her children, and, upon their death, without issue, devolved to the plaintiff: Held, by the Vice Chancellor, that the Court of Chancery had no jurisdiction over the question; and that the award of the commissioners was final, as to both the legal and the equitable rights of any persons claiming an interest in the subjects which had been confiscated, or in the compensation which had been awarded. *Hill* v. *Reardon*, 4 Law J. Chanc. 127, s. c. 2 S. & S. 431.

But, on appeal to the Lord Chancellor (Eldon), although, under the circumstances, the Court would not interfere to relieve the plaintiff, it was held, that where a person in whose favour an adjudication has been made by the commissioners or the Privy Council, is affected by a trust or by fraud, the Court has jurisdiction to enforce the trust or relieve against the fraud. And, *semble*, that these Conventions, and the act for carrying them into effect, do not exclude the jurisdiction of a Court of Equity to examine and enforce equities attaching upon the compensation in the hands of the person, in whose favour the award of the commissioners has been made. *Hill* v. *Reardon*, 2 Russ. 608.

No appeal lies to the House of Lords, on an order made by the Court of Exchequer, consequent upon a judgment of the Barons in a matter of extent. *Wall* v. *Attorney General*, 11 Price, 643.

From the official of a royal peculiar, the appeal lies direct to the Court of Delegates, and not to the intermediate jurisdiction of the Bishop of the diocess. *Miller* v. *Bloomfield*, 1 Add. 499.

An appeal from the Dean and Chapter of Exeter, lies to the Court of Arches, and not the Consistory Court of Exeter. *Parkham* v. *Templar*, 3 Phil. 323.

An appeal lies from the Special Petty Sessions to the General Quarter Sessions, where the former have dismissed an application under the 3 Geo. 4. c. 33. s. 2, in consequence of a misconception of the law, and not upon the merits of the case. *Rex* v. *Tucker*, 3 B. & C. 544, s. c. 5 D. & R. 434.

The Court of King's Bench have not the power of ordering an appeal against an order of removal, to be heard at the sessions of a county next adjoining a city and county of itself, even though all the justices of the latter are interested in the event of the appeal. *Rex* v. *the Justices of Kent*, 5 Law J. M.C. 45.

### (B) Notice of.

Where notice of appeal against an order of filiation was given in the following form:—"I, A. B. of &c., intend at the next quarter sessions to be

holden, &c. to commence and prosecute an appeal against an order of filiation, made &c., whereby I was adjudged to be the father of a bastard child, born on the body of C R, and chargeable to the parish of S;" it was holden insufficient, as the stat. 9 Geo. 3. c. 68. s. 5, required that the cause and matter of appeal should be specially stated. *Rex* v. *the Justices of Oxfordshire*, 1 B. & C. 279, s. c. as *Rex* v. *the Justices of Gloucester*, 2 D. & R. 426.

Where a statute gives a right of appeal against acts done in pursuance thereof, to "parties aggrieved," by such acts, the notice of appeal must state that the appellant is a party aggrieved by the act of which he complains. *Rex* v. *the Justices of the West Riding of Yorkshire*, 6 Law J. M.C. 59, s. c. 7 B. & C. 678, s. c. 1 M. & R. 547: s. p. *Rex* v. *the Justices of Essex*, 5 Law J. M.C. 65, s. c. 5 B. & C. 431, s. c. 7 D. & R. 658.

A notice of appeal against a poor rate, on the ground that the rate does not specify the property in respect of which it is imposed, must state that objection on the face of it. *Rex* v. *Bromyard*, 6 Law J. M.C. 100, s. c. 8 B. & C. 24, s. c. 2 M. & R. 280.

*Semble*, that the notice of appeal against an order of justices upon a surveyor of highways, to pay a composition for statute duty, under 4 Geo. 4. c. 95. s. 87, need not be within ten days of the making of the order, but is in time if it be within six days of the service thereof, upon the party appealing. *Rex* v. *the Justices of Lancashire*, 6 Law J. M.C. 119.

Clauses in a local act, providing that persons aggrieved by the commissioners, appointed to carry it into execution, should appeal to the quarter sessions, and that twenty-one days notice should be given before any action or suit was commenced for anything done in pursuance of the act, do not apply to the case of a person claiming as an incumbrancer of the rates, which the act gave authority to assess and levy, and instituting his suit in order to give effect to his incumbrance. *Drewry* v. *Barnes*, 3 Russ. 94.

(C) Limitation to.

Where a county rate was made under a local act, 54 Geo. 3. c. 103, giving a certain right of appeal: Held, that nevertheless a party aggrieved had the larger right of appeal given by the 55 Geo. 3. c. 51, which applies to all acts relating to county rates theretofore passed, whether local or general. *The King* v. *the Justices of Buckinghamshire*, 5 Law J. M.C. 93, s. c. 7 B. & C. 3.

(D) Nature and effect of.

An appeal from the Rolls, or the Vice Chancellor, to the Lord Chancellor, is only a rehearing. *Williams* v. *Goodchild*, 2 Russ. 91.

An appeal does not render a sentence a nullity, but only suspends its consequences. *Blyth, formerly Soden*, v. *Blyth*, 1 Add. 312.

(E) Evidence.

*Semble*—Matter not brought before the Court below, being neither stated in the pleadings or otherwise, not having been proved in evidence, will be admitted and acted upon as the ground of decision in cases of appeal to the Lords. *Noel* v. *Noel*, (on appeal from Exc.) 12 Price, 213.

(F) In the Court of Admiralty.

No principle is better established in this Court, than that, where there is an appeal, the property in question cannot be withdrawn but upon security given for the value.

Bail must be given in the case of a real *bonâ fide* appeal.

An appeal is not frivolous and insincere, merely because it is afterwards advisedly withdrawn. *Woodbridge*, 1 Hag. 77.

## APPOINTMENT.

[See Power.]

## APPORTIONMENT.

A, being seised in fee of a manor subject to an executory devise over, purchases a farm, consisting partly of copyholds holden of the manor, and partly of freeholds; the copyholds are surrendered to him and his heirs, and the freeholds are conveyed to him and his heirs: under an inclosure act, certain lands are allotted to him and his heirs in respect of the estate thus purchased: afterwards B becomes entitled to the manor under the executory devise: Held, upon a bill filed by B against the devisee of A, that B was entitled to so much of the allotment as was made in respect of the copyholds. *King* v. *Moody*, 4 Law J. Chanc. 227, s. c. 2 S. & S. 579.

In a suit for the administration of a testator's assets, after the decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in court to be apportioned among the other legatees, a creditor obtained permission to prove his debt; the Master subsequently reported a debt to be due to him, but, in the meantime, the fund had been apportioned, and part of it had been paid over, while the remainder had been carried to the account of particular legatees: Held, that the creditor was entitled to receive out of the funds of the legatees so remaining in court, not the whole of the debt, but only a part of it, bearing the same proportion to the whole, as the legacies given to those legatees bore to the whole amount of the legacies given by the will. *Gillespie* v. *Alexander*, 3 Russ. 130.

## APPRAISEMENT.

A written stamped appraisement is not necessary to prove the value of goods, if the broker speaks of it merely from recollection. *Stafford* v. *Clark*, 1 C. & P. 25. [Burrough]

## APPRENTICE.

[See Settlement.]

Where a tobacconist took an apprentice, with whom he received a premium, and covenanted to instruct and maintain him—in an action on that covenant the master pleaded, that the apprentice refused to obey his orders, and left his house, saying

that he would not return again. To which it was replied, that afterwards the apprentice returned and offered to obey his commands, but the master refused to receive him: Held, that if the apprentice had, under these circumstances, stopped away an unreasonable time, which ought to have been stated in a rejoinder, the master would have been justified in not receiving him; but that he was not at liberty to turn him away, or refuse to admit his apprentice into his house for misconduct, and absenting himself for a few days, but should have sued on his covenant. *Winstone* v. *Linn*, 1 Law J. K.B. 126, s. c. 1 B. & C. 460, s. c. 2 D. & R. 465.

A executed an indenture of apprenticeship, (to which was appended a printed notice for the insertion of the premium, &c. under stat. 5 Geo. 3. c. 49.) by which A bound her son apprentice to B, and A paid a premium. The indenture did not contain any statement respecting the premium, and was not stamped. The indenture being invalid for want of such statement, and not having been stamped within the period limited: It was held, that A was not an innocent party, and that A could not recover the apprentice fee from B, although paid without consideration, the indenture being invalid. *Stokes* v. *Twitchen*, 8 Taunt. 492, s. c. 2 B. Mo. 538.

A covenant in an indenture of apprenticeship, to instruct and provide for an apprentice, does not make the master answerable for the acts of the apprentice, or render him liable to an action for breach of covenant, in case the apprentice refuses to be taught, absents himself from the service, or disqualifies himself from serving in that capacity. *Hughes* v. *Humphreys*, 5 Law J. K.B. 270, s. c. 6 B. & C. 680.

*Semble*—That where an indenture of apprenticeship is offered in evidence, it may be presumed that the premium stated to have been given, was the sum actually paid; and the Court will not oblige the party producing it on the trial, to prove the payment on oath, as required by the 8 Anne, c. 1. *Stewart* v. *Laxton*, 2 Law J. C.P. 27, s. c. 1 Bing. 374, s. c. 8 B. Mo. 414.

Where an apprentice is bound out of a parish by his father, but part of the expenses is paid from the parochial funds, the indenture will be *void ab initio*, and not merely *voidable*, if not approved of under the seals as well as the hands of two justices, pursuant to the provisions of 56 Geo. 3. c. 139. s. 11. *Rex* v. *Stoke Damerel*, 6 Law J. M.C. 28, s. c. 7 B. & C. 536, s. c. 1 M. & R. 458.

If a lad goes on liking with a view to his being bound an apprentice, his intended master cannot charge for his board and lodging for the first month, nor perhaps for so long time as he conducts himself properly. But if he stays for many months, behaving ill after complaints to his father of his misconduct, it will be for the jury to say whether there was any contract, either express or implied, that his father should pay for his board and lodging. *Earratt* v. *Burghart*, 3 C. & P. 381. [Tenterden]

The Lord Chief Justice of the King's Bench will grant a warrant to discharge an apprentice, who has enlisted without his master's consent. *Rex* v. *Parkins*, 2 Ken. 295.

A *habeas corpus* does not lie where the party does not say that he is detained against his consent. Therefore, on motion for a *habeas* to discharge an apprentice impressed, it was refused, his assent not appearing—the proper mode being, in the absence of a consent, for the master to procure a warrant from a judge to the commander of the vessel, ordering his discharge. *Ex parte Grocot*, 5 D. & R. 610.

## APPROPRIATION.

[See DEBTOR AND CREDITOR, and BANKER.]

A bankrupt, prior to an act of bankruptcy, drew bills upon defendant, undertaking to provide for them, in case remittances to be received by him, due on foreign consignments, should not arrive in time to meet them: Held, that this was conclusive evidence of an agreement between the parties, that the proceeds of such goods should be applied in satisfaction of the bills, and amounted to a specific appropriation prior to the bankruptcy; and the defendant having paid the bills and received the remittances, was entitled to appropriate them towards such payments. *Thomas* v. *Da Costa*, 8 Taunt. 345, s. c. 2 B. Mo. 386.

The firm of a country bank gave a bond to their corresponding London bankers, conditioned for the repayment of all sums of money, &c. which the latter persons might advance to them, or any of them, associated or not with other persons.

On the death of one of the country bankers, there was a large balance due to the London ones. In the following month large sums were remitted to the London bankers, who continued to pay them away, and they were respectively placed to the old accounts; but no monthly statement was sent into the country. At the end of the second month, two accounts were sent from London: the old one, up to the death of the partner, and a new one, which included all the remittances since his death, taken from the old account.

If the remittances had remained in the old account, then nothing was due on it; but if the London bankers could alter their books, then the defendants were liable for the balance in the old account: The Court held, that inasmuch as no communication had taken place, the first entries made by the London bankers were not an appropriation of the money, and that they were entitled to put it to the new account. *Simson* v. *Ingham*, 1 Law J. K.B. 234, s. c. 2 B. & C. 65, s. c. 3 D. & R. 249.

If, where a person has two claims, one recognized by law, the other arising on a matter forbidden by law, an unappropriated payment be made, the law will afterwards appropriate it to the demand which it acknowledges, and not to the one which it prohibits. *Wright* v. *Laing*, 3 B. & C. 165, s. c. 4 D. & R. 783.

A, the acceptor of two bills for 25*l.* and 50*l.*, both overdue, paid 22*l.* 10*s.* to B, the holder, "on account." B said "he wished to have the full amount of the 25*l.* bill." A replied "he had no more money then, but would pay some more soon." B then indorsed on the 25*l.* bill, "Received 22*l.* 10*s.* in part of two bills:" Held, that B might appropriate the payment to the 25*l.* bill, though void for want of a stamp. *Biggs* v. *Dwight*, 6 Law J. K.B. 45, s. c. 1 M. & R. 308.

A, for the purpose of sale, consigned a cargo of fish to B, who was a correspondent with the house

of C, C having advanced money to A on an engagement from A, that the proceeds of the cargo of fish should be remitted by B to A through the hands of C, in order that they might form a security for the money advanced by C. A afterwards wrote to B telling him that the cargo of fish was not liable to any advances made by C. Notwithstanding this, B, after the receipt of A's letter, remitted the proceeds to C, who retained them to cover his advance, A having become bankrupt, and his assignees having sued B for the proceeds: Held, that a jury was warranted in considering A's engagement as an appropriation of the cargo of fish, which he could not rescind, and not a mere order for payment of money, which could be revoked by a subsequent countermand before payment. *Fisher* v. *Miller*, 1 Bing. 150, s. c. 7 B. Mo. 527.

Where A, having certain funds standing to his credit at the bankers, by letter, directed them to carry some parts of such funds to the account of certain persons, as trustees for his wife, and, after her decease, for his son; and other parts thereof to the account of certain persons, as trustees for his son; and such sums were accordingly carried over by the bankers to the account of such persons in their books, and the dividends were from time to time carried to the same accounts; but the testator never communicated the fact to the trustees; and there was some evidence that the testator had directed the transfers under an impression that he should be able, by that means, to evade the legacy duty, and that he had shewn an intention to exercise some acts of ownership over the funds: the Court held, that the appropriations were void, and that the testator might at any time have revoked them. *Gaskell* v. *Gaskell*, 2 Y. & J. 502.

## ARBITRATION.

(A) Submission.
(B) Order of Reference.
(C) Effect of the Reference.
(D) Revocation.
(E) Arbitrator.
*(a) Authority.*
*(b) Privilege.*
(F) Mode of Proceeding.
(G) Umpire.
(H) Award.
*(a) Form and construction of.*
*(b) Effect of, and within what time to be made.*
(I) Rule of Court.
(K) Remedies.
(L) Pleading and Evidence.
(M) Of setting aside the Award and directing the arbitrators to review.
(N) Costs.

### (A) Submission.

Where a submission to an award was signed by three of five joint contractors: Held, that it would not bind the five, as it was not an act within the ordinary course of business of a trading firm. *Stead* v. *Salt*, 3 Law J. C.P. 175, s. c. 3 Bing. 101.

Where matters in difference are referred to arbitration, by bond or agreement, and one of the parties revokes the authority of the arbitrator, he may be liable to an action; but the submission cannot afterwards be made a rule of court, in order to bring him into contempt.

But where a cause is referred by a judge's order, such order may be made a rule of court, even after revocation, in order to bring the party revoking into contempt.

It therefore seems advisable, and is recommended by the Court, that the submission be made a rule of court, in the first instance, and before any step be taken in the reference. *Howard* v. *Kaye*, 5 Law J. K.B. 62.

### (B) Order of Reference.

Where a reference is directed at Nisi Prius, but the defendant dies before the order is drawn up, the proper course is to move for leave to enter nominal damages. *Wyatt* v. *Hoste*, 1 Law J. C.P. 98.

### (C) Effect of the Reference.

Where one of the parties in a cause is appointed receiver, and afterwards, by a consent order, all the matters in dispute in the cause are referred to arbitration, this order and the pending reference will not be any objection to making such application to the Court, as may be necessary, in order to compel the party who is receiver, to pay in, to the credit of the cause, such sums as the Master shall have reported due from him, in his character of receiver. —— v. *Jarman*, 3 Law J. Chanc. 12.

A verdict was taken for the amount of the damages laid in the declaration, subject to the award of a barrister. He proceeded a little way with it, but from motives of delicacy declined finishing it, and one of the defendants refused to appoint another arbitrator. The Court would not stay execution for the amount of the verdict from issuing against that defendant, unless he would consent to appoint another arbitrator. *Woolley* v. *Clark*, 1 Law J. K.B. 38, s. c. 1 B. & C. 63, s. c. 2 D. & R. 158.

### (D) Revocation.

Two parties agreed, by writing, not under seal, to refer their differences to the arbitration of C S, and bound themselves mutually in a penalty for the true and faithful observance and performance of the award to be made by him: Held, that a revocation of the submission was a breach of the agreement, and incurred the penalty. *Warburton* v. *Storr*, 3 Law J. K.B. 156, s. c. 4 B. & C. 103, s. c. 6 D. & R. 213.

Until a baron's order directing a reference be made a rule of court, it is revocable. *Greenwood* v. *Misdale*, 1 M'Clel. & Y. 276.

A party who has submitted to arbitration under an order of Nisi Prius, may revoke his submission before the order has been made a rule of court, and the Court will set aside the award made after such revocation, even in a case where the party revoking has obtained time from the arbitrator. *Clapham* v. *Hyam*, 1 Law J. C.P. 5, s. c. 1 Bing. 87, s. c. 7 B. Mo. 403.

A verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom all matters in difference were referred. One of the parties died. The Court set aside an award for being made after

his death, which (although he was a nominal party) put an end to the authority of the arbitrator. *Rhodes* v. *Haigh*, 2 Law J. K.B. 40, s. c. 2 B. & C. 345, s. c. 3 D. & R. 608.

The death of either of the parties before an award, is not a revocation of the submission, under an order of Nisi Prius, if the judgment and verdict will embrace all the matters in dispute. *Bower* v. *Taylor*, cited *Rhodes* v. *Haigh*, 2 Law J. K.B. 40, s. c. 3 D. & R. 610, s. c. 2 B. & C. 347.

Although the reference to arbitration is made under an order of the Court, every party may revoke the authority of the arbitrator before the award is made; but it is a high contempt so to do. *Haggett* v. *Welsh*, 1 S. & S. 134.

(E) Arbitrator.

*(a) Authority.*

Subsequent to a reference by bond, one of several obligees died, previous to the award being made: Held, that the arbitrators could not award payment by the survivors and executors of the deceased, and direct releases, &c. to be given. *Quære*, If the award would have been effectual if made on surviving obligees only? *Edmunds* v. *Cox*, 2 Chit. 432.

Where a cause and all matters in dispute between the parties were referred by a bond, in which no mention was made of the costs: Held, that the arbitrator had power over the costs of the cause, but not those of the reference. *Firth* v. *Robinson*, 1 Law J. K.B. 115, s. c. 1 B. & C. 277.

Under a reference to arbitration, authorising the arbitrators to examine the parties to the suit on oath, it was holden, that the words were sufficiently large to empower the arbitrator to examine the plaintiff in support of his own case. *Wayne* v. *Bryant*, 3 B. & C. 590, s. c. 5 D. & R. 601.

Two partners, as surgeons, referred all matters in dispute between them, and the terms on which the partnership should be dissolved, to arbitration. The arbitrator having awarded that one of them should not act as such during the life of the other, within thirteen miles of the place wherein they resided: It was holden that the award was good, inasmuch as the arbitrator had power to impose such a condition. *Morley* v. *Newman*, 5 D. & R. 317.

If, in an action on a policy of insurance, where a total loss has been sustained, the jury find an average loss, directing the amount to be ascertained by an arbitrator, which necessarily involves the question, whether the expenses of the sale of the damaged cargo should be borne by the underwriters or not: Held to be a question not within the province of a jury, but to be decided by the arbitrator. *Hudson* v. *Marjoribanks*, 1 Bing. 393, s. c. 7 B. Mo. 463.

Where the time for making an award was enlarged by the parties altering and re-executing the arbitration bonds,—it was holden, that the arbitrator might award interest beyond the original submission: that is, down to the extended date. *Watkins* v. *Philpots*, 1 M'Clel. & Y. 393.

Where a cause was referred by order at Nisi Prius, and the arbitrator awarded that which the plaintiff had claimed in her declaration, but had afterwards abandoned: The Court set aside the award *pro tanto*, as an excess of jurisdiction. *Hooper* v. *Hooper*, 1 M'Clel. & Y. 509.

Arbitrators nominated to fix the value of an estate, may adopt the opinion of skilful men, employed by them to survey part of the property. *Hopcraft* v. *Hickman*, 3 Law J. Chanc. 43, s. c. 2 S. & S. 130.

Where an arbitrator has a power to examine the parties, such a power includes the liberty of examining witnesses who are interested in the result; and who, at Nisi Prius, would, on that ground, be incompetent. *Laird* v. *Dixon*, 6 Law J. K.B. 109.

The authority of an arbitrator under a rule of court, which empowers him to deliver his award to the parties or their executors, does not determine by the death of one of the parties before the award is executed. *Clarke* v. *Crofts*, 5 Law J. C.P. 127, s. c. 4 Bing. 143.

Where, after the trustees of an infant had referred matters to arbitration, the latter died before the award was made: Held, that an award against the trustees, as such, could not be enforced. *Bristow* v. *Binns*, 3 D. & R. 184.

Where guardians had submitted matters to arbitration, and the infant died, the Court relieved the guardians from the consequences of the award, and set it aside. *Burslem* v. *Burns*, 1 Law J. K.B. 155.

An arbitrator, in regulating the future use of a stream of water, the right to which was divided between the parties, interfered with the customary enjoyment by one of them of another stream, which exclusively belonged to him, and was not a matter in difference, and which joined the first: Held, that he had power to do so, incidental to and resulting from his former direct and larger power.

If an arbitrator, after regulating on the subject matter referred to him in its present state, goes on and regulates prospectively on the same subject matter reduced to a different state, and thereby in some degree altered, *quære*, whether that be a proceeding beyond his authority. *Winter* v. *Lethbridge*, 13 Price 533, s. c. 1 M'Clel. 253.

*(b) Privilege.*

The Court will not direct a barrister to make an affidavit respecting anything which has been done by him as an arbitrator, but the Court will give him the option, either to state to the Court any matters he may think proper, or to make an affidavit. *Mansfield* v. *Partington*, 2 Law J. K.B. 153.

(F) Mode of proceeding.

The witnesses in an arbitration may, *by consent*, be examined without the oath having been administered, provided they take it before the award is made. *Mansfield* v. *Partington*, 2 Law J. K.B. 153.

When a cause is referred to arbitration, the mode of conducting it must be left to the arbitrators; and if they, after the first or second meeting, exclude both the parties and their attornies, and examine witnesses privately, at their (the witnesses') houses, it seems that such conduct is no good ground of objection, provided it does not proceed from corrupt motives. At all events, if either party would take advantage of it, he must give notice at the time that he intends to rely on it as an objection; and if he lie by and suffer other meetings to take place, and when the arbitrators are ready to make their award, revoke his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award. *Hewlett* v. *Laycock*, 2 C. & P. 574. [Abbott]

### (G) Umpire.

A cause was referred to two arbitrators, with liberty for them, if they could not agree, to choose a third, and the award of any two of them was to be good. The two arbitrators, not being able to make an award, agreed that they should cast lots, and that they should each name a person, from whom the winner should choose the third arbitrator; who was so chosen. The Court held that the third arbitrator had been improperly appointed, and set aside the award. *Young* v. *Miller*, 3 Law J. K.B. 54, s. c. 3 B. & C. 407, s. c. 5 D. & R. 263.

Two arbitrators were empowered to appoint an umpire under the terms of the reference, prior to entering into consideration of the matters in dispute, and to make their award before a specified day, or such period as they, or any two of them should appoint; the arbitrators, antecedent to appointing the umpire, enlarged the time, and, subsequently, held a meeting at which the parties attended: it was determined, as the parties were aware of these facts, and had afterwards attended, they could not make any objection, on the ground of the enlargement of the time having been made before the appointment of the umpire. *In re Hick*, 8 Taunt. 694.

If the submission to arbitration leave the costs in the discretion of the arbitrators, who have power to choose an umpire, the award is good if the amount of the costs is settled by the umpire. *Taylor* v. *Dutton*, 1 Law J. K.B. 158.

By a reference, all matters in dispute between the parties were submitted to the determination of two arbitrators; and, in case of their not agreeing, to choose an umpire; the latter made an award without the express admission of the arbitrators that they could not agree: the Court refused to set it aside. *Hill* v. *Marshall*, 5 Law J. C.P. 161.

A deed of submission authorizing arbitrators to appoint an umpire in, or to concur with them in considering and determining the matters referred, does not bind the parties to an award made by that umpire alone. *Beddall* v. *Page*, 5 Law J. K.B. 101.

### (H) Award.

#### *(a) Form and construction of.*

In general an award which is bad as to part, is bad as to the whole. *Harris* v. *Curnow*, 2 Chit. 594.

Though an award be bad for regulating prospectively on the subject matter referred, yet that does not vitiate those parts which are otherwise unobjectionable; and it may stand *in toto*, until the particular contingency arise, to which the prospective regulation refers. *Winter* v. *Lethbridge*, 13 Price, 533, s. c. 1 M'Clel. 253.

Where an action of ejectment was referred to arbitration, and the reference stated, that if the arbitrator should award that the plaintiff had any cause of action, he should be entitled to costs as in a court of law; and the arbitrator directed the defendant to deliver up the premises, and pay the costs of the action, and pay a sum of money to the plaintiff for the loss of rent during the time the defendant had continued in possession, and that the parties should execute general mutual releases. It was decided, that the award, with respect to the payment of the money was good, although the arbitrator did not find in terms that the plaintiff had any cause of action; and that if the award were bad, with regard to the directions as to mutual releases, it would not vitiate the whole award. *Doe d. Williams* v. *Richardson*, 6 Taunt. 697.

So in every case, if the subject of submission be capable of being separated, the award may be valid in part, and invalid in part; but it is otherwise where all the matters are within the submission, and the award is upon the face of it entire. *Auriol* v. *Smith*, 1 Turner, 128.

As the language of an award is immaterial, framing it in the form of an opinion does not invalidate. *Matson* v. *Trower*, 1 R. & M. 17. [Abbott]

An award which a man of common understanding can comprehend, is sufficient. *Ex parte Aitcheson*, 1 Law J. K.B. 48, s. c. 2 D. & R. 222.

When a cause, and all matters in difference between the parties, are referred to arbitration, it is not necessary in the award to specify what part of the sum awarded is given for the differences, independent of the cause of action. *Waters* v. *Pedley*, 2 Law J. K.B. 152.

If arbitrators determine upon one point in dispute, and refer the other to an umpire, who makes an award, it is bad *in toto*, unless the submission gave them an express authority to make their award in such a detached manner. *Tollit* v. *Saunders*, 9 Price, 612.

The terms of an award cannot be altered; the Court therefore refused to order the award to be made consistent with the submission. *Hall* v. *Alderson*, 2 Bing. 476.

An award by arbitrators named to fix the value of an estate, is not uncertain, by reason of its allowing an augmentation or diminution in the sum fixed, even where the submission to arbitration gave minute directions for the course to be pursued by the arbitrator, as the price, according as the land shall, upon admeasurement, exceed or fall short of a given quantity.

But if the augmentation or diminution in the price is to be at the rate of so much per acre, if the error as to quantity shall be in one part of the estate; and at a different rate per acre, if the error shall be in another part of the estate; and the award does not express the estimated quantity of either of these parts taken separately; then the award is void for uncertainty. *Hopcraft* v. *Hickman*, 3 Law J. Chanc. 43, s. c. 2 S. & S. 130.

An award, that each party shall pay his own costs in a certain action, and that the defendant shall pay the plaintiff a certain sum for making the first breach, is not uncertain. *Hawkins* v. *Colclough*, 2 Ken. 553, s. c. 1 Burr. 275.

If a submission be, that the award shall be made by four persons, or any three of them, and it be only executed by three of them, though made by four, it is void. *Thomas* v. *Harrop*, 1 S. & S. 524.

An award directing an executor (who had referred matters to arbitration) to pay a certain sum, on a named day, out of the assets in his hands, without stating whether there were assets, is not void for uncertainty. *Love* v. *Honeybourne*, 4 D. & R. 814.

All matters in difference between two persons were referred by them to arbitration. The submission recited, that certain actions were depending, in

which they and others were jointly made parties. The arbitrators awarded, that the costs of those actions should be paid by them in certain proportions, and that the sums already paid by either of them should be considered as part payment by them. The Court held the award to be sufficiently certain and final. *Cargey* v. *Aitcheson*, 1 Law J. K.B. 252, s. c. 2 B. & C. 170, s. c. 3 D. & R. 433; affirmed in error 2 Bing. 199, s. c. 9 B. Mo. 38, s. c. M'Clel. 367.

Where several underwriters to a policy, after entering into a consolidation rule, referred the cause; and the arbitrators awarded an aggregate sum to the assured from the underwriters at large, the Court refused to order the arbitrators to separate the sums due from each, and to open the consolidation rule, without the consent of the defendants. *Kynaston* v. *Liddell*, 8 B. Mo. 223.

Where the time for making the award is enlarged by a judge's order, the award should state on the face of it, that the enlargement was made by consent; otherwise the Court will not grant an attachment for its non-performance. *Halden* v. *Glasscock*, 5 B. & C. 380, s. c. 8 D. & R. 151.

A cause, and all matters in difference between plaintiff and defendant were referred by order of Nisi Prius: the arbitrator awarded, "that there is nothing due to the plaintiff:" Held, that the award was sufficient, and determined the right of action between the parties. *Dickins* v. *Jarvis*, 5 B. & C. 528, s. c. 8 D. & R. 285.

An award that A *or* B, shall do a certain act, is bad for uncertainty. *Lawrence* v. *Hodgson*, 1 Y. & J. 16.

Where a question as to the validity of a payment, made by a bankrupt in the ordinary course of trade, was referred to an arbitrator, who found specially a payment under arrest, and other circumstances tending to shew, that it was made to the creditor cognisant of the insolvency, and awarded against the payment being *bonâ fide*, without assigning any reasons:—It was holden, that he must have concluded that the creditor had notice of the insolvency; and, therefore, the award was good on that ground: secondly, that the word insolvency, in the 19 Geo. 2, must, in this instance, be construed not to mean a state of utter and complete insolvency, but must be understood in its popular sense: and lastly, that they dissented from those cases which decide, that a payment under an arrest was in the ordinary course of trade—(Hullock B. *dissent.*) *Teale* v. *Younge*, 1 M'Clel. & Y. 497.

An arbitrator gave a shilling damages, which he declared to be in full for the injury which the plaintiff had sustained up to the time of making the award: Held, that although the arbitrator had exceeded his authority in giving damages beyond the commencement of the action; yet, as the damages themselves were (and à *fortiori* the excess was) merely nominal, and could not affect the costs, the award was good.

On a general reference, by three partners, of all matters in difference, to arbitration, the arbitrators found the partnership capital, on the day of the dissolution, to be, in merchandize and good debts, of a given amount, including a debt due from A, one of the partners, and that there were some dubious debts. They then ascertained the amount of the debts due from the partnership, and found the gross value of the stock, which, including the debt due from A, they awarded to be divisible between the other partners, B and C. They next found the dubious debts to be divisible as received between the three partners; and they awarded that A should give security for the payment of his debt by instalments; and directed B to receive the outstanding debts and effects, and to pay all debts owing by the partnership, of which accounts were to be stated periodically; and of the balance of receipts, special credit was to be given for A's share against his debt, and the remainder was to be divided between B and C; and any balance of payments was to be borne in the same proportions. The award was acted upon by all parties, but B subsequently received some debts which were omitted in the accounts laid before the arbitrators, and on which their award proceeded; and he also received good debts to a larger amount than had been estimated by the arbitrators. On a bill by A against his co-partners: Held, that he was entitled, notwithstanding the reference was of all matters in difference, to an account of the good debts received beyond the amount estimated by the arbitrators, and to an account of the receipts in respect of dubious debts; and that any over-receipt, in respect of good debts, ought to follow the directions of the award with respect to the dubious debts. *Spencer* v. *Spencer*, 2 Y. & J. 249.

Although an award, which finds the special facts, is in the nature of a special verdict, it is not to be construed with so much strictness; but the award is to be maintained, if it is good in substance.

A plaintiff declared in an action on the case for an injury done to his reversionary interest. The action was referred to an arbitrator, who found for the plaintiff, with nominal damages; but the language he used in finding the special facts appeared to indicate rather a possessory interest: Held, that the award was good, as the Court would not presume that damages had been given in respect of any injury, but that which was the subject of the declaration. *Harding* v. *Harrison*, 5 Law J. K.B. 249.

*(b) Effect of, and within what time to be made.*

A reference to arbitrators contained two provisos —first, that the death of either of the parties before the making of the award, should not be a revocation of their authority; and secondly, giving them power to enlarge the time for making their award: the plaintiff having died, and the arbitrators after his decease having enlarged the time for making the award: It was holden that the reference gave them incidentally the same power of enlarging the time after that event as before, and that an award made within such enlarged time was good. *Tyler* v. *Jones*, 3 B. & C. 144, s. c. 4 D. & R. 740.

A submission, by which an award is to be made, on or before the day of , or such day to which the submission may be enlarged, is a general authority to be executed within a reasonable time.

The death of either of the submitting parties will not determine the authority of the arbitrator, or vacate the subsequent proceedings upon the reference, where the deed or instrument of submission contains a proviso, that the submission shall not vacate or expire through the death of either of the

parties. *Macdougal* v. *Robertson* (in error), 4 Bing. 435, s. c. 1 M. & P. 147, s. c. 2 Y. & J. 11.

(I) Rule of Court.

Upon a reference under a consent order in a cause, the award may be enforced without being made previously a rule of court.

*Semble*—That the interference of the Court to enforce an award made under a consent order by summary process, is not excluded by the circumstance, that the parties executed bonds for the performance of the award, which bonds, in pursuance of the order of reference, the Master had settled.

If the award, the performance of which is so secured by bond, is not made within the period limited for it, and the time is by subsequent consent orders enlarged, and no other bonds are executed, the award is a proceeding entirely under the authority of the Court, and will be enforced by its process. *Ormonde* v. *Kynnersley*, 2 Law J. Chanc. 178, s. c. 2 S. & S. 15.

Where it has been agreed, that a submission to an award shall be made a rule of the Court of Common Pleas, a court of equity will not interfere by granting one of the parties relief inconsistent with the award, although the submission has not been made a rule of court. *Davis* v. *Getty*, 1 Law J. Chanc. 209, s. c. 1 S. & S. 411.

Where there is a submission of matters in dispute to arbitration, under the statute of William 3, and the submission is to be made a rule, either of the Court of Chancery, or of the King's Bench, if the submission is, by one of the parties, made a rule of the Court of King's Bench within due time, the Court of Chancery has no jurisdiction to set the award aside, or to restrain acting upon it, even though a bill be filed for that purpose, before the submission is made a rule of the court of law. *Dawson* v. *Sadler*, 2 Law J. Chanc. 80, s. c. 1 S. & S. 537.

It is the submission that must be made a rule of court, and not the award. *Lewis* v. *Healing*, 1 Law J. Chanc. 154.

The order of reference must be made a rule of court, where a verdict is found for the plaintiff at Nisi Prius, subject to a reference. *Kirkus* v. *Hodgson*, 8 Taunt. 783, s. c. 3 B. Mo. 64.

It is too late, in answer to an application for an attachment for not performing an award, to say that the submission and bond which have been made a rule of court are irregular. There should have been a motion to discharge the rule. *Taylor* v. *Dutton*, 1 Law J. K.B. 158.

(J) Remedies.

[See Attachment.]

When the Court can clearly see that a person has full knowledge of the contents of an award, they will not require personal service before they grant an attachment for non-performance of it. *King* v. *Bower*, 1 Law J. K.B. 110, s. c. 1 B. & C. 264.

If there be a doubt whether an award be certain and final, the court will not grant an attachment upon it, but will put the party to his remedy by action. *Ex parte Aitcheson*, 1 Law J. K.B. 48.

If, under an award, the act complained of be done before the submission to arbitration was made a rule of court, this Court will not grant an attachment for a contempt for doing that act. *Jennett* v. *Latimer*, 2 Law J. K.B. 78.

An attachment may be issued for the non-performance of an award, although the defendant be not resident within the jurisdiction of the court. *Hopcraft* v. *Fermor*, 2 Law J. C.P. 29, s. c. 8 B. Mo. 421, s. c. 1 Bing. 378.

A person was directed by an award to sign a release to the opposite party. The solicitor for the opposite party tendered a release to him, but he refused to sign it. The Court would not grant an attachment for a contempt, because the solicitor had not a power of attorney to do that specific act. *Humphries's case*, 2 Law J. K.B. 78.

Where a submission to arbitration contains a power of enlarging the time for making the award, and the enlargement is made by rule of court, that rule of court is a sufficient foundation for an attachment, without an affidavit of due enlargement. *Dickins* v. *Jarvis*, 5 B. & C. 528, s. c. 8 D. & R. 285.

Where the time for making an award is enlarged by a judge's order, the Court will not grant an attachment, unless the award state that the enlargement was made by consent. *Halden* v. *Glasscock*, 5 B. & C. 390, s. c. 8 D. & R. 151.

The validity of awards will not be tried on the last day of term. *Watkins* v. *Philpots*, 1 M'Clel. & Y. 393.

An application for an attachment for non-performance of an award, is not answered by shewing corruption in the arbitrators. *Brazier* v. *Bryant*, 3 Bing. 167.

To an action of debt on bond, conditioned for the performance of an award, the defendant cannot plead that he revoked the submission, though he state circumstances which shew misconduct in the course of the reference, either in the arbitrator or the plaintiff himself.

It seems that in such a case the remedy is to be obtained by application to the Court to set aside the award. *Grazebrook* v. *Davis*, 4 Law J. K.B. 321, s. c. 5 B. & C. 534, s. c. 8 D. & R. 295.

Where, by the terms of the submission, an award is to be made under the hand and seal of the arbitrator, and an award is made under his hand only, —the Court will not grant an attachment for contempt. But neither will the Court set aside the award. *Anon.* 5 Law J. K.B. 16.

An arbitrator found that a party was indebted, but no time for payment was stated, nor any mode pointed out by which such payment was to be made: —The Court would not grant an attachment, but left the party, to whom the payment was to be made, to his remedy by action, for non-performance of the award. *Edgell* v. *Dallimore*, 4 Law J. C.P. 193, s. c. 3 Bing. 634.

Where, on motion for an attachment for non-payment of money pursuant to an award, it was objected that the arbitrator had directed a verdict to be entered for the plaintiff, for damages which, as the reference had been made by rule of court, after issue, he had no authority to order; it was holden that they could not grant an attachment, inasmuch as the arbitrator should merely have awarded the money to be paid. *Jackson* v. *Clarke*, 13 Price, 208, s. c. M'Clel. 72.

Where a parol submission has been entered into by an infant plaintiff before trial, and the arbitrator has awarded in favour of defendant, and plaintiff

refuses to perform the award, defendant may proceed to trial by proviso. *Godfrey* v. *Wade*, 6 B. Mo. 488.

The renewal of a lease upon the terms of an award, which had been twice enforced by the Court, was again enforced; but the jurisdiction to give effect to an award, confirmed by the decree of the Court, in the case of a charity, is doubtful. *The Attorney General* v. *Clements*, 1 Turner, 58.

Where, upon a reference of actions in the Court of Common Pleas, a sum of money was awarded to be paid by each party, and the party entitled to the larger amount brought an action in the Court of King's Bench, in order to compel the defendants to set off subject to the lien of his attorney for his costs; the Court of Common Pleas refused to interfere to enforce the set-off, and would not order the award to be delivered up. *Symonds* v. *Mills*, 8 Taunt. 526.

Where the parties to a bond conditioned for the performance of an award, agreed by deed for further time, the Court held, that an action might be brought upon the original bond, as the deed must be taken to incorporate all the antecedent terms contained in the condition of the bond. *Greig* v. *Talbot*, 2 B. & C. 179, s. c. 3 D. & R. 446.

The venue cannot be changed in an action on an award. *Stanway* v. *Heslop*, 2 Law J. K.B. 209, s. c. 3 B. & C. 9, s. c. 4 D. & R. 635.

A revocation of a submission to arbitration not under seal, before award made, is in effect, a breach of an agreement to stand to, obey, abide, perform, &c. an award, for which assumpsit will lie; and the plaintiff may declare that the defendant undertook to perform the agreement, *and not to revoke the submission*, and lay the revocation as a breach. *Brown* v. *Tanner*, 1 M'Clel. & Y. 464, s. c. 1 C. & P. 655.

If the parties to an arbitration by a rule of court, which gives no power to enlarge the authority of the arbitrator, consent to the enlargement of that authority, such consent will constitute a sufficient agreement to maintain an action for the non-performance of an award made pursuant to the enlarged authority. *Anon.* 5 Law J. K.B. 247.

### (K) Pleading and Evidence.

If the declaration upon an arbitration bond sets forth so much of the award as supports the plaintiff's claim, it is sufficient. In debt on an award, the declaration stated, a release of the particular suit referred to be awarded, but the award in evidence shewed general releases: Held, good. *Perry* v. *Nicholson*, 2 Ken. 557, s. c. 1 Burr. 278.

Arbitrament without performance is a good plea, where the parties have mutual remedies. *Gascoyne* v. *Edwards*, 1 Y. & J. 19.

Where the plaintiff declared in assumpsit, that certain differences had arisen, and a certain suit was then depending in Chancery, in which the plaintiff, and divers other persons, including infants, were plaintiffs, and P K, T B (since deceased), and J R, defendants; and that, by an order of the Vice Chancellor, it was ordered, with the consent of the attornies of the parties in the suit, that the several matters in question in the suit, and all disputes and differences then subsisting between certain of the plaintiffs and P K and T B (since deceased), should be referred to the arbitrament of an arbitrator, who was to be at liberty to make one or more award or awards, as he should think fit; and that in case either of the parties should happen to die before the making of the award, the reference was not to abate; but that the executors and administrators of the parties so dying, were to be taken as parties to the order in like manner as their testator or intestate; —that before the making of the award T B died; and that the arbitrator afterwards awarded that the defendants, executors of T B, should pay the plaintiff a certain sum out of the assets of the said T B, on a particular day mentioned in the award, by reason of which the defendants, as executors, became liable to pay, and being so liable, they, as *executor and executrix* as aforesaid, promised to pay: Held, on a special demurrer, that the action was well brought against the executors, although it was objected, first, that the promise alleged to have been made by the defendant was a personal promise, for which there was no consideration; secondly, that the arbitrator was not properly constituted as to some of the parties; and that a sufficient authority to refer was not shewn; and, lastly, that the authority to refer was revoked by the death of T B. *Dowse* v. *Coze*, 3 Law J. C.P. 127, s. c. 2 Bing. 20.

In an action upon an award, where the declaration averred a mutual submission of several persons by bond, it was held necessary that the execution by all should be proved, though the action was against one only.

But it would be otherwise if the action were upon the bond, and the bond were joint and several. There, though the submission might be joint, the plaintiffs might declare upon the several bond, and the declaration would then be satisfied by proof of the execution by the defendant alone. *Ferrer* v. *Owen*, 6 Law J. K.B. 28, s. c. 7 B. & C. 427, s. c. 1 M. & R. 222.

An award, made under an agreement of reference, cannot be pleaded to a bill filed to impeach a certain deed, or a part of it, and to carry the trusts of a former deed, and of the impeached deed, (so far as valid) into effect, where all the persons interested in the trusts of those deeds are not parties to the agreement of reference. *Dyer* v. *Dawson*, 4 Law J. Chanc. 167.

Where, after bill filed, an agreement was entered into to refer the whole subject-matter of the suit to arbitration,—it was holden, that the award might be pleaded in bar to the bill: but where all the parties to the suit were not parties to the award, and where part of the prayer of the bill was for the execution of the trusts of a deed, under which some of the parties to the suit were interested, who were not parties to the award, a plea of the award was ordered to stand for an answer, with liberty to except. *Dryden* v. *Robinson*, 2 S. & S. 529.

### (L) Of setting aside the award, and directing the arbitrators to review.

The acceptance of the costs of reference and award precludes the party from moving to set it aside. *Kennard* v. *Harris*, 2 B. & C. 801, s. c. 4 D & R. 272.

A rule *nisi*, to set aside an award, on the plea side of the Court of Exchequer, should specify the grounds of objection; and the same rule seems to hold on the equity side. *Watkins* v. *Philpots*, 1

M'Clel. & Y. 394: s. P. *Smith* v. *Briscoe*, 11 Price, 57.

An award cannot be set aside after the time limited by the 9 & 10 W. 3. c. 15. *Anon.* 1 Ken. 118.

In a rule *nisi* to set aside an award, it is not necessary to specify in detail the objections to the award; provided the objections are so specified in the affidavit upon which the rule is obtained.

Where the rule is made "in a cause," the regulations of the 9 and 10 Wil. 3. c. 15. do not apply. But the Court will not listen to an application to set aside an award, which is not made within the time allowed to move for a new trial, unless adequate grounds for indulgence be shewn. *Rawstherne* v. *Arnold*, 5 Law J. K.B. 270, s. c. 6 B. & C. 629.

Where a reference has been made, under the 9 & 10 Wil. 3, the power of setting aside or enforcing the award is vested in the court in which the submission was made a rule, and the time within which an application to set it aside must be made is regulated by the statute; nor does a case of fraud appear to constitute an exception to this rule. *Auriol* v. *Smith*, 1 Turner, 126.

Where trustee and *cestui que trust* refer accounts to arbitration, and the award is made a rule of court, under the 9 & 10 Wil. 3, notwithstanding it be proved that there was a fraudulent misrepresentation by the trustees to the arbitrators as to particular items of the account, a bill in equity by the *cestui que trust* cannot be supported after the period limited by the statute for setting aside awards has expired. *Auriol* v. *Smith*, 1 Turner, 121.

The Court will not set aside an award after the period limited by the statute has expired, although there is a palpable defect on the face of it, but may refuse to enforce it. *Auriol* v. *Smith*, 1 Turner, 125.

Where an award is made in vacation, on a verdict taken nominally, subject to a reference, or under an order of Nisi Prius, an application to set it aside must be made within the first four days of the next ensuing term. *Thompson* v. *Jennings*, 3 Law J. C.P. 80.

An award having been made in vacation, a rule to set it aside was obtained, on the last day of the next term, but the agreement of reference had not then been made a rule of court. This case is within the 9 & 10 Wil. 3. c. 15. s. 2, which provides, that application to set aside an award must be made before the last day of the next term after the award is made. A rule to make the articles of reference a rule of court was obtained in the vacation, as of the last day of the term in which the rule for setting aside the award had been granted—but was held too late to support the latter rule. *In re Hughes* v. *Emett*, 3 Law J. K.B. 175.

An award made after the essoign day of a term, is to be taken as made in that term; so that a party who seeks to impeach the award shall be allowed the following term to make his application. *In re Burt*, 4 Law J. K.B. 276, s. c. 5 B. & C. 668, s. c. 8 D. & R. 421.

An award will not be set aside on any ground, which in truth is a question upon the merits between the parties. *Winter* v. *Lethbridge*, 13 Price, 533, s. c. M'Clel. 253.

A second rule will not be granted to set aside an award, when one rule for that purpose has already been discharged. *In re Hellyer and Snook*, 2 Chit. 266.

To support an application to set aside an award on the ground of recently-discovered fraud, it must be shewn that it is a new discovery, and could not with due diligence have been ascertained before. *Auriol* v. *Smith*, 1 Turner, 127.

The Court will grant a rule *nisi* to set aside an award, where the award does not recite the bond of reference. *Dodsley* v. *Dodsley*, 1 Law J. K.B. 7.

Where an award is made in consequence of a submission under the statute of 9 & 10 Wil. 3. c. 15, a bill to set aside the award cannot be sustained, even though it charge fraud and corruption in the arbitrator. *Dawson* v. *Sadler*, 2 Law J. Chanc. 172.

The Court will not set aside an award, in the absence of proof of the arbitrator's partiality or misbehaviour, on the ground that he has given more costs than by calculation they would amount to. *Turner* v. *Ross*, 1 Ken. 393.

Where one party to a reference has notice of a meeting to take instructions for an award, but does not attend, and the other party attends, is examined privately as a witness, and upon his evidence an award is given in his favour, it will be set aside. *In re Hick*, 8 Taunt. 694.

The Court will not direct an award to be referred back to the arbitrator, on the ground that he had allowed an apothecary his charges for attendances, which could not be recovered at law. *Gensham* v. *Germain*, 4 Law J. C.P. 37.

The Court will not set aside a void award, which cannot be enforced without suit, because such suit must fail: but if it direct that which can be done without suit, as that a verdict be entered for the defendant,—the Court will set it aside, inasmuch as otherwise, the party in whose favour it is made will have judgment without any new proceeding to enforce the award. *Doe d. Turnbull* v. *Brown*, 5 B. & C. 384, s. c. 8 D. & R. 102.

An objection that the time for making an award has not been duly enlarged, is waived by proceeding in the reference, with a knowledge of that fact. *Lawrence* v. *Hodgson*, 1 Y. & J. 16.

Two objections were made to an award—first, that the arbitrators had appointed an umpire, which they had no authority to do; and second, that the award was untenable, in consequence of the umpire having examined the parties in the absence of each other: Held, that the first objection was waived, by the parties having recognized the authority of the umpire, by submitting to be examined by him; and second, that, in a mercantile reference, the defendant, not having expressed a desire to be present at the examination of the plaintiffs, he could not object to the award having been made in his absence. *Matson* v. *Trower*, 1 R. & M. 17.

The Court, upon an affidavit, stating that the arbitrator made his award, after he had told the defendant that he should not do so until his witnesses returned, set it aside. *Dodington* v. *Hudson*, 1 Bing. 384.

Where it was supposed, that the arbitrator had made a mistake in calculating the sum awarded, the Court refused to send the award back to the arbitrator without the adverse parties' consent. *Ex parte Cuerton*, 7 D. & R. 774.

A cause was referred to arbitration by a judge's

order, containing the usual conditions, that the arbitrator might examine the parties, and that neither of them should file a bill in equity. The arbitrator awarded that a sum of money was due from the plaintiff to the defendant. The plaintiff objected, that the defendant had not supported his claim by any witness, and wished to be permitted to file a bill in equity. The Court would do nothing more than refer it back to the same arbitrator. *Henson* v. *Heckle*, 3 Law J. K.B. 56.

Where indigo, after being shipped, was, by the vessel upsetting, materially damaged, and *bonâ fide* sold at the port of lading, but was afterwards washed, dried, and repaired by the purchasers, and sent to London, where it eventually obtained almost the same price as sound indigo,—and, on an action on the policy, which was referred, the arbitrator calculated the loss as a total one, without benefit of salvage, instead of an average loss only, calculated upon the invoice charges of drying, &c. and forwarding to London:—The Court refused to set aside the award. *Hardy* v. *Innes*, 6 B. Mo. 574.

Upon reference of three actions to arbitration, and a subsequent taxation, by the Master, of the costs of the causes and of the reference, the affidavits being contradictory, the Court, trusting to his discretion, refused to direct him to review. *Utting* v. *Evans*, M'Clel. 12.

Where, on a reference of an action of debt on bond, the arbitrators directed a verdict to be entered generally for the plaintiff, the Court refused to set it aside, on the ground that the arbitrators had not specifically directed in what sum judgment should be taken, there being no affidavit that there were other matters in difference. *Cayme* v. *Watts*, 3 D. & R. 224.

The Court will not set aside an award on the ground of a mistake by the arbitrator on a point of law, unless the illegality be apparent on the face of the award. *Pain* v. *Massey*, 3 Law J. C.P. 34.

Or unless the award shew the principles upon which the arbitrator decided. *Delves* v. *Fry*, 5 Law J. C.P. 17.

Or that the reference having been of a matter, not of fact, but of pure law, the decision was against law, unless the reasons for the award be stated. *Anon.* 3 Law J. K.B. 174.

And where matter of law alone, and not matter of fact, is referred to a barrister, the Court will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear on the face of the award. *Cramp* v. *Symons*, 1 Bing. 104, s. c. as *Grant* v. *Summers*, 1 Law J. C.P. 4.

No objection can be taken to an award upon the ground of a mistake in point of law, unless the grounds of the objection appear upon the award, or in some authentic shape before the Court. *Price* v. *Jones*, 2 Y. & J. 114.

The arbitrator to whom an action on the case for a fraudulent representation of the circumstances of A was referred, found that the defendant, knowing, the object of the plaintiffs' inquiries, omitted to state certain material facts concerning A's credit, and, although he did not mean to hold out any inducement to plaintiffs to trust A, thereby misled and created in them a false confidence in the circumstances of A. The arbitrator acquitted the defendant of all collusion with A, and of all fraud at the time of making the representation, but feeling himself compelled by adjudged cases, which he mentioned, to decide that the knowledge of the falsehood of the thing asserted was in itself fraud and deceit, he awarded in favour of the plaintiffs. The Court set aside the award, on the ground that the arbitrator had, on the face of it, acquitted the defendant of fraud and deceit. *Ames* v. *Milward*, 8 Taunt. 637, s. c. 2 B. Mo. 713.

The Court of King's Bench will not interfere to set aside an award, founded upon an indictment at the assizes. *Rex* v. *the Inhabitants of Cotesbatch*, 2 D. & R. 265.

An indictment for a conspiracy was removed from the Chester Court into the King's Bench, and sent to Chester to be tried. A juror was there withdrawn, and all matters in difference referred to arbitration. The Court of King's Bench said, that they had no authority to set aside the award. *Rex* v. *Corbishley*, 2 Law J. K.B. 150.

## (M) Costs.

Where the award of an arbitrator, under an order of Nisi Prius, was directed to be equivalent to a verdict, and the arbitrator was silent as to the costs attending the reference: Held, that the costs should follow the verdict. *Mackintosh* v. *Blyth*, 1 Law J. C.P. 99, s. c. 8 B. Mo. 211, s. c. 1 Bing. 269.

Judgment having been suffered by default, and, on the execution of the writ of inquiry, the jury having given the plaintiff more damages than he was entitled to, the defendant moved to set aside the inquisition, for excess,—when the Court recommended, that the amount of damages should be referred; but nothing being said about the costs of moving to set aside the writ of inquiry, and the arbitrator having reduced the damages: Held, that the plaintiff was not entitled to the costs of the rule for setting aside the inquisition. *Lewis* v. *Harris*, 2 B. & C. 620, s. c. 4 D. & R. 129.

A defendant was arrested for 28*l.*: he paid 2*l.* into court. The cause and all matters in difference were, before trial, referred to an arbitrator, who had power to examine the parties, and the costs were to abide the event. The arbitrator awarded 1*l.* 19*s.* to the plaintiff. The defendant moved for costs under 43 Geo. 3. c. 46. s. 3. The Court held, that the case was *not* within that statute. *Keene* v. *Deeble*, 3 Law J. K.B. 75, s. c. 3 B. & C. 491, s. c. 5 D. & R. 383.

The plaintiff having arrested the defendant for 179*l.* at the trial a verdict was found for the plaintiff, subject to the award of an arbitrator &c., and the costs of the cause to abide the event of the award. The arbitrator found a debt of 45*l.* only due by defendant at the commencement of the action, and that there was no reasonable or probable cause for the arrest for 179*l.*, and, as damages of such arrest, awarded to the defendant the sum of 20*l.*; but ordered the verdict to be finally entered for the plaintiff for 25*l.* 18*s.* the balance due after deducting the sum so awarded to the defendant as damages. The Court held, that the defendant was not entitled to costs under the statute 43 Geo. 3. c. 46, as the event of the award was in favour of the plaintiff. *Thompson* v. *Atkinson*, 5 Law J. K.B. 101, s. c. 6 B. & C. 192.

Where an action of assumpsit was referred to arbitration, the costs to abide the "event," and

the arbitrator ordered the defendant to pay the plaintiff 12s., "by reason of the detention of the plaintiff's debt," but without specifying any debt, the Court held this to be an "event" of the arbitration in the plaintiff's favour, sufficient to entitle him to costs. *Green* v. *Richards*, 6 Law J. K.B. 130.

By order of Nisi Prius, a cause was referred to arbitration; the costs were to abide the event: there were two defendants; one attended before the arbitrator, the other never interfered. The Master taxed the whole of the costs of the cause and the reference in one sum:—*Semble*, that the Master had not power to tax the costs for the defendants separately. *Dickins* v. *Jervis*, 5 B. & C. 528, s. c. 8 D. & R. 285.

Where an arbitrator orders one of the parties to pay the costs of the cause, those costs will be understood to be such as that party would have had to pay in case there had been a judgment in the ordinary course.

Accordingly, where a defendant had obtained a verdict on the trial; and, pending a rule for a new trial, obtained by the plaintiff, the cause was referred; "the costs" being in the discretion of the arbitrator, and he found for the plaintiffs, and ordered the defendants to pay the "costs of the cause,"—it was held, that this did not include the costs of the trial. *Rigby* v. *O'Rell*, 5 Law J. K.B. 357, s. c. 7 B. & C. 57.

## ARMY.

An officer cannot pledge or mortgage his commission. *Collyer* v. *Fallon*, 3 Law J. Chanc. 23.

Where A applied to two soldiers, a drummer and a private, to enlist him, which they at first refused, but afterwards the drummer gave him a shilling for that purpose, and, on A's wanting to go away, they detained him: Held, that they had no authority to enlist, and therefore no right to detain him. *Rex* v. *Longden*, R. & R. C.C.R. 228.

## ARMY AGENTS.

[See Principal and Agent, and Set-off.]

Army agents having distinct accounts with the colonel and paymaster of a regiment, upon the assurance of the paymaster, that he was authorized by the colonel, and on his account, to provide certain stores for the regiment, transfer to the debit of the colonel a sum standing in their books, originally carried to the paymaster; and having settled accounts with, and the balance due from, the paymaster, sue the colonel for the balance claimed by him, including the sum upon the debit transferred. Pending this action, the paymaster, on the requisition of the agents, furnishes them with a letter from the colonel as the authority for the charge against him. The agents being fully satisfied as to the extent and meaning of this authority, in the course of their pleadings maintain strenuously the right of the paymaster to act under it, and judgment in the first instance is given in their favour. After they had obtained this judgment, apprehending the possibility that it might be reversed, they re-transfer the sum in dispute from the debit of the colonel to the debit of the paymaster, giving him notice of that fact; and of the proceedings in and state of the action against the colonel. The former judgment, on representation, was reversed; and it was held, by the Court of Session, and by the House of Lords, on appeal, that the agents were entitled, in an action against the paymaster, to recover the sum in dispute, and the costs of the action against the colonel. *M'Donald* v. *Ross*, 2 Bligh, 547.

## ARSON.

A challenge on an indictment for arson cannot be sustained, unless the party making the challenge be prepared to prove the requisites required by the 9 Geo. 1. *Rex* v. *Savage*, 1 R. & M. C.C.R. 51.

An indictment for arson must state the ownership:—but, where the ownership was laid in an insolvent, who had assigned the premises under the Insolvent Act, and who continued in possession, it was holden sufficient. *Rex* v. *Bell*, 1 R. & M. C.C.R. 30.

## ARTICLES OF THE PEACE.

The Court of King's Bench will not direct articles of the peace to be entered into at Westminster, upon a fact arising in the country. *R.* v. *A. B.*, 2 Ken. 511, s. c. as *Rex* v. *Waite*, 2 Burr. 780.

## ARREST.

(A) For what cause of action allowed.
(B) Who are privileged from.
 (a) *Married Woman*, see Baron and Feme.
 (b) *Attorney*, see Attorney and Solicitor.
(C) Irregularities.
(D) What constitutes an Arrest.
(E) Re-arrest, when allowed.
(F) Arrest in criminal cases.

[And see Bail.]

### (A) For what cause of action allowed.

[See 7 & 8 Geo. 4. c. 71. s. 1, 5 Law J. Abr. Stat. 123.]

A party cannot be holden to bail, upon a subsequent promise to pay a debt, as to which he has been discharged upon an insolvent act. *Butt* v. *Vane*, 4 D. & R. 154.

Unsettled accounts do not prevent the party, in whose favour the balance appears to be, from holding the other to bail. *Turlington* v. *Erasmus*, 1 Ken. 424.

A party may be arrested on a guarantee to pay for goods furnished to a third person, on the common affidavit for goods sold and delivered. *Cope* v. *Joseph*, 9 Price, 155.

A submission was made to two arbitrators, with power to name an umpire, who was to make his award on or before a further day. The arbitrators named an umpire, who made an award for the plaintiff, but (as was sworn by the defendant,) after the further time had elapsed. The plaintiff was held entitled to hold the defendant to bail, without

stating in his affidavit, the fact of the time when the award was made. *Mazel* v. *Angel*, 3 Law J. K.B. 159, s. c. 6 D. & R. 15.

A person cannot be arrested in Wales for less than 20*l.* upon process issuing out of the Courts at Westminster. *Juggins* v. *Kendrick*, 4 Law J. K.B. 44.

(B) Who are privileged from.

Members of Parliament are privileged from arrest, for a reasonable time after a dissolution of parliament. *Barnard* v. *Mordaunt*, 1 Ken. 125.

A person who has been discharged as a fugitive under an insolvent act, may be holden to special bail. *Sheldon* v. *Foot*, 1 Ken. 380.

A bankrupt if at large on bail, is not in custody within the meaning of the exception in the 5 Geo. 2. c. 30. s. 5. *Ex parte Leigh*, 1 G. & J. 264.

A bankrupt cannot be arrested upon a subsequent promise to pay a debt due before his bankruptcy, after he has obtained his certificate. *Peers* v. *Gadderer*, 1 Law J. K.B. 16, s. c. 2 D. & R. 240, s. c. 1 B. & C. 116.

It is doubtful whether a yeoman of the guard is privileged from arrest. If he be privileged, the Court of King's Bench will not enter an *exoneretur* on the bail-piece after he has put in and perfected bail, on removing his cause from the Palace Court into the King's Bench. *Sard* v. *Forrest*, 1 Law J. K.B. 31, s. c. 1 B. & C. 139, s. c. 2 D. & R. 250.

An Irish Peer cannot be arrested for a debt. *Coates* v. *Lord Hawarden*, 6 Law J. K.B. 62, s. c. 7 B. & C. 388, s. c. 1 M. & R. 110.

An affidavit by an ambassador's secretary stating "that he, before and at the time of the arrest, was in the actual employment of the ambassador, and in daily attendance upon him, and writing dispatches and other official documents and communications:" Held insufficient. *English* v. *Caballero*, 3 D. & R. 25.

One of the warders of the Tower was arrested, and informed at the time that the plaintiff would be satisfied if he would enter an appearance. He, however, claimed his privilege, but afterwards executed a bail-bond: the Court refused to order the bail-bond to be delivered up to be cancelled. *Bidgood* v. *Davies*, 5 Law J. K.B. 64, s. c. 6 B. & C. 84, s. c. 9 D. & R. 153.

The defendant was arrested, under a *capias* not having a *non omittas* clause, within the precinct of the Tower, and gave a bail-bond to the sheriff. The Court refused to order it to be cancelled. *Bell* v. *Jacobs*, 6 Law J. C.P. 82, s. c. 4 Bing, 523, s. c. 1 M. & P. 309.

(C) Irregularities.

Where a widow, after her husband's decease, continued to use the initials of his christian name, and accepted a bill of exchange with them, and was arrested by those initials: The Court set the bail-bond aside. *M'Beath* v. *Chatterley*, 1 Law J. K.B. 56, s. c. 2 D. & R. 237.

And where a defendant had been arrested, and executed a bail-bond by the initials of one of his christian names, the bail-bond was ordered to be cancelled, but without costs. *Parker* v. *Bent*, 1 Law J. K.B. 14, s. c. 2 D. & R. 73.

An attorney gave the defendant until a certain day to pay the debt. On the day before that day, he caused him to be arrested. The Court stayed the proceedings upon payment of the debt, without costs. *Dixon* v. *Nesbit*, 1 Law J. K.B. 154.

If a person has been arrested by the name of "*Josiah*," instead of *Josias*," the Court will order him to be discharged out of custody on his entering a common appearance, and undertaking to bring no action. *Johnson* v. *Cooper*, 5 B. Mo. 472.

The Court ordered a bail-bond to be delivered up to be cancelled, with costs of the application, the arrest having been made on a Sunday. *Anon.* 3 Law J. K.B. 128.

(D) What constitutes an arrest.

Mere words do not constitute an arrest: therefore where a sheriff's officer told A that he had a writ against him, to which he replied, "Very well, I will come to you:" Held, that this was not a legal arrest, inasmuch as the officer ought to have touched A. *Russen* v. *Lucas*, 1 R. & M. 24, s. c. 1 C. & P. 153.

But an actual touching of the person is not necessary to constitute an arrest.

Nor does the fact of a person giving a bail-bond of necessity imply a previous arrest; and accordingly, in an action for a malicious arrest, the plaintiff, in order to support an averment in his declaration, that he had been arrested, proved the writ; the warrant; that the officer sent a messenger to him, informing him that he had such a warrant, (the messenger not having it then with him,) and desiring him to give bail; that he sent word that he would on the following day; and that he accordingly did so, giving a bail-bond at the officer's house; but never being actually detained,—it was held, that these facts did not amount to an arrest; and, therefore, that the averment was not proved. *Berry* v. *Adamson*, 5 Law J. K.B. 218, s. c. 6 B. & C. 528, s. c. 2 C. & P. 503.

(E) Re-arrest, when allowed.

A being in prison at Bristol, had a suit commenced against him by B in the Tolsey Court. After it had proceeded a little way, B discontinued the action; but before he had paid the costs, he sued out a *latitat*, and lodged a detainer against A. Upon an application, that he ought to be discharged out of custody, as having been twice subject to bailable process for the same debt, the Court refused it, on the ground that the first detainer was in an inferior court. *Paine* v. *Gawdery*, 1 Law J. K.B. 191.

A person being arrested on an *Irish Judgment*, gave a warrant of attorney to confess judgment in the Court of King's Bench. He was arrested on that judgment, and the Court would not discharge him out of custody on filing common bail. *Barker's case*, 2 Law J. K.B. 76.

The Court for the Relief of Insolvent Debtors adjudged, that an insolvent should have the benefit of the act as to all the creditors named in his schedule, excepting as to certain persons, at whose suit the Court further adjudged, that he should be imprisoned for sixteen months.

The insolvent was seen at large within six months; and a creditor named in the schedule, but not one of those at whose suit he was to be detained in prison for sixteen months, arrested him:—

The Court of King's Bench held, that every one of the creditors named in the schedule, had the power to insist that the insolvent should be confined for the sixteen months, and would not set aside the bail-bond, which he had given on being arrested. *Phillips* v. *Whitmore*, 2 Law J. K.B. 168, s. c. 4 D. & R. 347: s. p. *Edwards* v. *Tucker*, 4 D. & R. 216.

Where a defendant had been holden to bail, in an inferior court, and had afterwards superseded the action, although irregularly: The Court held, that he could not be again arrested in London for the same cause of action. *England* v. *Lewis*, 3 D. & R. 189.

### (F) Arrest in criminal cases.

An attempt to commit a felony in the night, justifies the detention of the offender without a warrant, until he can be brought before a justice of the peace. *Rex* v. *Hunt*, 1 R. & M. C.C.R. 93.

A constable having reasonable cause to suspect a person of felony, may arrest him, though it appears no felony was committed. *Beckwith* v. *Philby*, 5 Law J. M.C. 132, s. c. 6 B. & C. 35.

A seaman, who had been taken from on board a fishing lugger at sea, by the crew of a revenue cutter, and landed and delivered into civil custody without legal warrant or authority; and who was, whilst in such custody, charged with a *capias* on an information for smuggling, under which he was removed to Newgate by *habeas corpus* at the instance of the Crown, and committed thence to the Fleet by this Court, ordered by the Court to be discharged unconditionally, on motion.

The delay which had occurred in making the application, held to be no objection to a motion of this nature in such a case. *Attorney General* v. *Golder*, 12 Price, 335.

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## ASSAULT AND BATTERY.

(A) What constitutes an assault.
(B) Pleadings.
(C) Evidence and Damages.
(D) Costs.

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### (A) What constitutes an assault.

A person, by entering the house of another with violence, renders himself liable to be turned out, without a previous request; and the party ejecting him will not be guilty of an unjustifiable assault; but if he enters peaceably, a request is essential to exculpate the first aggressor. *Tullay* v. *Reed*, 1 C. & P. 6. [Park]

A medical man by unnecessarily stripping a female patient, commits an assault. *Rex* v. *Rosinski*, 1 R. & M. C.C.R. 19.

Riding after a person and obliging him to run away into a garden to avoid being beaten, is an assault. *Martin* v. *Shoper*, 3 C. & P. 373. [Tenterden]

Where a man had an ideot brother, and kept him in a dark room without sufficient warmth, &c. he being bed-ridden,—it was holden, neither a false imprisonment, nor an assault. *Rex* v. *Smith*, 2 C. & P. 449. [Burrough]

A watchman, by collaring a man to prevent him from committing a nuisance at a blank wall at night, commits an assault, although it seems he would be justified in remonstrating with and asking him to go elsewhere. *Booth* v. *Hanley*, 2 C. & P. 288. [Abbott]

### (B) Pleadings.

To a declaration for an assault, charging the defendant with having beaten, bruised, wounded, and ill-treated the plaintiff, the defendant pleaded *son assault demesne*, and the plaintiff replied *de injuriâ suâ propriâ*. At the trial it appeared, that the plaintiff being on horseback, dismounted, and held up his stick at the defendant, when the latter struck him: Held, that the plaintiff ought to have replied specially; and the jury having found for the defendant, the Court refused a new trial. *Dale* v. *Wood*, 7 B. Mo. 33.

A battery may be justified under an arrest by *molliter manus imposuit*.

In a plea of justification under process of an inferior court, erected by letters patent, it is not necessary to make a profert of the letters patent. If it be stated in such a plea, that a plaint was levied at one court, and such proceedings thereon had, that a *capias* issued at the next, it will be intended that the proceedings were regular, though no summons be stated. *Titley* v. *Foxall*, 2 Ken. 308, s. c. Willes, 688.

To a declaration for an assault, containing several counts charging several assaults, the defendant justified the whole as master of a ship, in which the plaintiff was sailor, and refractory. The plaintiff replied *de injuriâ* generally; and on issue being joined thereon, it was holden, that the plaintiff could not recover on any other assault than the one specified in the plea. *Gale* v. *Dalrymple*, 1 C. & P. 381, s. c. 1 R. & M. 118. [Abbott]

If there be two counts in a declaration for an assault, and to one there is a justification, and to the other the general issue, a new assignment is not necessary; but if there be a justification of *molliter manus* to all the counts in the declaration, the plaintiff cannot prove the excess unless he has newly assigned. *Bowen* v. *Parry*, 1 C. & P. 394. [Best]

### (C) Evidence and Damages.

Although a defendant may not have pleaded a justification to an action for an assault, yet he may extract evidence in mitigation of damages in the cross-examination of the plaintiff's witnesses. In shewing special damage, remote consequences cannot be given in evidence. *Moore* v. *Adam*, 2 Chit. 198.

Where a servant brought assault against his master, who pleaded *molliter manus*, to remove him from a house of which he, as master, was possessed, —it was holden, that evidence of another servant having the key to let himself in to work, nobody being in the house, was, as against his own servant, sufficient to support the plea. *Hall* v. *Davis*, 2 C. & P. 33. [Best]

To an action of assault against several of the yeomanry cavalry, called in aid of the civil power at Manchester; the defendants pleaded not guilty and several pleas of justification, alleging a conspi-

racy to excite sedition, &c., previous drilling and training of the persons assembled; and that the defendants were acting in aid of the civil power to restrain the plaintiff and others present at a seditious meeting: Held, first, that it was incumbent on the plaintiff to prove the assault, in the first instance, by the defendants, before he could shew acts of trespass by other individuals of the corps to which the defendants belonged; and that injuries done by them to other persons, could not be given in evidence, in an action for damages, for a specific injury to the plaintiff. Secondly, that, to support the justification on the ground of such conspiracy existing, evidence of bodies of men having been seen by a witness marching on the road, and also expressions used by them, shewing that they were going to W. for the purpose of being drilled; of their having solicited the witness to accompany them; and that facts, creating an alarm in the witness's mind, were admissible: so communications made to a committee of magistrates, appointed to provide for the public security, of the general sense of alarm, were admissible upon an issue, whether the defendants were acting in aid of the civil power or not, as shewing the causes which might occasion their being so called in aid; and if they were so acting in aid, and it appeared on the record; and the action was not brought within six months, under 24 Geo. 2, it would be a complete defence. Thirdly, that, upon such an issue, a refusal of the constable to execute a warrant, issued by the magistrates, for the apprehension of certain individuals present at the meeting, and the grounds of such refusal, were admissible. Fourthly, that to prove the existence of such conspiracy, a copy of resolutions passed at a meeting at another place, where the same person was chairman; expressions used by other persons at other meetings; the plaintiff being shewn to have been present at some of them, the banners exhibited, &c. upon these different occasions, were also admissible, although it was for the jury to consider whether there was such a conspiracy or not. Fifthly, that where several persons act together for a lawful purpose, and one does an unlawful act, the others are not answerable for it; but they are, if they go together for an unlawful purpose; but even in that case, if they separate, and one do an unlawful act, not in pursuance of the common design, the others are not answerable. Sixthly, that a party acting under a lawful authority, though he may go beyond it, is still within the protection of 24 Geo. 2. Upon the question, whether the defendants were, in fact, acting in aid of the civil power or not, the expediency or necessity of their being called in is not material, if the meeting were illegal, and the defendants were called in by the magistrates; although the magistrates might not have exercised a sound discretion in so calling them in. *Redford* v. *Birley*, 3 Stark. 76.

A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, and has succeeded in it, and received from the Treasury a portion of the fine imposed upon the defendant, is not entitled, in an action against the same defendant, to recover more than nominal damages. *Jacks* v. *Bell*, 3 C. & P. 316. [Tenterden

### (D) Costs.

Where, in an action for an assault, the declaration stated, that the defendant assaulted the plaintiff, and beat, wounded, and ill-treated him, and rent and tore his clothes; and the defendant pleaded that he was not guilty of the supposed assaults above laid to his charge, in manner and form as the plaintiff had complained against him; and the jury found a verdict for the plaintiff, damages 20*s.*: Held, that he was entitled to no more costs than damages. *Weatherill* v. *Howard*, 3 Law J. C.P. 205, s. c. 3 Bing. 135.

Where, in trespass for an assault, the declaration contained two counts, one for assaulting the plaintiff, and the other for a false imprisonment, (which includes a battery,) and the jury found a general verdict for him, damages 1*s.*, and the judge certified under 43 Eliz. c. 6, the Court refused to tax the plaintiff his costs. *Briggs* v. *Bowgin*, 3 Law J. C.P. 25, s. c. 2 Bing. 333.

The judge may, under 22 and 23 Car. 2. c. 9, grant a certificate, "that a battery has been proved," within a reasonable time after the trial. *Johnson* v. *Stanton*, 2 Law J. K.B. 115, s. c. 2 B. & C. 621, s. c. 4 D. & R. 156.

Where a declaration in trespass contained two counts, the first for assaulting the plaintiff, and destroying a scraper affixed to his house; and, the second for destroying the scraper; and the jury found a general verdict for him, damages 2*s.*: Held, that he was entitled to his full costs. *Reece* v. *Lee*, 7 B. Mo. 269.

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## ASSESSMENT.

[See Rate.]

The commissioners, under acts of parliament for draining lands, were empowered to make assessments, and to enforce payment of them by distress. At one of their meetings, an order, among others, was written in their minute-book of an assessment to a certain amount, on certain lands, under which appeared the names of three commissioners, in the handwriting of one of them; afterwards followed a paragraph, fixing a day of adjournment, and, beneath the whole account of the meeting, was written the names of two of the commissioners by themselves: The Court held, that the names at the end of the minutes had relation to the assessments; and that, as they were signed by the majority of the commissioners present, the assessment was good and valid. *Mobson* v. *Johnson*, 1 Law J. K.B. 210.

By a local act of parliament, trustees were empowered to raise any sum of money not exceeding 30,000*l.* for the purposes of the act, and were authorized to make assessments, not exceeding 2*s.* 6*d.* in the pound, as long as the sum borrowed remained unpaid: they borrowed 32,636*l.*: The Court held, that an assessment, not exceeding 2*s.* 6*d.* in the pound, made for the purposes, among other things, of paying the interest of that sum, was illegal and void *in toto*. *Richter* v. *Hughes*, 2 Law J. K.B. 61, s. c. 2 B. & C. 499, s. c. 3 D. & R. 788.

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## ASSIGNMENT.

[See BANKRUPT—COVENANT—LEASE—LANDLORD AND TENANT.]

(A) OF OFFICES.
(B) OF A TERM.
(C) OF AN EQUITABLE INTEREST.
(D) OF A DEBT.
(E) FOR THE BENEFIT OF CREDITORS.
(F) UNDER EXECUTION.
(G) HOW STAMPED.

### (A) OF OFFICES.

An assignment of the profits of all offices which the assignor might acquire, is valid and effectual as to those which he might legally assign. *Palmer* v. *Bate*, 2 B. & B. 673, s. c. 6 B. Mo. 38 n.

### (B) OF A TERM.

A lessor, not being bound by an assignment of the term, unless it be with his consent, may to a plea of assignment reply the want of assent. *Thompson* v. *Thompson*, 9 Price, 471.

### (C) OF AN EQUITABLE INTEREST.

A, being entitled contingently to a share of a fund standing in the names of trustees, assigns part of it to B, for valuable consideration; afterwards, and while the contingency is still in suspense, A, for valuable consideration, agrees to assign the whole fund to C, who, having inquired of, and been informed by the surviving trustee, that there was no incumbrance upon it, pays his purchase-money, and takes a conveyance, of which he immediately gives notice to the trustee: subsequently B gives notice of the conveyance to him: Held, that the assignment of the equitable interest to C, though posterior in date, will, in consequence of the prior notice, prevail in equity over the assignment to B.

It is of no importance, in the question as to the priority of title acquired under the assignment, whether the interest of the vendor be vested or contingent, present or reversionary. *Loveridge* v. *Cooper*, 2 Law J. Chanc. 75, s. c. 3 Russ. 1.

### (D) OF A DEBT.

In the course of proceedings between A and B in the King's Bench, a reference had been directed to the Master of that Court, in which A was to give credit for all sums of money received by him, for or on account of B. In taking that account, the Master had refused to charge A with a sum received by him, in payment of a debt due to B, which debt B had assigned to C without consideration, and upon a trust subsequently declared for him B; and the Court of King's Bench refused to direct the Master to review his allocatur: A may maintain a bill in equity against B and C, praying, a declaration that the assignment of the debt to C was merely in trust for B, an account against A; and an injunction to stay proceedings on the allocatur of the Master. *Farquharson* v. *Fletcher*, 9 Russ. 81.

### (E) FOR THE BENEFIT OF CREDITORS.

Where an assignment is made by deed for the benefit of creditors, by a party whose goods are at the time in the possession of the sheriff, having been taken under a *fi. fa.*, and a writ of extent comes to the hands of the sheriff after the assignment is executed, but before the goods are sold—*Quære*, whether the assignment passes the property professed to be assigned. *Rex* v. *Evans*, 9 Price, 366.

An assignment by a person of all her furniture, plate, &c. and all other the estate and effects, of or to which she is possessed or entitled, to trustees, upon trust for her creditors, does not pass her contingent interest in a residuary estate. *Pope* v. *Whitcombe*, 3 Russ. 124.

### (F) UNDER EXECUTION.

In trover against the assignees of a bankrupt, by a party claiming under an assignment from the sheriff, under an execution issued by him before the bankruptcy, the plaintiff must prove the judgment as well as the writ of execution. *Glasier* v. *Eve*, 1 Law J. C.P. 67, s. c. 1 Bing. 209, s. c. 8 B. Mo. 46.

### (G) HOW STAMPED.

A deed of assignment to trustees, in trust to sell and pay, with a primary trust to pay the trustees, and then to discharge the debts owing to the other creditors, with a resulting trust as to the residue, to the parties assigning, was held not to require an *ad valorem* duty within the 55 Geo. 3. c. 184. s. 6, part 1. *Coates* v. *Parry*, 5 B. Mo. 188, s. c. 3 B. & B. 48.

## ASSUMPSIT.

(A) WHEN AND FOR WHAT IT LIES.
(B) BY AND AGAINST WHOM MAINTAINABLE.
(C) CONSIDERATION.
(D) USE AND OCCUPATION.
(E) WORK AND LABOUR.
(F) GOODS SOLD.
(G) MONEY PAID.
(H) MONEY LENT.
(I) MONEY HAD AND RECEIVED.
(K) ACCOUNT STATED.
(L) PLEADINGS.
(M) EVIDENCE.

(D)–(K): See these several titles.

### (A) WHEN AND FOR WHAT IT LIES.

Assumpsit is maintainable on a judgment obtained in one of the superior courts in Ireland since the union: for such judgment is not a record in England. *Harris* v. *Saunders*, 3 Law J. K.B. 239.

Assumpsit may be maintained in the English courts of law, on a decree in absence, pronounced by the Court of Session in Scotland, against a native of that country, for a debt contracted there. *Douglas* v. *Forrest*, 6 Law J. C.P. 157, s. c. 4 Bing. 686, s. c. 1 M. & P. 663.

Indebitatus assumpsit will lie for fish, wheat, or any other chattel. *Lord Falmouth* v. *Penrose*, 5 Law J.K.B. 156, s. c. 6 B. & C. 385.

Assumpsit cannot be maintained for a chose in action, in the name of a trustee, under the Scotch Bankrupt Act, 54 Geo. 3. c. 137. *Jeffery* v. *M'Taggart*, 6 M. & S. 126.

(B) By and against whom maintainable.

A moral obligation is a good consideration for a promise: hence, where a person borrowed a sum of money in 1807, and in 1815, stated by parol to an attorney, that the plaintiff was entitled to it; and that he had provided for it in his will, and in 1825, he died, without having made such provision,—it was holden, in an action against the executor, that the promise was good; and that neither the Statute of Frauds nor of Limitations extended to it. *Wells* v. *Horton*, 2 C. & P. 383. [Best]

And a moral obligation, accompanied with a distinct promise, is binding in law; thus, where defendant agreed to pay plaintiff, in consideration of her becoming his tenant, 20*l*. to repair the house, and also to make certain alterations, and plaintiff became tenant under a lease in which this agreement was not stated, and did the repairs; when defendant promised to pay for them: Held, that he was liable at all events on the account stated, although the agreement had not been introduced into the lease. *Seago* v. *Deane*, 6 Law J. C.P. 66, s. c. 4 Bing. 459, s. c. 1 M. & P. 227.

A vendee, by keeping an article, not supplied according to his order, an unreasonable time, makes it his own. *Milner* v. *Tucker*, 1 C. & P. 15. [Burrough]

Any person, whether he be overseer or not, who desires a surgeon to attend a poor man, renders himself liable. *Watling* v. *Walters*, 1 C. & P. 132. [Park]

An implied contract cannot be raised where the parties have entered into an express contract by deed. Therefore, where the tenant of certain premises underlet a part by deed, and his original landlord distrained for rent upon the under-tenant,—it was holden, that the under-tenant could not maintain assumpsit against his lessor, to recover the money paid under the distress. *Schlencker* v. *Moxsey*, 3 B. & C. 789, s. c. 5 D. & R. 747.

Assumpsit lies by the Southwark Bridge Company, for the use and occupation of premises held under them. *Southwark Bridge Company* v. *Sills*, 2 C. & P. 371. [Best]

Assumpsit lies by the City of London Gas-Light and Coke Company, for gas supplied to the occupiers of a wharf, since it is not necessary that there should be any deed executed. *London Gas-Light Company* v. *Nicholls*, 2 C. & P. 365. [Best]

Where, by bills of lading, sugars were made deliverable to Messrs. C. & Co., or to assigns, he or they paying freight for the same, and Messrs. C. & Co. indorsed the bills to the defendants, and afterwards became bankrupts; and the brokers of the ship-owner, being ignorant that the bills of lading had been indorsed by Messrs. C. & Co. to the defendants, or that the former had become bankrupts, applied to them for payment of the freight, and afterwards brought an action against the defendants to recover it: Held, that they were liable, on the ground that the holder of a bill of lading is bound to know that he is liable for freight, and that whoever obtains the delivery of goods under such bill, contracts by implication to pay the freight due on them. *Dougal* v. *Kemble*, 4 Law J. C.P. 103, s. c. 3 Bing. 383.

The defendant having undertaken to assign a certain lease, the plaintiff repaired the premises: Held, that he was liable to an implied assumpsit for the repairs, if he refused to assign the lease. *Gray* v. *Hill*, 1 R. & M. 420. [Best]

A corporation aggregate may maintain assumpsit, for use and occupation, against a tenant who has held premises under them and paid them rent, on the ground, that as he had occupied, the consideration was executed. *The Mayor and Burgesses of Stafford* v. *Till*, 5 Law J. C.P. 77, s. c. 4 Bing. 75.

The plaintiffs, as directors of a water-work company, were incorporated by act of parliament, and empowered to make contracts, &c. for the carrying on of their works: Held, that they were not thereby authorized to contract, otherwise than under the corporation seal; and that, therefore, they could not maintain *assumpsit* for the breach of an agreement (not under seal) for supplying the company with pipes. *East London Water Works Company* v. *Bailey*, 5 Law J. C.P. 175, s. c. 4 Bing. 283.

Where an order by one person on another, to pay a sum of money to a third is irrevocable, as between the giver and receiver of the order; and the person upon whom it is made assents to it—there is a sufficient privity of contract between the receiver of the order and the person on whom it is made, to entitle the former to maintain an action; although the giver of the order has attempted to revoke it. *Metcalf* v. *Clough*, 6 Law J. K.B. 281, s. c. 2 M. & R. 178.

(C) Consideration.

A moral obligation is a good consideration for a promise. *Wells* v. *Horton*, 2 C. & P. 383. (*Supra*, B.)

Suffering another to do that which is beneficial, is sufficient to raise a good consideration for an implied promise. *Davis* v. *Morgan*, 4 B. & C. 8, s. c. 6 D. & R. 42.

Where a declaration in assumpsit stated, that the plaintiff had retained the defendant, at his request, to lay out 700*l*. in the purchase of an annuity; that the defendant promised to lay it out securely; and that the plaintiff delivered to him the money for that purpose—breach, that the defendant laid it out improperly: It was holden that after verdict the consideration appeared sufficiently in the declaration. *Whitehead* v. *Greetham*, 2 Bing. 464, s. c. 1 M'Clel. & Y. 205.

(L) Pleadings.

The first two counts of a declaration alleged, that, in consideration that the plaintiff would retain and employ the defendants to invest a sum of money in the purchase of an annuity for the plaintiff, the defendants undertook to do their duty in the premises; that the plaintiff did retain and employ the defendants; that the defendants purchased an annuity for the plaintiff, but did not do their duty in the premises, but, on the contrary, took an insufficient security for the payment of the annuity; and that the defendants then and there had notice of all the premises:

*Semble*—These counts are bad, for not averring a damage sustained by the plaintiff; for though the security was insufficient when taken, subsequent circumstances might have rendered it available.

A third count contained a similar allegation, by reason whereof the plaintiff lost the money invested: Held bad, in arrest of judgment; for it did not state

that the defendants were employed by the plaintiff in any particular character, *e. g.* as attornies, so as to make them responsible for want of skill, in taking a bad security, though not guilty of neglect or dishonesty; nor, secondly, did it state that any reward was to be paid to them on such retainer. *Dartnall* v. *Howard*, 3 Law J. K.B. 246, s. c. 4 B. & C. 345, s. c. 6 D. & R. 438.

The plaintiff must declare specially where there is a special agreement, and it is conditional; but if he affirms that the agreement was cancelled, he must prove that it was acquiesced in by all the parties. *Davis* v. *Nichells*, 2 Chit. 320.

In an action of assumpsit, the declaration alleged that the plaintiffs, as assignees, had been possessed of certain terms in leases and stock in trade, and that the same were put up to auction on certain conditions, and the defendant became purchaser, and afterwards the leases were set out; it was determined, that it was not necessary to set out the nature of the terms, and the precise days on which they commenced, and, therefore, a variance was immaterial; but it might have been otherwise, if such an inaccurate allegation had been used in an action for the price of the lands.—*Semble*, it would not be a misdescription of a lease, stating the lease as commencing on the 15th day of February, when the *habendum* was from that date. *Welch* v. *Fisher*, 8 Taunt. 338, s. c. 2 B. Mo. 378.

Where, in assumpsit, the plaintiff declared that he had bargained with J E for the purchase of three houses for a certain sum; and that the defendant agreed to give him 40*l.* for his bargain, if he would permit him to be the purchaser instead of the plaintiff, and averred that he had become such purchaser:

The Court of Common Pleas held, that such declaration might be supported, although there was no written contract for the purchase of the houses between the plaintiff and J E, as the latter allowed the defendant to become the purchaser; and he was in fact let into possession of the premises. *Seaman* v. *Price*, 2 Bing. 437, s. c. 1 C. & P. 589.

The Court of King's Bench, on a writ of error, affirmed that judgment. *Price* v. *Seaman*, 4 Law J. K.B. 3, s. c. 4 B. & C. 525, s. c. 7 D. & R. 14.

An averment, on a promise by the defendant to pay, if the plaintiff would suspend the proceedings on a cognovit against A, that the plaintiff did suspend the proceedings, without stating for how long: Held to be sufficient after verdict, because it must be taken to mean, that the forbearance was until the day of payment appointed by the defendant, and that such forbearance must have been proved on the trial. *Payne* v. *Wilson*, 6 Law J. K.B. 107, s. c. 7 B. & C. 423.

A plea of an account stated to an action of assumpsit is bad. *Adderley* v. *Evans*, 1 Ken. 250.

Although the defendant to an action of assumpsit pleads that "he did not undertake," omitting the words, "or promise in manner and form," &c. it does not authorize the plaintiff to sign judgment for want of a plea. *Smith* v. *Jones*, 3 D. & R. 621.

In an action of assumpsit on several promises, the defendant pleaded that a pipe of wine was given in satisfaction of the cause of action; on special demurrer, the Court held that the plea was bad. *Hopkinson* v. *Tahourdin*, 2 Chit. 303.

Held, that a plea, that the defendants' undertaking was for the default of another, without writing, and without consideration, might be pleaded, although the facts might have been given in evidence under the general issue.

So, a plea that the person for whom the defendants' undertaking was given, was a feme covert. *Maggs* v. *Ames*, 6 Law J. C.P. 75, 4 Bing. 470, s. c. 1 M. & P. 294.

Where a plea stated that the defendants were executors, and made a promissory note as executors, and *plene administravit præter*;—special demurrer thereto, that they had thereby made themselves personally liable, and admitted that they had assets for the note; that it might have been given for their own debt; and that, they having promised to pay with interest, they could not become liable for it in their representative character:—the Court held, that such plea was insufficient, and afforded no answer to the action. *Childs* v. *Monins*, 5 B. Mo. 282, s. c. 2 B. & B. 460.

Declaration in assumpsit by the assignee of a bankrupt, containing eight counts,—the first six of which stated, that the defendant was indebted to the bankrupt before his bankruptcy for goods sold, &c.; and, in each of these counts, the defendant was stated to be indebted to the bankrupt in the sum of 50*l.*; and the declaration concluded by stating the damage to be that sum. Plea to these first six counts: that before the bankruptcy, an account was stated between the bankrupt and defendant, of and concerning the several sums in those counts specified, and upon that occasion, the defendant was found to be indebted to the bankrupt in the sum of 14*l.* 10*s.* 2*d.*, for which sum the bankrupt drew a bill upon the defendant, which he accepted for and on account of the said several promises in those six counts mentioned; and, by reason thereof, the defendant became and was, and still is liable to pay the bill: Held, that such plea was bad on general demurrer, as it was pleaded to the whole of the plaintiff's demand in the first six counts, and did not state that the defendant was indebted no more than the amount for which the bill was drawn and accepted; and that the giving a bill for a less sum was not a satisfaction for the amount of the debt claimed. *Rolt* v. *Watson*, 5 Law J. C.P. 18.

### (M) Evidence.

A declaration in assumpsit stated, that in consideration that the plaintiff had delivered a watch to the defendant to be repaired, the latter undertook to return it to the plaintiff; and assigned for breach, that he did not return it;—proof that the defendant having repaired the watch, tendered it to the plaintiff, who requested him to take it to his uncle, who would pay him for it; but the defendant being unable to find the plaintiff's uncle, delivered it to his brother, from whom it was afterwards stolen: Held, that the plaintiff was entitled to recover the value of the watch; although it was objected, that there was a variance between the declaration and evidence, as the former ought to have been founded on the new contract to deliver to the plaintiff's uncle. *Wilson* v. *Powis*, 4 Law J. C.P. 192.

If, in an action of assumpsit, on the cross-examination of the plaintiff's witnesses, it appears that there is a written contract, the plaintiff cannot in

such case recover under the *quantum meruit*: but if the plaintiff has proved a *quantum meruit*, and the fact of the existence of such contract comes out in the progress of the defendant's case, the cause may proceed, provided the plaintiff does not require its production. *Damer* v. *Langton*, 1 C. & P. 168. [Abbott]

Counts in *indebitatus assumpsit* for houses bargained and sold, and for carcasses bargained and sold, can only be supported by proof of a written assignment to the defendant, within the Statute of Frauds.—*Quære*, if assumpsit is the right form of action. *Pennington* v. *Statman*, 3 Law J. K.B. 220.

Where a plaintiff declared in assumpsit generally for tolls of fish, and it appeared in evidence, that he was entitled to certain fish, when selected, as toll: It was held, that the evidence did not support the declaration, which should have averred, that the selection had been made; and thence charged the *indebitatus assumpsit*. *Lord Falmouth* v. *Penrose*, 5 Law J. K.B. 156, s. c. 6 B. & C. 385.

An averment, that, in consideration that the plaintiff *would* consent to suspend proceedings on a cognovit against A, the defendant promised to pay, is proved by evidence of a contract, which stated, that in consideration of the plaintiff *having* consented to suspend proceedings, the defendant promised to pay. *Payne* v. *Wilson*, 6 Law J. K.B. 107, s. c. 7 B. & C. 423, s. c. 1 M. & R. 708.

A receipt acknowledging the receipt of money, and promising to be accountable for it, will support an *indebitatus assumpsit*. *Harris* v. *Huntbach*, 2 Ken. 28, s. c. 1 Burr. 373.

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## ATTACHMENT.

### 1. *AT LAW.*

[See ARBITRATION, and ATTORNEY AND SOLICITOR.]

(A) WHEN AND UPON WHAT GROUNDS GRANTED.
(B) FOR NON-PAYMENT OF MONEY AND COSTS.
(C) FOR NOT OBEYING A SUBPŒNA.—See WITNESS.
(D) FOR A RESCUE.
(E) AGAINST SHERIFFS.
(a) *For not returning writs.*
(b) *For not bringing in the body.*
(F) RULE FOR, WHEN AND HOW SERVED.

### 2. *IN EQUITY.*

(A) WHERE GRANTED OR REFUSED.
(B) EXECUTION AND RETURN OF.
(C) IRREGULARITY IN; AND WHEN SET ASIDE.

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### 1. *AT LAW.*

#### (A) WHEN AND UPON WHAT GROUNDS GRANTED.

A contempt of court consists in a wilful disobedience of its orders. Hence, to entitle a party to an attachment against a defendant for not complying with an order, directing him *forthwith* to reinstate premises which he had injured by alterations, a demand of performance must be shewn, as well as the service of the order. *Dodington* v. *Hudson*, 2 Law J. C.P. 58, s. c. 1 Bing. 410, s. c. 8 B. Mo. 510.

An attachment, and not an information, lies against a party for executing process by undue means. *Anon.* 2 Ken. 372.

The Court will not grant an attachment against an attorney for not performing his undertaking to refund money, upon his bill being taxed. The usual course is, to make the order for taxing it a rule of court. *Morling* v. *Tongue*, 1 Law J. K.B. 108.

The Court refused to grant an attachment against a person who had practised as an attorney, without having been admitted as an attorney; but left the party to sue for the penalty given by the 2 Geo. 2. c. 23. s. 24. *Matthews* v. *Royle*, 6 B. Mo. 70.

An attorney gave an undertaking in a cause in the Court of Common Pleas. He was not an attorney of that court, and the Court of King's Bench refused to entertain a motion for an attachment. *Anon.* 1 Law J. K.B. 188.

Where an act, directed to be done by an order, will take three weeks for the completion of it, an attachment may be granted, at the expiration of four days, against the defendant, for not commencing it before the expiration of the latter period. *Dodington* v. *Hudson*, 2 Law J. C.P. 58, s. c. 1 Bing. 464, s. c. 8 B. Mo. 510.

An attachment lies against a party for disobeying an *habeas corpus* at common law. *Rex* v. *Barber*, 2 Ken. 289.

An attachment lies against a mayor for not obeying a peremptory mandamus, though there was no personal service. *Rex* v. *the Mayor of Fowey*, 5 D. & R. 614.

#### (B) FOR NON-PAYMENT OF MONEY AND COSTS.

[See COSTS.]

An attachment for non-payment of money pursuant to an order of court, is absolute in the first instance; and a misnomer of the party in the order (being an attorney of the Court of King's Bench), by calling him *John* instead of *James*, is not an objection to the application, when made against him by his right name, if he has attended and consented to summonses when wrongfully designated. *Stevenson* v. *Power*, 9 Price, 384.

A person cannot be attached by process out of the Court of the Sheriff of London, where he has money in his hands, and is about to pay it, pursuant to an award made under an order of court. *Caila* v. *Elgood*, 1 Law J. K.B. 38, s. c. 2 D. & R. 193.

On motion for an attachment, for not paying money pursuant to the Master's allocatur, the affidavit must state, that, at the time of serving the office copy, the original order was shewn to the defendant. *Reid* v. *Deer*, 7 D. & R. 612.

The Court will grant a rule to shew cause why an attachment issued on a Master's allocatur should not be set aside, if it appear that it issued for more than was the exact amount. *Daniel* v. *Bishop*, 13 Price, 129, s. c. 1 M'Clel. 61.

#### (D) FOR A RESCUE.

The Court will, in the first instance, grant an attachment against persons named in the sheriff's return as being guilty of a rescue. *Bernard* v. *Taylor*, 6 Law J. K.B. 324.

(E) AGAINST SHERIFFS.

[See SHERIFF.]

(a) *For not returning writs.*

Where the rule to return a writ expires in vacation, an attachment may be moved for on the first day of the following term. *Smith* v. *Bleck*, 9 Price, 255.

(b) *For not bringing in the body.*

[See BAIL.]

If the notice of render omit the defendant's name, though the party was not missed, the Court will set aside the attachment against the sheriff for not bringing in the body. *The King* v. *the Sheriff of Surrey*, 1 Law J. K.B. 58.

A party has a strict legal right to an attachment against the sheriff for not bringing in the body, after he has been served with a rule for that purpose; therefore, where the sheriff had returned *cepi corpus* to a *ca. sa.*, and that the defendant remained in his custody; the defendant having escaped, and the plaintiff served a rule upon the sheriff to bring in the body, and obtained an attachment against him: It was held, that the proceedings were regular, and the Court refused to leave the party to his action for the escape. *Duncan* v. *Timin*, 1 Law J. C.P. 51, s. c. 1 Bing. 156.

Where a defendant was arrested, and the sheriff's officer took money from him instead of a bail-bond, and then wrote to the plaintiff that he could not find the defendant, and an *alias* writ was issued, to which *cepi corpus* was returned, the defendant being then in custody upon other process, and pending a body rule, the officer put in bail, and then brought up the defendant by *habeas corpus*, to be surrendered in discharge of his bail: The Court refused to relieve the sheriff, and granted an attachment. *Vandebeuren* v. *Bruton*, 4 D. & R. 155.

On motion for an attachment against a sheriff, for not bringing in the body pursuant to a rule for that purpose, the affidavit stated that the sheriff had given notice of putting in bail, but that the notice did not set forth the names of the bail, or that they had been perfected. Held, that though the form was not correct, the notice could not be treated as a nullity, so as to entitle the plaintiff to an attachment. *Page* v. *Fuce*, 4 D. & R. 58.

Where the plaintiff's attorney, in Trinity term, consented that the proceedings against the defendant should be stayed, on payment of the debt and costs within a month, and an order was obtained accordingly, on which the defendant's attorney signed his name in the judge's book, but the rule to bring in the body did not expire until the 3d day of the following Michaelmas term; and the defendant not having complied with the order or justified bail, the plaintiff's attorney, on the 9th day of that term, sued out an attachment against the sheriff, and notice of render was served two days afterwards:

The Court ordered the attachment to be set aside on payment of costs, although it was objected that the order was conditional only, and that the plaintiff could take no step to compel payment from the defendant till the expiration of the rule for bringing in the body. *Nix* v. *Sheriff of Winchester*, 3 Law J. N. S. 41, s. c. 8 Bing. 360.

Where an order for an attachment against the sheriff for not bringing in the body had been obtained on the last day of term, on a rule which expired the day before, the Court would not, where there had been delay, and a trial had been lost, set aside that order on the ground of the bail having justified since it was obtained, even on payment of costs. *Empson* v. *Bridle*, 13 Price, 262, s. c. M'Clel. 83.

Where the defendant has had a week's time to put in bail by a judge's order, an attachment cannot be moved against the sheriff for not bringing in the body, until such order be discharged. *Rose* v. *Harvey*, 5 Law J. C.P. 56.

An application to set aside an attachment, for not bringing in the body, should be grounded on an affidavit, that it is made at the expense of the bail. *Rex* v. *the Sheriff of London*, in *Wilson* v. *Goldstein*, 4 Bing. 427.

(F) RULE FOR, WHEN AND HOW SERVED.

The rule for an attachment against a sheriff for not bringing in the body, may be served on the day of the Purification. *Phipson* v. *Bevir*, 13 Price, 208.

Rules for an attachment must be served personally. The Court refused to order that service at the dwelling-house should be deemed good service of a rule for an attachment, upon an affidavit, that the defendants were "shy and difficult to be met with," and that the deponent had tried all the means in his power, for two months, before he could serve the defendants personally with the award, for the non-performance of which the attachment was sought to be enforced. *Garland* v. *Goulden*, 1 Y. & J. 89.

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## 2. *IN EQUITY.*

(A) WHERE GRANTED OR REFUSED.

An undertaking of the defendant's solicitor who has received a subpœna to appear to a bill for an injunction, is not sufficient to bring the party into contempt for not appearing and to obtain an attachment. *Pemberton* v. *Gilby*, 9 Price, 146.

An attachment cannot be obtained for want of an answer to an amended bill, until the amendments have been entered in the Six Clerks' Book; and it makes no difference whether the original bill has been answered or not. *Adamson* v. *Blackstock*, 1 S. & S. 118.

Attachment granted for non-appearance to a subpœna served abroad. *Nickel* v. *Gwyn*, 1 Sim. 389.

Where husband and wife were co-defendants, and the husband was abroad, and the subpœna against husband and wife was served upon the wife alone, an attachment against her, for want of appearance, was ordered upon motion. *Bushell* v. *Bushell*, 1 S. & S. 164.

An order for time to answer, unless drawn up and served, will not stop an attachment. *Gayler* v. *Fitz John*, 1 Sim. 386.

After exceptions are filed, and the order for setting them down is served, all further process for a better answer is stayed *ipso facto*; nor is it necessary to come to the Court for an order to stay proceedings. *Knowles* v. ——, 3 Law J. Chanc. 7.

An answer must be filed on the evening before the seal day, in order to prevent an attachment. *Whitehouse* v. *Hickman*, 1 S. & S. 102.

And though an answer was sworn the day before the seal day, but was not actually on the file till the earliest moment of the seal day, it was held to be too late. *Ibbotson* v. *Booth*, 1 S. & S. 103, n.

Where an order is made for the payment of money *forthwith*, and a short order is afterwards obtained; in order to ground an attachment for non-payment, a demand must be made under the short order; and a demand under the first or general order is not sufficient, no time for payment being fixed by it. *Lamb* v. *Withers*, 1 Y. & J. 453.

Upon the execution of a decree in a cause of possession, the Court of Admiralty declined to interfere further by attachment. *John of London*, 1 Hag. 342.

### (B) Execution and return of.

It is altogether irregular to execute an attachment, for want of appearance, against an infant. *Ranken* v. ——, 3 Law J. Chanc. 88.

If, whilst the defendant is in custody in the King's Bench prison, an attachment issue against him, it is to be lodged with the Marshal, and an *habeas corpus* may then be moved for before the return of the attachment. *Trotter* v. *Trotter*, 1 Jac. 533.

Where an attachment is sealed for want of a dedimus, and an order for a dedimus has been obtained previously, but notice of it is given to the plaintiff before the attachment is executed, though not till after it is sealed, the plaintiff ought not to execute the attachment, unless payment of the costs is refused. *Anon.* 4 Law J. Chanc. 142.

### (C) Irregularity in; and where set aside.

The defendant being in default for want of answer, one of the co-plaintiffs dies; before the suit is revived, an attachment is issued against the defendant: Held, that the attachment is irregular. *Gibson* v. *Cheston*, 3 Law J. Chanc. 3.

The Master having reported the answer of a defendant insufficient, the plaintiff served a subpœna to put in a better answer: exceptions to the report were taken, and the order for setting them down to be argued was served, before the defendant was brought into contempt, but not till eight days from the service of the subpœna had elapsed: Held, that an attachment subsequently issued, for want of a better answer, was irregular. *Knowles* v. ———, 3 Law J. Chanc. 7.

Where a defendant, after notice of the plaintiff's intention to issue an attachment, unless an order for time is obtained, procures the order, but is unable, on account of the press of business, to get it drawn up, and omits to give the defendant notice of the order until an attachment is sealed, he cannot set aside the attachment. *Kirkpatrick* v. *Meers*, 2 Sim. 16.

It is irregular to seal an attachment, before the affidavit, which is the ground for issuing it, is filed. *Gardner* v. *Rowe*, 6 Law J. Chanc. 175.

Exceptions to an answer having been allowed, plaintiff obtained an order to amend, and for defendant to answer the exceptions and amendments at the same time: defendant put in an answer to the amended bill only. The plaintiff then issued an attachment: Held, that it was irregular, and that plaintiff ought to have moved to take the second answer off the file. *De Tastet* v. *Lopez*, 1 S. & S. 11.

## ATTACHMENT OF PRIVILEGE.

An irregularity in the return of an attachment of privilege, in being returnable after the essoign day, and before the *quarto die post*, instead of a day certain in full term, may be permitted to be amended on payment of costs, and costs of the rule. *Adams* v. *Luck*, 6 B. Mo. 113, s. c. 3 B. & B. 25.

## ATTAINDER.

[See Copyhold.]

The income of certain personal property is given to A for life; and, after his decease, to B: A is convicted of a capital felony; and receives sentence of death, which is commuted into transportation for life: Held, that B's interest does not take effect by the forfeiture of A, and that the Crown is entitled to the income during the life of A. *Hiett* v. *the Attorney General*, 5 Law J. Chanc. 69.

## ATTORNEY AND SOLICITOR.

(A) Qualifications of.
(B) Of the Certificate.
(C) Privileges and Disabilities.
(D) Duties and Liabilities.
(E) Appointment of.
(F) Connexion between Attorney and Client.
(G) Summary Jurisdiction of the Court over.
(H) Lien of.
(I) Remedy for Costs.
(K) Striking off the Roll.
(L) Re-admission.

### (A) Qualifications of.

A young man served three years in the office of an attorney, under the impression that he had been bound an articled clerk to him. It appeared, that the articles had been made out with the consent of his father in the name of another attorney, who was not a partner with his master, and almost unknown to him. The Court would not interfere, and said, that the act 22 Geo. 2. was imperative, and that they could not, by any possibility, make the three years' service available. *Sandy's case*, 1 Law J. K.B. 152.

An articled clerk to an attorney must serve under the articles for five years continuously, and be *sui juris* to contract to serve, and to serve during all that time. Thus, where a surveyor of assessed taxes served a nominal clerkship for five years, though the duties of his office only occupied one-eighth of his time, he was struck off the roll. Having lost his office, he served near three years under other articles, and was again admitted on affidavit, that for different periods during the first five years, amounting in all to three years, he had served his first masters: but he was again struck off the roll, on the ground that his service for the first five years was broken, and not continuous; and that he was not *sui juris* to

contract for that service. *In re Taylor*, 3 Law J. K.B. 242, s. c. 4 B. & C. 341, s. c. 6 D. & R. 428.

Where articles of clerkship were duly stamped and executed, and transmitted to an agent in London, for the purpose of being inrolled with the proper officer of the court; and although it appeared in the agent's book that there was an entry in the handwriting of a clerk, who had left England, of having attended the inrolment, and paid a fee on that occasion, but there being no such entry of an inrolment in the book kept at the Master's office; the Court would not permit a counterpart of the articles to be registered *nunc pro tunc*, or order the party to be admitted an attorney. *Ex parte Pilgrim*, 1 Law J. K.B. 114, s. c. 1 B. & C. 264, s. c. 2 D. & R. 429.

(B) Of the Certificate.

Where an attorney's certificate was filed, by his agent's mistake, in the Court of King's Bench, instead of the Court of Common Pleas, and he had not been admitted in the former court, and the plaintiff sued him for a debt in an inferior court, on which he sued out his writ of privilege, the Court ordered the writ to be quashed, and a *procedendo* to issue. *Nixon* v. *Hewitt*, 3 Law J. C.P. 125, s. c. 10 B. Mo. 270.

Although an attorney, who omits for a year to take out his certificate, is forbidden under a penalty to practise as an attorney until he be re-admitted; yet proof of a certificate, though irregularly obtained, is sufficient *primâ facie* evidence of his being lawfully authorized to practise.

And, to get rid of this presumption, it is not sufficient to shew that he has not been re-admitted of the Court in which he was originally admitted; because it will be presumed that he has been properly admitted in *some* court; and the party who attempts to shew he was not authorized to practise, must shew that he had no authority in *any* court. *Pearce* v. *Whale*, 4 Law J. K.B. 86, s. c. 5 B. & C. 38, s. c. 7 D. & R. 512.

The year within which an attorney must take out his certificate begins to run from the time of his admission, and not merely from the time of his beginning to practise.

And therefore, an attorney who did not practise until a year after his admission, and not even then until he had taken out his certificate, and who continued in the following years to take out his certificate, was held incapable of maintaining any action for business done, while he had a certificate. Nothing could remove the difficulty but re-admission.

But *quære*—whether this objection is not now removed by the Indemnity Act, 7 Geo. 4. c. 44. —— *gent. one &c.* v. *Hulkes*, 5 Law J. K.B. 99.

(C) Privileges and Disabilities.

Attornies and clerks of the Court of Exchequer, may sue and arrest attornies of the other courts by *capias* of privilege. *Bowyer* v. *Hoskins*, 1 Y. & J. 199: s. p. *Walker* v. *Rushbury*, 9 Price, 16.

And, *semble*, that attornies of the Court of Common Pleas at Lancaster have the same right to arrest attornies of the Courts at Westminster. *Hopkins* v. *Ferrand*, 1 Y. & J. 204, n.

A sworn clerk of the Court of Chancery, may arrest a practising solicitor and attorney on an attachment of privilege, and hold him to special bail. *Wainwright* v. *Smith*, 5 Law J. Chanc. 20, s. c. 2 Russ. 568.

If the plaintiff, an attorney of the Court of King's Bench, sue by bailable process a person who is an attorney of the Court of Common Pleas, the Court of King's Bench will not require him to plead his privilege, but will order him to be discharged, or the bail bond to be cancelled, and make the plaintiff pay the costs. *Pearson* v. *Henson*, 2 Law J. K.B. 91, s. c. 4 D. & R. 73.

But the practice in the Court of Common Pleas is, that an attorney of that Court who has been arrested at the suit of an attorney of the Court of King's Bench, must plead his privilege, and cannot be discharged on motion. *Adams* v. *Bugby*, 5 Law J. C.P. 76.

A defendant who is an attorney, and also a Member of Parliament, may be sued as an attorney, without noticing his parliamentary privilege, except by forbearing to issue process against his person. *Gray* v. *Wilks*, 5 Law J. K.B. 291.

An attorney suing as plaintiff is not bound to indorse his name on the writ, according to the 2 Geo. 2. c. 23. s. 22, whether he sue by attachment of privilege, as an attorney, or by *latitat*, or other process, as a common person. *Duncan* v. *Etches*, 6 Law J. K.B. 270.

The statutes relative to attornies do not, it would seem, prevent them giving to persons not attornies a share in the profits of their business. *Candler* v. *Candler*, 1 Jacob, 225.

The words in the 12 Geo. 2. c. 13. s. 4, that any attorney or solicitor commencing or prosecuting any action or suit shall, &c., do not prevent a solicitor, whilst in prison, from attesting a petition in bankruptcy, it being, strictly speaking, neither a proceeding at law nor in equity. *Ex parte Thompson*, 1 G. & J. 308.

If, on an action by an attorney for a libel, relative to his profession and business, it be objected, that the action cannot be supported, as the plaintiff had omitted to take out a certificate, as directed by the 37 Geo. 3, for more than one year, during the time of the grievances mentioned in the declaration, it is unavailable, as he may sue for a libel reflecting on his character in that capacity, notwithstanding such an omission. *Jones* v. *Stevens*, 11 Price, 235.

An unqualified person, having practised as an attorney, being a prisoner for debt, was, upon being sentenced to three months' imprisonment, brought before the Court by a special order, it appearing that he was not able to pay the expense of a day-rule. *In re Clark and others*, 3 D. & R. 260.

The defendant's attorney entered into the usual undertaking under a judge's order, to pay the plaintiff the amount of his debt and costs; and the defendant died before taxation: Held, that the attorney was still bound to perform his engagement. *Hellings* v. *Jones*, 3 Bing. 70, s. c. 10 B. Mo. 360.

Where an attorney has become bail to the sheriff, and the bail-bond has been assigned, the Court of Exchequer will, upon the usual affidavit, stay proceedings upon the bail-bond upon payment of costs. *Mann* v. *Nottage*, 1 Y. & J. 367.

Although communications made to an attorney for the purpose of bringing or defending an action are privileged, yet he is bound to divulge that which is disclosed to him previous to the commencement

of the action. *Williams* v. *Mudie*, 1 C. & P. 158, s. c. 1 R. & M. 34. [Abbott]

A solicitor advised his client to summon a meeting of his creditors. A meeting was called. In the morning of the day, the client asked the attorney whether he could safely attend such meeting without being arrested for debt, and the attorney told him to remain at his office, until it was ascertained whether the creditors would engage to give him a safe conduct. The client remained at the office of the attorney upwards of two hours to avoid being arrested: The Court held, that the attorney could be examined to prove the whole of those facts, as constituting an act of bankruptcy by the client. *Bramwell* v. *Lucas*, 2 Law J. K.B. 161, s. c. 2 B. & C. 745, s. c. 4 D. & R. 367.

The solicitor under a commission of bankruptcy against annuity brokers, who have laid out and expended money on an insufficient security, is bound in an action against the brokers to produce their books under a *subpœna duces tecum*. *Hawkins* v. *Howard and Gibbs*, 1 C. & P. 222, s. c. 1 R. & M. 64. [Gifford]

The defendant's attorney being called to prove his hand-writing, he refused, on the ground, that he was only acquainted with it from having seen him sign a bail-bond, which being a proceeding in the cause, must be deemed a confidential communication: but it was holden not a privileged communication. *Hurd* v. *Moring*, 1 C. & P. 372. [Abbott]

The Court will not restrain a solicitor from disclosing confidential communications in the absence of misconduct. *Beer* v. *Ward*, 3 J. & W. 77.

An attorney is not allowed to give evidence of the contents of a deed in his client's possession; the client refusing to produce it. *Rex* v. *Upper Boddington*, 5 Law J. M.C. 10, s. c. 8 D. & R. 726.

Confidential communications made to an attorney's clerk, on behalf of his master, are privileged. *Taylor* v. *Forster*, 2 C. & P. 195: s. p. *Bricheno* v. Thorp, 1 Jac. 300.

He is bound equally with his master, not to divulge the secrets of the client; and, wherever the master should be prevented from disclosing, the clerk should also be prevented. *Rex* v. *Upper Boddington*, 5 Law J. M.C. 10, s. c. 8 D. & R. 726.

But an attorney's clerk may disclose statements made to him by his master, if they be not communicated to him as secrets, and do not affect the interests of any of the attorney's clients, though he is articled, and his articles bind him to keep his master's secrets. *Webb* v. *Smith*, 1 C. & P. 337. [Littledale]

A clerk to a solicitor, commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having, in his former service, acquired information likely to be prejudicial to the clients of his master. *Bricheno* v. *Thorp*, 1 Jac. 300.

One of two solicitors, who where partners, became bankrupt; the assignees excluded the other from interfering with the affairs of the partnership: the Court, nevertheless, refused to order the assignees to deliver to him the papers belonging to the clients of the firm. *Davidson* v. *Napier*, 1 Sim. 297.

(D) Duties and Liabilities.

It seems to be the business of the solicitor for a private act of parliament, to take care that the standing orders of the House of Commons are complied with, even though they relate to maps, plans, &c. *Taylor* v. *Higgins*, 1 Law J. K.B. 19.

An attorney, imagining that the two causes above his own would take up some time, left the court at the assize. On his return, the tenant had been called to confess lease, entry, and ouster. It was not sworn that counsel had been instructed. The Court granted a new trial, on the attorney paying the costs out of his own pocket. *Roe* v. *Doe*, 1 Law J. K.B. 154.

Where a deed is executed by a client, in favour of his solicitor, reversing a life interest and power of revocation, it is the duty of the solicitor to leave a counterpart of it in the possession of the client. *Balch* v. *Symes*, 1 Turner, 92.

An attorney who takes witnesses to an inn, is *primâ facie* liable to the innkeeper for the expenses incurred. *Cariss* v. *Richardson*, 1 Law J. K.B. 11.

The attorney for a parish indicted for not repairing a highway, entered into an agreement with the attorney for the prosecution, whereby he, on the *part of the parish*, consented to withdraw a special plea and to plead guilty, "and also to pay all the costs:" and "it was agreed, that the costs to be paid *by the said parish*, should be taxed by Mr. C: The Court held, that the attorney was *personally* liable; and also, that it was not a condition precedent that Mr. C should give any notice to the defendant of the time of taxation. *Watson* v. *Morrall*, 2 Law J. K.B. 155, s. c. 1 C. & P. 307.

An attorney put in his own clerk as one of the bail, who was not excepted to. After the defendant had rendered, the Court would not listen to an application against the attorney. *Pickering* v. *Sedgwick*, 1 Law J. K.B. 248.

The plaintiff in an action on a statute passed for the preservation of game, being insolvent, and his attorney refusing to tell by whom he was employed, the Court directed the action to be stayed, and ordered the attorney to pay the costs that had been incurred, unless in ten days he gave security for the payment of the costs. *Smith* v. *Watson*, 2 Law J. K.B. 92.

An arrest having been made by a person not named in the warrant, who did it at the request of the attorney, the Court discharged the party out of custody, and ordered the attorney to pay the costs. *Bradbury* v. *Hunter*, 2 Law J. K.B. 79.

Although a rule calling on an attorney to answer the matters of an affidavit is discharged; yet, if there were reasonable and probable grounds for moving for it, the Court will not give costs to the attorney. *Doe d. Thwaites* v. *Roe*, 1 Law J. K.B. 245, s. c. 3 D. & R. 226.

Circumstances alone are the criterion by which the rule, that notice to an attorney in one transaction shall be notice to him in another, is governed. *Mountford* v. *Scott*, 1 Turner, 280.

Where proceedings were stayed, on an undertaking by the defendant's attorney to pay the plaintiff his costs, such attorney is bound to do so, although the defendant died before the commencement of the taxation or bail put in. *Hellings* v. *Jones*, 3 Law J. C.P. 164.

[illegible] made. The jury having found a [illegible] of the [illegible], damages 160*l.*, a motion [illegible] to enter a nonsuit, or that a new [illegible] or the judgment should be ar- [illegible] Court held, that the lease which con- [illegible] covenant need not be produced to the [illegible] that the jury were right in including the 60*l.* [illegible] of the damages; and that the [illegible] was sufficient after verdict. *Swannell* v. [illegible] 2 Law J. C.P. 8, s. c. 1 Bing. 347, s. c. 8 [illegible] 346.

[illegible] against the executrix of an attorney, [illegible] negligence of her testator, in making insuf- [illegible] inquiries as to the validity of a security upon which the client has advanced money. *Wilson* v. [illegible] Sheet. 154, s. c. 1 D. & R. N.P.C. 30. [illegible]

[illegible] negligence charged against an attorney, to [illegible] an action at the suit of his client, must [illegible]

[illegible] a warrant of attorney from two, with- [illegible] words to guard against the possibility [illegible] judgment: Held, not [illegible] negligence. *Kettle* v. *Wood*, 5 Law J. [illegible]

[illegible] against a man, as of [illegible] 3 and 4 Geo. 4.: the essoign day of [illegible] was on the 18th of April. On the 12th [illegible] prison in discharge of his [illegible] but did not give notice of [illegible] a few days after Easter Term he [illegible] in custody, by the order of a [illegible] of Hilary Term, 26 [illegible] that a prisoner must [illegible] within two terms. An [illegible] against the attorney for negli- [illegible] in execution: The Court [illegible] had the whole of Trinity [illegible] in execution, as the render was [illegible] of it, and consequently that [illegible] Easter Term, and not *as of* Hilary [illegible] that an attorney is not liable to [illegible] in misconstruing an obscure [illegible] inasmuch as there must be *crassa neg-* [illegible] attorney liable to an action. [illegible] Law J. K.B. 96, s. c. 3 B. & C. [illegible] 655.

[illegible] a vendee received an abstract of [illegible] consisting sixty-five sheets. He [illegible] in it had an estate in [illegible] of that abstract, containing [illegible] conveyancer, who advised that [illegible] made a good title. It appeared, [illegible] fee, in consequence [illegible] an equitable tenant in [illegible] without the concur- [illegible] law. The jury found a [illegible] The Court held, that [illegible] to warrant that verdict. [illegible] K.B. 119, s. c. 5 B. [illegible]

[illegible] against the defendant, [illegible] undertook to procure the [illegible] amount, which he failed [illegible] a subsequent declaration, by the [illegible] proceed with the action, [illegible] the attorney's undertaking. *Miller* v. [illegible] 4 K. M. 308.

An attorney, by not entering an appearance, pursuant to his undertaking, renders himself liable to an attachment. *Mould* v. *Roberts*, 4 D. & R. 719.

The defendant's attorney having undertaken to pay over a sum of money to the plaintiff within one month, he was, on motion, ordered to comply with his undertaking. *Birchinshaw* v. *Jackson*, 3 Law J. K.B. 253.

*Semble*—that in an action against an attorney for negligence, in not making a motion to set aside proceedings for irregularity, if the declaration aver, as the consequence of the neglect, a judgment by default, and further proceedings and final judgment and execution, the judgments are of the gist of the action and not merely special damage. *Godfrey* v. *Say*, 3 C. & P. 192. [Burrough]

The Court will not allow an attorney to set up the Statute of Frauds, to escape the consequence of a written undertaking, which he has given in a cause: and they will enforce such an undertaking upon motion; and not leave the party to his action. *Senior* v. *Butt*, 5 Law J. K.B. 138.

Where, after payment of debt and costs to the attorney, the agent, not being in due time apprized of this fact, issued execution, under which the debtor's goods were taken,—it was held, that trespass lay against the creditor and the attorney, as the act of misfeazance had been committed after the payment of the debt and costs; though, if the execution had been issued before payment, it would not have been absolutely necessary for them to interfere and stop it. *Bates* v. *Pilling and Seddon*, 5 Law J. K.B. 40, s. c. 6 B. & C. 38, s. c. 9 D. & R. 44.

A placed money in the hands of his attorney to invest for him, giving the attorney an unlimited discretion to do what was best; the attorney advanced the money to B on mortgage, but discovering that the security was bad, the attorney sued out a bailable writ in A's name against the borrower for the amount, without A's knowledge: Held, that B could maintain no action against the attorney for arresting him without the authority of A, if the attorney acted *bonâ fide*, and A afterwards approved of what he had done. *Anderson* v. *Watson*, 8 C. & P. 214.

In general, an attorney who has become bankrupt and obtained his certificate, is not liable to be called upon by motion to pay to a client money which he had, previously to his bankruptcy, received on account of that client. *Semble*, that it would be otherwise if a case of fraud were established against him. *Ex parte Cullifford* v. *Warren*, 5 Law J. K.B. 229, s. c. 8 B. & C. 220.

The statute 1 Geo. 4. c. 119. s. 11. enacts, that no suit in law be proceeded in further than an arrest on mesne process by any assignee of an insolvent's estate, without the consent of creditors and approbation of one of the commissioners of the insolvent court: Held, in an action brought by an attorney to recover his bill of costs incurred in an action, at the suit of such an assignee, that it was incumbent on the attorney to prove that the consent of creditors and the approbation of one of the commissioners of the insolvent court had been obtained, or at all events that he had informed his client that such consent was necessary. *Allison* v. *Rayner*, 6 Law J. K.B. 85, s. c. 7 B. & C. 441, s. c. 1 M. & R. 241.

It is the duty of an attorney, when instructed to bring an action for an assault for which the plaintiff has previously prosecuted the defendant to conviction, and received a portion of the fine from the treasury, to dissuade his client from proceeding. *Jacks* v. *Bell*, 3 C. & P. 316. [Tenterden]

(E) Appointment of.

A proper party to a suit, whose name has been inserted in the bill as a plaintiff, without his own knowledge or concurrence, will not, while the record remains in that state, be allowed to appear by a distinct solicitor. *Pyecroft* v. *Gregory*, 2 Law J. Chanc. 122.

A retainer to commence a suit which abates, is evidence of a retainer to commence another action. *Crook* v. *Wright*, 1 R. & M. 278.

Receiving out of court the money produced by a suit, is equivalent to evidence of a special retainer. *Grain* v. *Wainman*, 1 Law J. C.P. 21.

Though it is not absolutely necessary, yet in correct practice, an attorney ought, before he commences an action, to take a written direction from his client for so doing. *Owen* v. *Ord*, 3 C. & P. 349. [Tenterden]

An attorney cannot be compelled to attend with a deed at the hearing of a cause, without a *subpœna duces tecum*, although he was a witness to the deed, and has it in his possession. *Bush* v. *Lewis*, 6 Mad. 29.

(F) Connexion between Attorney and Client.

If a person knows of an attorney being employed for him by a third person, and does not disapprove of it, the acts of the attorney are evidence against him. *Cameron* v. *Baker*, 1 C. & P. 268. [Best]

Where one attorney in the country requests another attorney to do some business for the benefit of his client, the credit may be given to the attorney who is bound to pay the bill of costs, unless he *expressly* says, that his client alone shall be liable: and the mere circumstance of the client signing his name to some part of the proceeding, and thus becoming known to the attorney employed, is not sufficient to compel him to look to that client for a remuneration for his trouble. *Scrace* v. *Whittington*, 1 Law J. K.B. 221, s. c. 2 B. & C. 11, s. c. 3 D. & R. 195.

The circumstance of having no other solicitor, may in some cases be sufficient to constitute a connexion between an attorney and another person, without it distinctly appearing in what particular manner, or to what extent the attorney may have been employed by him in law business. *Goddard* v. *Carlisle*, 9 Price, 169.

Application on behalf of the defendants, that the solicitor who had filed the bill for the plaintiff might pay the defendants their taxed costs, on the ground that the plaintiff had absconded eight years before the bill was filed, and that the solicitor never had any instruction from him, but from his brother-in-law, granted. *Hall* v. *Bennett*, 2 S. & S. 78.

Several inhabitants of a parish, attending a special vestry, signed resolutions, by which they ordered an indictment, brought against the inhabitants, to compel them to repair a road within the parish, to be opposed; and that the surveyor of the highways should take the necessary steps for carrying such order into effect. The surveyor having accordingly

employed an attorney for that purpose: Held, that the persons who had signed the resolutions were not personally liable to the attorney for the charges incurred in resisting the indictment. *Sprett v. Powell*, 4 Law J. C.P. 161, s. c. 3 Bing. 478.

Clients are not bound by the undertakings of their attorney given whilst conducting a cause, particularly where it is said that they personally agree to do certain acts. *Iveson v. Conington*, 1 Law J. K.B. 71, s. c. 1 B. & C. 160, s. c. 2 D. & R. 307.

A defendant, having appeared to the action by one attorney, cannot, in the same cause, make any application to the court by another, without having obtained an order for changing his attorney. *Ginders v. Moore*, 1 B. & C. 654.

The authority of an attorney is determined on final judgment being signed. *Macbeath v. Cooke*, 1 M. & P. 513, s. c. 4 Bing. 578.

Where a solicitor has lent money to his client, and taken a mortgage for the balance appearing to be due to him by certain accounts, in which the items of his demand are specified,—The Court will not, merely because the parties stood in the relation of solicitor and client, deprive the mortgagee of any part of the benefit of his security. *Hampson v. Nicoll*, and *Nicoll v. Hampson*, 6 Law J. Chanc. 22.

(G) Summary jurisdiction of the Court over.

If the proceedings of the Court, as a declaration, be *so badly written*, as to be almost unintelligible, the Court will in future punish the attorney for the party. *Anon.* 2 Law J. K.B. 154.

If an attorney, after saying that there is no defence to the action, and that the plaintiff shall not be put to expense, put a plea on the record, the Court will grant a rule, calling on him to shew by what authority he has done it. *Harrison v. Eakin*, 1 Law J. K.B. 247.

The Court refused to grant an attachment against a person, who had practised as an attorney in the Court of C. P. without having been admitted, but left the party to sue for the penalty given by the 2 Geo. 2, c. 23, s. 24. *Matthews v. Royle*, 6 B. Mo. 70.

Where the matters charged against an attorney are of an indictable nature, the Court will not call on him summarily to answer them. *Short v. Pratt*, 1 Law J. C.P. 9, s. c. 1 Bing. 102: s. p. *In re Knight and Hill*, 1 Bing. 148.

The 22 Geo. 2, c. 46, s. 11, enacts, "That if any sworn attorney or solicitor shall suffer his name to be used by an unqualified person, *to enable him to practise as an attorney or solicitor*, and complaint shall be made thereof in a *summary way, and proof made thereof on oath to the satisfaction of the Court*, such attorney or solicitor shall be struck off the roll;" and by the same section it is enacted, "That in that case, and upon *such complaint and proof made as aforesaid*, it shall be lawful for the Court to commit such unqualified person so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year:" Held, that a person brought before the Court on the latter branch of the section, was not entitled to have the witnesses in support of the charge examined *viva voce*, after the matter had been referred by the consent of counsel to the Master of the Crown Office, who reported the party in contempt; the Court, however, permitted the latter to bring the whole of the case under their own consideration, when brought up to be committed. *In re Jaques*, 1 Law J. K.B. 5, s. c. 2 D. & R. 64.

Where a sum of money was ordered by the Court to be paid by one party, and his attorney, or one of them, the Court, upon an affidavit that the party had not paid it, and that the attorney had been applied to, granted an attachment against the attorney. *Doe d. Humphries v. Allen*, 1 Law J. K.B. 153.

If a party in a cause take a promissory note from his attorney, for the debt, which his attorney has received from the opposite party, he deprives himself of the summary relief by application to the Court, to make the attorney pay over the money. *Anon.* 3 Law J. K.B. 106.

The Court will not refer it to the Prothonotary to inquire into charges made against an attorney, when he is called on to answer the matters of an affidavit, in which such charges are imputed to him. *In re* ——, 5 Law J. C.P. 107.

If an attorney arrest excessively, he is liable to the jurisdiction of the Court as one of its officers, though the case be not within the 43 Geo. 3. c. 46. s. 3.

But *semble*, that the Court will not exercise such jurisdiction where the arrest has been preceded by a bill delivered under the statute, a month before action, and the defendant did not apply for a taxation until after action:—at least they will not, unless it be a case of gross vexation. *Price v.* ——, 5 Law J. K.B. 221.

The Court of Chancery will not exercise its summary jurisdiction, to compel a vendor's solicitor to perform an undertaking given by him at the sale, to do certain acts for clearing the title to the estate. *Peart v. Bushell*, 2 Sim. 38.

(H) Lien of.

A London agent of a country attorney, has no general lien on money received as such agent as against the client in the country. *Moody v. Spencer*, 1 Law J. K.B. 1, s. c. 2 D. & R. 6.

A solicitor by taking a security abandons his lien. *Balch v. Symes*, 1 Turner, 92.

Where a will is in the possession of a solicitor, he has no lien upon it, nor can he refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest and a power of revocation. *Balch v. Symes*, 1 Turner, 87.

Where the plaintiff's attorney was indebted to the plaintiff in a greater sum than the attorney's costs in the cause, and to his agent on a general account, in a greater sum than the amount of those costs; it was held, that the agent could not, as against the plaintiff, retain out of the sum recovered by the plaintiff more than the costs of the agency in the particular cause. *White v. Royal Exchange Assurance*, 1 Bing. 20, s. c. 3 B. Mo. 249.

An attorney is not bound to deliver up deeds and papers to the assignees of a bankrupt, until his lien upon them is satisfied. *Lambert v. Buckmaster*, 2 Law J. K.B. 93, s. c. 2 B. & C. 616, s. c. 4 D. & R. 125.

If a solicitor withdraws from the conduct of a suit, he cannot claim to retain the papers necessary for the prosecution of it, till his costs are paid, but will be ordered to deliver them up, without

prejudice to his lien, to the new solicitor of the party. *Colegrave* v. ———, 2 Law J. Chanc. 39.

The Court will not order an attorney to deliver up papers in his hands before his bill is taxed on the payment of money on account. *Dyer* v. *Bowley*, 2 Law J. C.P. 41.

If a solicitor declines to continue to act for a party, the Court will order that the party be at all reasonable times permitted to inspect all papers relating to the cause, without imposing upon him any condition as to the payment of the solicitor's bill of costs. *Moir* v. *Mudie*, 1 Law J. Chanc. 218, s. c. 1 S. & S. 282.

If a deed, by which property is conveyed, be in the hands of a solicitor, the Court, notwithstanding his lien, will compel him to produce the deed, for the purpose of a suit relative to that property; and if he has refused, order him to pay the expenses attendant on his refusal. *Brassington* v. *Brassington*, 1 S. & S. 455.

The Court granted a rule to shew cause why a deed, that had been delivered to an attorney by a client, should not be redelivered on payment of what was due. ——— v. *Russell*, 1 Ken. 129, s. c. Sayer, 125.

An agent in town for a plaintiff attorney, has a lien on the postea, for his costs in the cause, though the plaintiff dies intestate before the agent obtained possession of it; for his authority is exercised beneficially for the administrators of his principal *pro tanto*, and is not revoked by his death. *Taunton* v. *Geforth*, 3 Law J. K.B. 229, s. c. 6 D. & R. 49.

The vendee's attorney sent the deeds of conveyance to B, the vendor, to be executed, who returned them to the defendant, his attorney, executed without any direction. Some necessary parties having refused to execute, the contract was rescinded. In trover by the vendee for deeds and stamped pieces of parchment—it was holden, that the purchaser was entitled to recover the deeds from the defendant, the vendor's attorney, without being subject to the lien which he had against the vendor. *Esdaile* v. *Oxenham*, 3 B. & C. 225, s. c. 5 D. & R. 49.

There had been several actions between the same parties, arising out of the same grievance. The plaintiff had succeeded in three of them, and the principal defendant in one of them. A motion was made to the Court, that the judgment and costs in this action, subject to the lien of the attorney, might be set off against the judgment and costs in the action in which that defendant had succeeded. The attorney claimed a lien on the judgment and costs in this (being the *last* action in which the plaintiff succeeded), for all his *extra* costs in all the actions. The Court held, that the attorney had not a general lien, but only a special lien for the extra costs in procuring that judgment. *Stephens* v. *Weston*, 3 Law J. K.B. 78, s. c. 3 B. & C. 535, s. c. 5 D. & R. 399.

### (I) Remedy for Costs.

Several persons were deeply interested in different suits at law, which were similar in their nature, and employed the same attorney to conduct the whole business. When any one of them called on the attorney he spoke about all the other cases, as well as that in which he was individually interested, and gave general directions: Held a sufficient compliance with 2 Geo. 2. c. 23. for the attorney to deliver one bill to one of the parties, to entitle him to maintain an action against all of them for the amount of his costs. *Oxenham* v. *Leman*, 1 Law J. K.B. 133, s. c. 2 D. & R. 461.

An action may be maintained by an attorney-at-law, for the amount of his bill for suing out a commission of bankruptcy, although he is not admitted a solicitor of the Court of Chancery. *Wilkinson* v. *Diggell*, 1 Law J. K.B. 87, s. c. 1 B. & C. 158, s. c. 2 D. & R. 302.

Where an attorney carried on business at a town remote from his own residence by a clerk, whom he paid by a proportion of the profits: Held, that he could not recover in an action for business done by such clerk from a client, who never saw or knew the principal, nor ever had the benefit of his judgment. *Hopkinson* v. *Smith*, 1 Bing. 13, s. c. 7 B. Mo. 23.

In an action on an attorney's bill, it appeared that the plaintiff resided at L, and that he also carried on business at W, by an articled clerk, by whom the business in this case had been transacted: Held, that the plaintiff was not entitled to recover, the business not having been transacted by a person of competent skill and experience. *Taylor* v. *Glassbrook*, 3 Stark. 75. [Holroyd]

Receiving out of court the money produced by a suit is equivalent to evidence of a special retainer, and the solicitor will be entitled to recover the amount of his bill of costs. *Gray* v. *Wainman*, 1 Law J. C.P. 21.

An attorney suing for a bill, held the defendant to bail for 15*l*. It had been delivered one month before action brought in the usual manner. The Master taxed at 14*l*. The Court would not give the defendant his costs under 43 Geo. 3. c. 46. s. 3. *Anon*. 2 Law J. K.B. 151.

It is not necessary for the executor of an attorney to deliver a bill of costs for business done by his testator *one month* before the commencement of an action. *Barret* v. *Moss*, 1 C. & P. 3. [Burrough]

An attorney of a superior court cannot maintain an action for his bill, for business done in the Insolvent Court, in procuring the discharge of an insolvent, without delivering a bill according to 2 Geo. 2. c. 23. s. 23. *Smith* v. *Wattleworth*, 3 Law J. K.B. 244, s. c. 4 B. & C. 364, s. c. 6 D. & R. 510, s. c. 1 C. & P. 615.

Although part of an attorney's bill be not set out as directed by the 2 Geo. 2, and therefore not recoverable, still the residue of the bill, as to which the provisions of the statute have been complied with, may be recovered. *Drew* v. *Clifford*, 2 C. & P. 69, s. c. 1 R. & M. 280. [Abbott]

Evidence of the retainer and delivery of the bill is sufficient to enable an attorney to support his action. *Hellings* v. *Gregory*, 1 C. & P. 627. [Best]

The items of charge for the proceedings in an action must be stated in an attorney's bill upon his client, though they have been previously taxed by the Master, as between the client and the other party.

But, where there are two actions in which there has been exactly the same course of proceeding, and the same charges are proposed, it is not necessary that the items should be repeated. *Allison* v. *Rayner*, 5 Law J. K.B. 172.

If an attorney does business for a client, of a nature to make his bill taxable, and other business clearly not so, he is bound to put the whole into one bill, which bill is taxable; and he cannot bring an action in the first instance, and recover for the non-taxable business, but must deliver his whole bill a month &c. under the statute. *Thwaites* v. *Mackerson*, 3 C. & P. 341. [Tenterden]

A rule for an attachment against an attorney, for not delivering a bill of costs, was discharged, the bill having been delivered since the service of the rule, and illness being assigned as a reason for the neglect.—Such a rule for an attachment is not absolute in the first instance. *Gripper* v. *Cole*, 11 Price, 593.

In an action to recover the amount of an attorney's bill, it appeared that an action had been brought by the defendant's son, for prosecuting which the charges were incurred; but that the defendant employed the plaintiff to commence the suit: but, as the defendant was examined as a witness at the trial on behalf of his son, and the attorney had prepared a release, in case his competency should be objected to: Held, that the plaintiff could not recover. *Williams* v. *Goodwin*, 4 Law J. C.P. 141, s. c. 2 C. & P. 257.

To defeat an action on an attorney's bill, it must appear that the costs in question were occasioned through the plaintiff's inadvertence, and not an error which a cautious man might have fallen into. *Montrion* v. *Jefferys*, 2 C. & P. 113, s. c. 1 R. & M. 317. [Abbott]

The words in the 2 Geo. 2. c. 23. s. 23, that "where the bill taxed is less by a sixth part than the bill delivered, the attorney is to pay the costs of the taxation," are imperative. *Higgins* v. *Woolcott*, 5 B. & C. 760.

In an action brought by an attorney against two defendants, to recover the amount of his bill of costs, evidence was adduced to shew that he was employed by both, but that one only undertook to pay; and the jury found that one only was liable, and accordingly found a verdict for the defendants: The Court refused to set it aside, or grant a new trial. *Hellings* v. *Jones*, 3 Law J. C.P. 164, s. c. 3 Bing. 70, s. c. 10 B. Mo. 360.

Settled accounts between attorney and client may be re-opened by bill in equity, as far as relates to the disputed items. *Johnes* v. *Lloyd*, 10 Price, 62.

But not in the absence of fraud or misconduct, after the expiration of seven years. *Ex parte Shipden*, 6 D. & R. 830.

A court of equity will direct an issue to try the fairness of charges between attorney and client. *Johnes* v. *Lloyd*, 10 Price, 60.

A solicitor who defends a suit for a defendant *in forma pauperis*, can only recover from the plaintiff the money actually paid out of pocket. *Philips* v. *Hubert*, 1 C. & P. 63. [Abbott]

If a solicitor suffers his client to arrange with the adverse party, without making any provisions for his costs, he is not entitled to proceed with the suit, for the purpose of recovering costs from the latter. *Mures* v. *Cooke*, 13 Price, 473, s. c. 2 C. & M. 411.

To entitle an attorney to recover fees for procuring the execution of a bail bond, the bond must be mentioned. *Sutcliffe* v. *Green*, 8 Stark. 135. [Abbott]

In an action on an attorney's bill, a witness may be called to prove, that when the attorney's agent went before the Master to have the bill taxed, he admitted that the cause was to be conducted for nothing. *Ashford* v. *Price*, 3 Stark. 185. [Abbott]

It is a good defence to an action on an attorney's bill, that he undertook to perform the business on the principle of "No cure, no pay." *Tabram* v. *Horne*, 6 Law J. K.B. 24, s. c. 1 M. & R. 228.

If an attorney undertake to conduct a cause for the costs out of pocket, it being represented to him by his client, that such client took a certain interest under a deed: the attorney cannot charge more than the costs out of pocket, though it should turn out that the cause was lost, because his client did not take the interest under the deed which he stated that he took, it being the duty of the attorney to see the deed before he brought the action. *Thwaites* v. *Mackerson*, 3 C. & P. 311. [Tenterden]

A dispute between A B, a married woman, and C D, was referred to arbitration. After the reference had proceeded for some time, an additional matter was submitted by the attornies for the parties. C D's attorney signed the submission in his presence. A B's attornies signed in the presence of C D's attorney, but without any authority from their client. The award was afterwards set aside, and C D's attorney sued him for the expenses of the arbitration: Held, that he had not been guilty of such negligence, in not requiring to see the authority of A B's attornies, as would prevent his recovering the amount of his bill. *Edwards* v. *Cooper*, 3 C. & P. 277. [Park]

The Court will not order the defendant not to pay the debt and costs to the plaintiff, in fraud of the plaintiff's attorney, although they may entertain a motion against the defendant, in case he should make such a fraudulent payment. *Anonymous*, 6 Law J. K.B. 76.

### (K) Striking off the Roll.

Conducting a plaint in the county court, is suing out process in a court of law within the meaning of 12 Geo. 2. c. 13, which subjects attornies to be struck off the roll, who commence or prosecute any suit at law or equity whilst in prison. *Ex parte Flint*, 1 Law J. K.B. 111, s. c. 1 B. & C. 254, s. c. 2 D. & R. 406.

An attorney took into his office a certificated conveyancer, to conduct the business as his clerk. Both of their names appeared on the door. The bills were made out in their joint names, and they divided the profits equally between themselves. The court adjudged, that the attorney had enabled an unqualified person to practise in his name for his own profit, and ordered the attorney to be struck off the roll, and the unqualified person to be imprisoned one month. *In re Jackson and Wood*, 1 Law J. K.B. 115, s. c. 1 B. & C. 270.

The Court will not strike an attorney off the roll, on account of an irregularity in the service of his clerkship, and misconduct prior to his admission. *In re Page*, 1 Law J. C.P. 45, s. c. 1 Bing. 160, s. c. 7 B. Mo. 572.

If an attorney wish to take his name off the roll of the Court of King's Bench, he must swear not only that no proceedings are depending against him for misconduct, but also that he does not expect

that any are about to be instituted. *Ex parte Jones*, 2 Law J. K.B. 151.

Two attornies having permitted an unqualified person to practise in their names, for their own benefit, were, under the 22 Geo. 2, c. 46, directed by the Court to be struck off the roll, and the unqualified person was sentenced to three months' imprisonment. *In re Clark and others*, 3 D. & R. 260.

An attorney of the Court of Common Pleas having been found by the Prothonotary to be in contempt for allowing another person to practise in his name, who had not been admitted an attorney, the Court ordered the former to be struck off the roll, and the latter to be committed to the Fleet Prison for three months. *In re Isaacson, Clark, and Brookes*, 7 B. Mo. 322.

By statute 22 Geo. 2, c. 46, s. 11, it is enacted, "that if any sworn attorney or solicitor shall suffer his name to be used by any unqualified person, to enable him to practise as an attorney or solicitor, and a complaint shall be made thereof in a summary way, and proof made thereof on oath to the satisfaction of the Court, such attorney or solicitor shall be struck off the roll;" and by the same section it is enacted, "that in that case, and upon such complaint, and proof made as aforesaid, it shall be lawful for the Court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said Court for any time not exceeding one year:" Held, that a person brought within the latter branch of the section, upon affidavit of his offence, was not entitled to have the witnesses in support of the charge examined *vivâ voce*.

After the matter had been referred in such case, by consent of counsel, to the Master of the Crown Office, who reported the party in contempt, the Court allowed the latter to bring the whole of the case under their own consideration, when brought up to be committed. *In re George Jaques*, 2 D. & R. 64.

An attorney having died and bequeathed all his property to his widow; his eldest son, for the mixed consideration of the good-will of the business, the advancement of money for carrying it on, and family affection, enters into an agreement with his mother to continue the business, and to account to her for a moiety of the profits during the minority of his younger brothers and sisters. This arrangement is not contrary to the policy of the stat. 22 Geo. 2, c. 46, s. 11. *Candler* v. *Candler*, 6 Mad. 141.

An attorney who forms a partnership with an unqualified person is within the provisions of the 22 Geo. 2, c. 46, s. 11. An agreement to share profits constitutes a partnership. *Tench* v. *Roberts*, 6 Mad. 145.

It seems that an attorney by signing a fictitious name to a demurrer, purporting to be a barrister's signature, renders himself liable to be struck off the roll. *Smith* v. *Matham*, 4 D. & R. 738.

An attorney who had taken out his certificate for the current year, but had neglected to do so for two years preceding, sued by attachment of privilege without being re-admitted. Rule to strike him off the roll was discharged, on payment of costs to the defendant. *Cooke* v. *Leggatt*, 3 Law J. K.B. 134.



The Court refused to strike an attorney off the roll, on an affidavit which stated that a person who had lately been his clerk, and who lived at a town eight miles distant from the residence of the attorney, and carried on business at an office, over the door of which was written the attorney's name, but that he only attended on market-days, and then transacted all his business at an inn—on the ground that it should have been shewn that such person either participated in the profits or carried on business on his own account. *In re Garbutt*, 9 B. Mo. 157.

If an attorney be struck off the roll of the King's Bench for misconduct, the Court of Common Pleas will make a like order, on an affidavit stating that fact. *In re Cope*, 4 Law J. C.P. 50.

### (L) RE-ADMISSION.

It is sufficient for an attorney, who intends to apply to be re-admitted, to stick up his notice on the outside of the court, on the first day of term, before the full Court sits. *Ex parte Davey*, 2 Law J. K.B. 209, s. c. 4 D. & R. 646.

If an attorney who has not taken out his certificate ceases to practise during that time, he may be re-admitted without paying any fine, or any arrears of duty. *Ex parte Marson*, 1 Law J. K.B. 60, s. c. 2 D. & R. 238; *Ex parte Cunningham*, 1 Bing. 91.

An attorney who has discontinued practising, may, on application to the Court, be re-admitted on paying a nominal fine. *Ex parte Maliphant*, 7 B. Mo. 495.

An attorney, after being admitted, and after taking out his certificate for many years, discontinued to practise in 1814; in 1817 he recommenced business, having in 1816 taken out a certificate. On application to be re-admitted, the Court ordered him to pay the arrears due from 1814 to 1816, and to pay a nominal fine. *Ex parte Sherwood*, 7 B. Mo. 493.

A solicitor who had ceased to practise, and in consequence of which had neglected to take out his certificate for one whole year, was permitted to be re-admitted on payment of a small fine only, without paying the arrears of duty. *Ex parte Murray*, 1 Turner, 56.

The re-admission of an attorney will not be allowed without the payment of a penalty, because it was the neglect of the attorney's agent in London that the certificate had not been taken out. *Ex parte Chalker*, 1 Law J. K.B. 86.

A person was admitted an attorney in Hilary Term, 1822, and then went into the country as a clerk. Before that time twelvemonth, he sent to an attorney in London to take out his certificate, which was omitted to be done. The Court, upon a motion for his re-admission without paying a fine, would not grant it on the affidavit of the agent, that he had not, in the meantime, been practising on his own account. *Hawkin's case*, 1 Law J. K.B. 160.

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## ATTORNMENT.

[See COVENANT, and EJECTMENT.]

The payment of rent by a tenant, in ignorance of the real nature of a claim to the property adverse

to that of his landlord, cannot be considered an attornment or evidence of a new tenancy, so as to preclude him from shewing that his landlord's title has expired; for before it can be so found, it must be proved that he was acquainted with all the particulars of the landlord's right to the property. *Fenner* v. *Duplock*, 2 Law J. C.P. 102.

A tenant in possession, who attorns to another from whom he did not receive possession, is not precluded from disputing the title of the person to whom he attorned.

Sequestrators under the authority of the Court of Chancery, having no interest in the premises, cannot take an attornment to themselves as sequestrators. *Cornish* v. *Searell*, 6 Law J. K.B. 255, s. c. 8 B. & C. 471.

## AUCTION AND AUCTIONEER.

(A) Relative to the Sale.
(B) Of the Auction Duty.
(C) Rights, duties, and liabilities of the Auctioneer.

[See Principal and Agent.]

### (A) Relative to the Sale.

[See Sale.]

Under a lease that the lessee and his assigns should not use or exercise certain obnoxious trades on the premises, the original lessee underleased the premises, with no proviso against the obnoxious trades provided against by the original lease: Held, that a vendee, under a sale by auction of the premises so underlet, might recover a deposit paid at the sale, if the conditions of sale did not state the proviso in the general lease, that no obnoxious trade should be exercised. *Waring* v. *Hoggart*, 1 R. & M. 39. [Abbott]

An auctioneer, after knocking down a lot for 105*l.*, wrote the name of the bidder, who was the agent of the purchaser, opposite to the lot in his catalogue. The conditions of sale had been read over by him to the persons assembled, but they were not attached to the catalogue, nor was any reference made in the latter instrument to the former: The Court held, that a note or memorandum in writing of the bargain had not been signed by the party or his agent, as required by the Statute of Frauds. *Kenworthy* v. *Schofield*, 2 Law J. K.B. 175, s. c. 2 B. & C. 945, s. c. 4 D. & R. 556.

The sheriff sold a vessel and her stores by public auction under an execution. The sails were seized on the premises of a sail-maker. At the time the purchase was completed, in August 1822, the sheriff gave to the purchaser an order on the sail-maker to deliver up the sails: but he refused, alleging that he had a lien upon them for 60*l.* The writ was returnable in Michaelmas term, 1822. In April 1823, the purchaser gave notice to the sheriff that he could not use the vessel without the sails, and should redeem them: The Court held, that the purchaser had accepted the order by not informing the sheriff, before the return of the writ, that he could not obtain the sails. *Duncan* v. *Carlton*, 2 Law J. K.B. 144, s. c. 2 B. & C. 108, s. c. 4 D. & R. 301.

An auctioneer at a sale, where it was one of the conditions, that a deposit should be paid immediately, and the remainder before the goods were delivered, knocked down a lot, and handed it to the bidder, who looked at it for three or four minutes, and then returned it to the auctioneer, saying that he was mistaken in the price. The auctioneer said he would take it back only to keep for his use: The Court held, that it was a question of fact for the jury, whether, under such circumstances, there had been a delivery to satisfy the Statute of Frauds. *Phillips* v. *Bistolli*, 2 Law J. K.B. 116, s. c. 2 B. & C. 511, s. c. 3 D. & R. 822.

A person possessed of a freehold house and premises, sold them by auction, without any mention being made of the fixtures. After the conveyance had been executed, and the vendee put into possession, a demand was made of the articles contained in "an inventory of the *fixtures*." The buyer refused to deliver up the *fixtures demanded*, and the vendor brought an action of trover: The Court held that, not only the things fixed to the freehold, but also the articles generally known as fixtures between landlords and tenants, passed by the conveyance; and also that, as the demand and refusal was of fixtures, the plaintiff's action was not supported, because some of the articles detained were not fixtures. *Colegrave* v. *Dias Santos*, 1 Law J. K.B. 239, s. c. 2 B. & C. 76, s. c. 3 D. & R. 255.

Where certain articles were put up to sale by auction, and the vendee and a friend of his were the only bidders, the rest of the company being deterred from bidding, in consequence of a statement made by the vendee, that he had been ill-used by the late owner: Held, that under such a sale the vendee did not acquire any property in the articles he had bought. *Fuller* v. *Abrahams*, 6 B. Mo. 317, s. c. 3 B. & B. 116.

The plaintiff having sent a horse to a repository to be sold by auction, his groom attended, and bid for the horse on behalf of his master, without its being announced to the company present that he attended for such a purpose: Held, that it was illegal, and avoided the sale against the last bidder, who was to be considered the purchaser, by the conditions of sale. *Crowder* v. *Austin*, 4 Law J. C.P. 118, s. c. 3 Bing. 368, s. c. 2 C. & P. 208.

If the owner of an estate put up for sale by auction employ a person to bid for him, the sale is void, although only one such person be employed, and although he is only to bid up to a certain sum, unless it is announced at the time that there is a person bidding for the owner. *Wheeler* v. *Collier*, 1 M. & M. 123. [Tenterden]

### (B) Of the Auction Duty.

A sale by auction, by assignees of a bankrupt, of the absolute interest in an estate in fee, which is in mortgage, is not liable to the auction duty. *Rex* v. *Winstanley*, 2 Y. & J. 124.

### (C) Rights, duties and liabilities of the Auctioneer.

If an auctioneer, on the sale of real estates, conducts himself in such a manner as to render the contract invalid, he cannot, though he knocked down the lot to the highest bidder, and afterwards paid to

the collector of Excise the duty in respect of such sale, and which was, by the express condition of sale, to be paid by the purchaser, maintain an action of special assumpsit against the vendee for the money paid to the collector of duties, he (the defendant) not being a purchaser, and by consequence not liable to duty, especially as the purchaser had not authorized the auctioneer to pay the money on his account.

*Semble*—that under the circumstances the vendor would not be liable to repay the auctioneer; yet *quære* whether under such a sale the auctioneer did not render himself liable to the duty. *Jones* v. *Nanney*, 13 Price, 76.

Where an auctioneer, on the sale of real estates, has been called upon to pay the Excise duty in respect of such sale, he must sue his employer on the implied assumpsit, leaving his employer to sue the vendee under the conditions of sale, if they be, that the duty is to be paid by the purchaser. *Jones* v. *Nanney*, 13 Price, 76.

An auctioneer, against whom an action is brought for the recovery of a deposit, is not entitled to a bill of interpleader, if he insists upon retaining either his commission or the duty. *Mitchell* v. *Hayne*, 2 S. & S. 63.

If an auctioneer deviates from the express conditions of sale, he renders himself personally liable to those who sustain an injury by his improper conduct. *Jones* v. *Nanney*, 13 Price, 76.

If A purchase an estate at a sale, and describe himself as an agent for B, and B refuse to complete the contract, and give the vendor's agent notice to that effect, and A afterwards pay the deposit according to the conditions; if the title be defective, A may maintain an action in his own name against the auctioneer, to recover the deposit. *Langstreth* v. *Toulmin*, 3 Stark. 145. [Abbott]

A sale by auction being unproductive, another day was fixed for a sale, when two persons who attended upon the former sale, being desirous of making a purchase, were directed to retire to another room, where each was to write two different sums on a piece of paper: and whoever should be found, on giving in these pieces of paper, to have written the largest sum, was to be declared the purchaser. This was held to be a mode of sale by auction within the 19 Geo. 3: and therefore, that the person who had so conducted the sale had incurred the penalty of 100*l.* thereby imposed, for having acted as an auctioneer without first taking out a licence. *Attorney General* v. *Taylor*, 13 Price, 636, s. c. M'Clel. 362.

Where an auctioneer sells an estate by public auction, and receives a deposit, it is his duty, as the agent of both vendor and purchaser, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs. Where an auctioneer sold an estate by public auction, and received the deposit, and signed an agreement stating that he acknowledged to have sold the estate, and that he agreed to complete the sale; and the sale was not completed on account of a defect of title: Held, that the purchaser might recover the deposit in an action for money had and received against the auctioneer, though the latter had paid it over to the vendor, without any notice from the purchaser not to do so, and before the defect of title was ascertained. *Gray* v. *Gutteridge*, 6 Law J. K.B. 154, s. c. 1 M. & R. 614, s. c. 3 C. & P. 40.

An auctioneer,—who, as agent for the vendor, agrees to sell an estate upon the terms contained in conditions of sale, by which the purchaser is to pay down immediately a deposit, and the auction duty, and the residue of the purchase-money upon a day certain, on having a good title; and the vendor is to prepare and deliver to the purchaser an abstract of title,—is not, upon a failure of the contract, in consequence of a defective title, personally responsible for *interest* upon the deposit and auction duty, unless the money be demanded, or notice be given to him that the contract has been rescinded. *Gaby* v. *Driver*, 2 Y. & J. 549.

## AUDITA QUERELA.

A defendant having been taken in execution on a judgment, was discharged upon a commission of bankrupt having issued against him; but the commission being afterwards superseded, he was again taken in execution upon the original judgment: Held, that if there was no fraud in suing out the commission, the defendant was entitled to his discharge; but if there was, that he was not exempt from being so taken a second time in execution. There being strong circumstances of fraud presented to the consideration of the Court, an order for the discharge of the defendant was refused, it being open to him to proceed by writ of *audita querela*. *Baker* v. *Ridgway*, 2 Law J. C.P. 110, s. c. 2 Bing. 41.

A bankrupt obtained his certificate on the 13th of November; the same day a *fieri facias* was executed on his goods; the Court refused relief on motion, but left the parties to their *audita querela*. *Hanson* v. *Blakey*, 6 Law J. C.P. 70, s. c. 4 Bing. 493, s. c. 1 M. & P. 261.

## AUTREFOIS ACQUIT.

The defendant was indicted for a misdemeanor in keeping a common gaming-house. The offence was laid on a day in 2 Geo. 4, and, in the usual words, on divers other days and times between that day and the day of the inquisition.

The defendant pleaded *autrefois acquit* of an indictment found in 4 Geo. 4, for keeping a gaming-house, laying the offence on a day in 57 Geo. 3, and on divers other days between that day and the day of the inquisition, against the peace of the King.

The Court held, that the offences in that latter indictment must be taken to be against the peace of Geo. 3, and therefore that the defendant had not been acquitted of offences against the peace of Geo. 4.

The Court also held, that the judgment against a defendant on a demurrer to a plea of *autrefois acquit* of a misdemeanor, was final. *Rex* v. *Taylor*, 3 Law J. K.B. 68, s. c. 3 B. & C. 502, s. c. 5 D. & R. 422.

If, in a plea of *autrefois acquit*, the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity. But *semble*, that if he insisted on the wrong, the Court would, in a capital case, take care that he did not suffer by it.

If the prisoner *could* have been legally convicted on the first indictment, upon any evidence that *might*

have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not. *Rex* v. *Sheen*, 2 C. & P. 634.

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## BAIL.

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5. *BAIL BY HABEAS CORPUS.*
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7. *IN* NE EXEAT REGNO.
8. *IN THE ADMIRALTY COURT.*
9. *IN ERROR*—[see Error.]
10. *IN CRIMINAL PROCEEDINGS.*

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### 1. *OF THE AFFIDAVIT TO HOLD TO BAIL.*

#### (A) By whom and how made.

The mere conviction for a conspiracy does not render the party incompetent to make an affidavit to hold to bail. *Park* v. *Strockley*, 4 D. & R. 144.

It cannot be objected to an affidavit to hold to bail, that it is sworn by a deponent, a third person, who does not shew himself to be in any way connected with the creditor, or to have any means of knowing of the existence of the debt. *Lee* v. *Sellwood*, 9 Price, 322.

The Court will not, under any circumstances, relax the rule, that the deponent, in an affidavit to hold to bail, should insert therein his true place of abode. *Collins* v. *Goodyer*, 2 Law J. K.B. 113, s. c. 2 B. & C. 563, s. c. 4 D. & R. 44.

In an affidavit to hold to bail, the plaintiff was described as A B, No. 31, Tottenham-court-road, gentleman; on inquiry being made, it was ascertained that the plaintiff did not reside there, but had merely taken an apartment, and that he had never slept there. On an application by the defendant to cancel the bail-bond, on the ground, that the plaintiff's true place of abode and description had been misstated in the affidavit of debt;—the Court refused to interfere, as the defendant had not sworn that he did not know who the plaintiff was, or that he was not indebted to him. *Brown* v. *Moore*, 5 Law J. C.P. 131, s. c. 4 Bing. 148.

An affidavit of debt by a bankrupt, stating that the defendant was indebted to him at the time of suing out the commission, and still was, as he verily believed, to his assignees, is insufficient, as the assignees should have joined. *Tucker* v. *Francis*, 5 Law J. C.P. 127, s. c. 4 Bing. 142.

In debt on bond by the obligee against the obligor (for the benefit of an assignee), the affidavit was made jointly by the plaintiff and the assignee, the former stating, that a certain sum was due on the bond, and that he had assigned his interest therein to the latter, and the assignee stating that the sum due on the bond remained unpaid and due to him as such assignee: Held good. *Fairman* v. *Farquharson*, 6 Law J. C.P. 49, s. c. 1 M. & P. 179.

#### (B) Before whom sworn.

By the act 12 Geo. 1, c. 19, s. 2, it is provided, that, before arrest by an inferior court, an affidavit of debt shall be made before the officer who issues the process, or his deputy: Held, that the deputy must be appointed for issuing process, and not merely for taking affidavits. *Rogers* v. *Jones*, 7 B. & C. 86.

#### (C) Form and Requisites of.

An affidavit to hold to bail on a bond, must shew that the debt is *due and payable* at the time of the arrest. *Smith* v. *Kendal*, 7 D. & R. 232.

Where an affidavit to hold to bail stated, "that the defendant is indebted to the plaintiff in the sum of 1000*l.*, upon and by virtue of a certain memorandum in writing, bearing date, &c., and signed by the defendant, whereby he promised plaintiff, that when he returned in the month of March or April, then next, he would marry her, or pay her the sum of 1000*l.*:" Held insufficient, because it did not shew mutual consideration on the part of the plaintiff, to sustain the defendant's promise. *Macpherson* v. *Lovie*, 1 Law J. K.B. 14, s. c. 1 B. & C. 118, s. c. 2 D. & R. 69.

An affidavit of debt, stating that A B, C D, E F, and G H, were indebted to the plaintiff, on a bill of exchange, (accepted in the name and firm of A B & Co.) by the four *or one of them*, is insufficient and uncertain. *Hamer* v. *Ashby*, 3 Law J. C.P. 144, s. c. 10 B. Mo. 323.

An affidavit of debt stating that the defendant is indebted to the plaintiff in a certain sum, for the difference of prices of foreign stock on certain days, is insufficient. *Poole's case*, 1 Law J. K.B. 30.

A debt, incurred in Holland, had been assigned to the plaintiff, who, in his affidavit, swore, that

*to his belief*, by the laws of Holland, he had a right to maintain an action in his own name. He had arrested the defendant. The Court refused to set aside the bail-bond. *Schuerhop* v. *Schmanuel*, 4 D. & R. 180.

A defendant may be held to bail on an affidavit, stating that the plaintiff had furnished goods to the amount of 2000*l.* to J S, for whom the defendant had undertaken to be responsible; that J S had failed, and paid a dividend of four shillings in the pound, and that 1600*l.* remained due from the defendant to the plaintiffs; although it was insisted that the damages were unliquidated, and that the defendant was only liable collaterally. *Collins* v. *Wallis*, 4 Law J. C.P. 88.

An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in 2,063*l.*, secured to the latter by an indenture made between him and the defendant, by which he covenanted to pay the plaintiff 50*l.* and the costs of executing the indenture, and the further sum of 2000*l.*, at certain times and on certain events, which have now passed, and that such sums have not as yet been paid, is sufficiently explicit and certain. *Burnard* v. *Neville*, 3 Law J. C.P. 197, s. c. 3 Bing. 126, s. c. 10 B. Mo. 475.

An affidavit of debt by the assignee of a bankrupt, that the defendant was indebted to him for goods sold by the plaintiff to the defendant, as appeared by the books of the latter, and as the assignee believed, is sufficient. *Sullivan* v. *Bristow*, 4 Law J. C.P. 190.

An affidavit to hold to bail was made before the British Consul at Cadiz, in which the plaintiff swore that the defendant was indebted to him in the sum of 100,000*l. sterling*.

The Court held, that the word *sterling* rendered the affidavit uncertain, and discharged the defendant on filing common bail. *Macquire* v. *Macherdo*, 4 Law J. K.B. 42, s. c. 4 B. & C. 886, s. c. 7 D. & R. 478, as *Pickardo* v. *Machado*.

It is not a variance to declare simply on the money counts, where the affidavit of debt states that the plaintiff accepted a bill of exchange for the honour of the defendant, and that he was obliged to pay it himself. *Brooks* v. *Clarke*, 1 Law J. K.B. 29, s. c. 2 D. & R. 148.

In an affidavit to hold to bail, it will be a sufficient statement of the cause of action, that it is for use and occupation of premises of the creditor. If the statement proceeds to say "as tenant thereof," it is no objection to it, that it do not add "to the creditor."

It is no objection to an affidavit to hold to bail, made by a third person, that such person swears positively the debtor has not made any tender in bank-notes to the creditor, although the creditor is residing in England. *Lee* v. *Sellwood*, 9 Price, 322.

An affidavit to hold to bail, which states "that G M'G is justly and truly indebted unto L S of L, in the sum of 499*l.* 10*s.*, upon and by virtue of a certain charter-party of affreightment, bearing date &c., for and on account of the hire of a certain ship or vessel called the S, let to hire by the said L S to the said G M'G, and by him taken for a certain voyage from the port of L to P," held sufficient. *Skeen* v. *M'Gregor*, 1 Law J. C.P. 77, s. c. 1 Bing. 242, s. c. 8 B. Mo. 107.

Affidavit to hold to bail on the ground that defendant was indebted to plaintiff in trust for defendant, under a deed by which the defendant had covenanted to pay "at certain times and on certain events now passed and happened:" Held sufficient. *Barnard* v. *Neville*, 3 Bing. 126.

Stating in an affidavit of debt, that the defendant is indebted to the plaintiff for principal and interest on a promissory note, without stating the purport of the note, is bad. *Jackson's bail*, 1 Law J. K.B. 16.

It is irregular, in an affidavit to hold to bail, to say that a bill of exchange *purports* to be indorsed by a party. *Lovie* v. *Longster*, 3 Law J. K.B. 55.

Where an affidavit of debt, setting out a bill of exchange, gave dates by mistake, which shewed that the bill was not actually due, the Court would not assist the plaintiff, and ordered the defendant to be discharged out of custody. *Jadis* v. *Williams*, 5 Law J. K.B. 135.

An affidavit of debt, stating that the defendant was indebted to the plaintiff on a promissory note, payable to the order of I, E, & Co. and duly indorsed to the plaintiff, is insufficient as against I, as it should have stated that the note was indorsed to the plaintiff by I, E, & Co., or by I alone, under the name of I, E, & Co. *M'Taggart* v. *Ellice*, 5 Law J. C.P. 123, s. c. 4 Bing. 114.

An affidavit of debt made for the purpose of holding a party to bail, on a promissory note: Held insufficient, in not stating that the note was due and unpaid, or that the holder was payee or indorsee. *Bill* v. *Rogers*, 12 Price, 194.

Where a defendant has undertaken to pay for goods sold to a third person, in the event of the latter not paying for them, he may be holden to bail on the common affidavit for goods sold. *Cope* v. *Joseph*, 9 Price, 155.

A defendant cannot be holden to special bail on an affidavit, stating him to be indebted to the plaintiff in a certain sum, for goods sold, unless it be also stated that they were delivered. *Lascar* v. *Morioseph*, 2 Law J. C.P. 14, s. c. 1 Bing. 357, s. c. as *Loisada* v. *Morjoseph*, 8 B. Mo. 366.

Where process is at the suit of the husband and wife, an affidavit that the defendant is indebted to the plaintiff for money had and received to the use of his wife, is insufficient. *Wade* v. *Wade*, 5 Law J. C.P. 49, s. c. 4 Bing. 50.

The affidavit to hold to bail for "money paid, laid out, and expended," need not state a request. *Jones* v. *Evans*, 1 Law J. K.B. 107.

An affidavit to hold to bail for money paid for a defendant, and advanced to him, need not contain an averment that the money was paid and advanced at the defendant's request. *Berry* v. *Fernandes*, 2 Law J. C.P. 1, s. c. 1 Bing. 338.

The affidavit to hold to bail for a sum of money, "upon account stated," should set forth a request. *Anon.* 1 Law J. K.B. 86.

So should an affidavit for "money had and received," state a request. *Carmichael* v. *Davies*, 1 Law J. K.B. 85.

An affidavit of debt, in which the plaintiff swore that the defendant was indebted to him in a certain sum, for goods sold and delivered by the plaintiff to the defendant, without adding "at his request," is sufficient, as such a request must be inferred. *Rowley* v. *Bayley*, 4 Law J. C.P. 155.

A defendant cannot be held to special bail on an affidavit, stating him to be indebted to the plaintiff in respect of a certain sale of land in the possession of the defendant. *Sykes* v. *Ross*, 2 Y. & J. 2.

An affidavit to hold to special bail, stating that the defendant was indebted to the plaintiff by virtue of certain articles of agreement, by which the latter agreed to sell, and the former agreed to purchase, certain lands, and that the defendant had been let into possession in pursuance of the agreement, is insufficient, without stating that a conveyance had been tendered to the defendant. *Young* v. *Dowlman*, 2 Y. & J. 31.

Where an arbitrator directs one of the parties to a reference to pay a sum of money "on demand," the affidavit to hold to bail, must state that a demand was made. *Driver* v. *Hood*, 6 Law J. K.B. 61, s. c. 7 B. & C. 494, s. c. 1 M. & R. 324.

Where the deponent is an illiterate person, or marksman, it should be stated in the jurat that it was read over to him in the presence of the commissioners. *Anon.* 1 Law J. K.B. 50.

An affidavit of debt by a Frenchwoman, contained in the jurat a certificate of the deputy signer of bills of Middlesex, that it was interpreted to the deponent by J C, professor of languages, (who had first sworn that he understood French and English,) and that the deponent afterwards swore to the truth of the affidavit,—was held sufficient. *Bosc* v. *Solliers*, 3 Law J. K.B. 248, s. c. 4 B. & C. 352, s. c. 6 D. & R. 514.

The words "justly and truly," before the word "indebted," are not material. In the jurat, "sworn at the King's Bench Office, Temple," is a sufficient description of place. The Court will not, upon motion, try the question as to the right to arrest, though it be stated, and not denied, that the plaintiff has executed to the defendant a letter of licence. *West* v. *Champneys*, 4 Law J. K.B. 58.

An affidavit purporting to have been sworn "at the King's Bench Office, Inner Temple, London, before Thomas Chambre," was held sufficient, although not entitled in any court, as the Court conceived themselves bound to notice that Thomas Chambre was an officer of the Court, attending at the King's Bench Office, and authorized to take affidavits. *Howell* v. *Wilkinson*, 7 B. & C. 783.

An affidavit entitled "in the common place," held sufficient. *Rolfe* v. *Brooks*, 4 Bing. 101.

An affidavit of debt, sworn before a commissioner in the country, without stating him to be a commissioner, in the jurat, is insufficient, although entitled in this Court; and the Court will not allow a supplemental affidavit, to aid the defect, to be filed. *Howard* v. *Brown*, 6 Law J. C.P. 9, s. c. 4 Bing. 303, s. c. 1 M. & P. 22.

Where a plaintiff, in the affidavit of debt, was described as Charles Edmund, and in the writ and declaration, as Charles only, the Court held, that application should have been made in the first instance, to set aside the writ, it not being in conformity with the affidavit; as, however, bail had been given in the cause, they ordered an *exoneretur* to be entered on the bail-piece. *Grindall* v. *Smith*, 6 Law J. C.P. 10, s. c. 1 M. & P. 24.

(b) OF SUPPLEMENTAL AND COUNTER AFFIDAVITS.

Where process was sued out by husband and wife, but the affidavit of debt was made by the husband alone, for money received by the defendant for the use of the wife, the Court directed the bail-bond to be cancelled, and refused to allow a supplemental affidavit. *Wade* v. *Wade*, 5 Law J. C.P. 49, s. c. (not s. P.) 4 Bing. 50.

An affidavit made and tendered by the defendant in support of a motion for his discharge on the ground of the insufficiency of the affidavit of debt stating that nothing was, in fact, due from him to the plaintiff, altogether rejected as inadmissible. *Bill* v. *Rogers*, 12 Price, 194.

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## 2. *BAIL TO THE SHERIFF.*

[See ARREST, and BARON AND FEME.]

*Semble*—If the bail do not appear to justify on the day specified in the notice, but on a subsequent day, in compliance with a further notice, and the plaintiff on the last day takes an assignment of the bail-bond, and proceeds to judgment and issues execution; the proceedings are not premature, although the rule for the allowance of bail be served on the same day; nor is the assignment waived by the plaintiff attending to oppose the justification of the bail. *Edmond* v. *Ross*, 9 Price, 5.

Where a defendant was arrested, and executed a bail-bond by the initials of his christian name only—the Court ordered the bail-bond to be delivered up to be cancelled, but without costs. *Parker* v. *Bent*, 1 Law J. K.B. 14, s. c. 2 D. & R. 73.

The defendant applied to the under-sheriff before the return of the writ, to surrender himself in discharge of his bail, which he refused to accept, without assigning any reason for so doing, and the following day he surrendered himself to the keeper of the county gaol, which was also before the return of the writ; and the bail-bond was afterwards assigned to the plaintiff: The Court ordered the proceedings to be stayed, but without costs. *Lewis* v. *Davis*, 5 B. Mo. 267.

It is an answer to an application for setting aside a writ, that the bail-bond should be delivered up to be cancelled on the ground of misnomer, to shew that the defendant is as well known by one name as the other. *Carberry* v. *Beeston*, 1 Law J. C.P. 66.

The Court will not stay proceedings on the bail-bond, on an affidavit of merits, until bail have been justified. *Mellish* v. *Mason*, 2 Law J. K.B. 76.

Where the defendant has become a bankrupt, and bail above has been perfected, the Court will not order the bail-bond given to the sheriff to be cancelled, but will leave the party to make a defence to any action that may be brought upon it. *Collins* v. *Hopwood*, 2 Law J. K.B. 24.

A man was arrested on a special original writ. He gave bail to the sheriff. On the third day after the *quarto die post* of the return, a commission of bankrupt was taken out against one of the bail. He obtained his certificate. An action was brought on the bail-bond: the Court held, that the bail had only until the *quarto die post* of the return to justify; and therefore, that the recognizance was forfeited before the commission issued; and consequently, that the debt was proveable under it, and no action could be maintained by the assignee of the bail-bond.

Goulson v. *Hammon*, 2 Law J. K.B. 114, s. c. 2 B. & C. 626, s. c. 4 D. & R. 160.

If bail have justified improperly, the Court will not interfere after the plaintiff has taken an assignment of the bail-bond, and the bail have pleaded that the defendant in the original action did appear in performance of the condition of the bond. *Brooker* v. *King*, 2 Law J. K.B. 24.

If a bond be given, that the defendant shall put in and perfect bail above, and, instead thereof, he render himself to prison, the Court will set aside all the proceedings taken on the first bond. *Warren's bail*, 2 Law J. K.B. 25.

A party, on being arrested on an attorney's bill, having entered into a bail-bond, is not entitled to have it cancelled under the 51 Geo. 3. c. 124, though the bill, by taxation, be reduced under 15*l*. *Thwaites* v. *Piper*, 4 D. & R. 194.

Where the defendant has become a bankrupt, and the bail have not applied to the Court for relief, so soon by a twelvemonth as they might have done, the Court will not stay the proceedings, even upon payment of costs. *Swayne* v. *Bland*, 2 Law J. K.B. 172, s. c. 4 D.& R. 373.

To enable bail to the sheriff to move to set aside proceedings on the bail-bond, it is not necessary that they should previously have entered an appearance to the action. *Alingham* v. *Twigg*, 1 Law J. C.P. 99.

The cancellation of a bail-bond, given by a debtor, who had been arrested at the suit of a creditor, on whose petition a commission of bankrupt had been sued out against the defendant, pending a petition presented to the Chancellor, praying to be discharged from the arrest,—was refused: the Court, however, gave the defendant two days' time, after the petition should be heard, to give notice of bail. *Wise* v. *Prowse*, 9 Price, 391.

To support a motion to stay proceedings on a bail-bond, the production of an affidavit is necessary, stating that the application is really and truly made, on behalf or in ease of the sheriff, or of the bail, and at their own expense, without collusion with, or indemnity from, the defendant. *Standen* v. *Blakie*, 13 Price, 114, s. c. M'Clel. 44.

A party having omitted to give notice of bail on the 29th of January, which was the last day for putting in bail, an assignment of the bail-bond was taken on the 30th, and the plaintiff proceeded against the bail on the bond, and served process on the defendant and his bail, to which they appeared, and pleaded *comperuit ad diem*. On motion, the Court made a rule absolute, which had been obtained by the plaintiff, calling on the defendant in the original action to shew cause why his appearance thereto should not be recorded as of the day when notice of bail being put in was served on the plaintiff's clerk in court, notwithstanding bail had been regularly put in, and notice had been given on the 30th, before the assignment of the bail-bond could have been executed in point of fact. *Allday* v. *George*, 9 Price, 406.

The taking of one surety to a bail-bond deprives the sheriff of his claim to indulgence to have an attachment set aside for not bringing in the body, even on the payment of costs. The losing of a trial in term is the loss of a term. *Rex* v. *the Sheriff of London*, 2 Law J. C.P. 259.

If there be two writs out against a party for the same cause of action, one into the county of Middlesex, and the other into the city of London, and the person upon being arrested in Middlesex give a bail-bond, and afterwards upon being arrested in the city of London give another bail-bond, the Court will not relieve him from the latter bail-bond. *Isaac* v. *Levien*, 3 Law J. K.B. 56.

Where the defendant has been misnamed in the writ, and has given a bail-bond, the Court will not set aside the proceedings, but leave him to plead his misnomer in abatement. *Homan* v. *Tidmarsh*, 4 Law J. C.P. 97.

The defendant was arrested by the name of *Stephen T. Silk*, and having executed a bail-bond in the name of *Stephen Thomas Silk*, the Court ordered the bond to be cancelled. *Lake* v. *Silk*, 4 Law J. C.P. 67, s. c. 3 Bing. 296.

Where a person is arrested in Wales, upon process issuing out of the courts at Westminster, the bail-bond must be taken in the *single* sum sworn to in the affidavit to hold to bail. *Joy* v. *Kenrick*, 4 Law J. K.B. 44.

Where a plaintiff had proceeded on an assignment of a bail-bond taken after the render of the defendant, who had put in bail, whom he had insufficiently described, so that time was necessarily given for furnishing a better description, during which interval such further description was not given, nor was any attempt afterwards made to justify,—the Court of Exchequer set aside the proceedings on the assignment of the bond, without an affidavit that the application was made *bonâ fide*, which is not required by the practice of that Court. *Richardson* v. *Hodgson*, 11 Price, 633.

Where an arbitrator has directed, that one of the parties to a reference shall pay a sum of money to the other "on demand," and that party is arrested for such sum, and held to bail upon an affidavit which does not state any demand made, the Court will order the bail-bond to be given up to be cancelled. *Driver* v. *Hood*, 6 Law J. K.B. 61, s. c. 7 B. & C. 494, s. c. 1 M. & R. 324.

The Court will not stay proceedings upon a bail-bond, upon the ground, that the affidavit upon which the bail above were rejected was founded on perjury, except upon the usual terms of paying the costs incurred by the assignment and subsequent proceedings. *Hobbs* v. *Miller*, 1 Y. & J. 403.

Where an attorney has become bail to the sheriff, and the bail-bond has been assigned, the Court will, upon the usual affidavit, stay proceedings upon the bail-bond, upon payment of costs. *Mann* v. *Nottage*, 1 Y. & J. 367.

The execution of a bail-bond before warrant by the sheriff, and the subsequent alteration of its date, so as to correspond with the date of the warrant, (although that alteration be unauthorized by the bail,) will not vitiate the bond or discharge the bail.

If two or more of several defendants plead *non est factum* as to themselves only, the other defendants suffering judgment by default, the plaintiff need only prove the execution of the instrument as to the parties who have so pleaded. *Fenner* v. *Bransby*, 5 Law J. K.B. 179.

In an action on a bail-bond at the suit of the assignee of the sheriff, a plea that the assignment of the bail-bond was not stamped before the exhibiting of the plaintiff's bill in the cause, is demurrable,

nor need issue be taken as to the time when it was stamped; and a replication, alleging that the assignment was stamped "at or before the exhibiting the bill, and concluding to the country, is good." *Carter* v. *Yates*, 2 Chit. 533.

When an action is brought on a bail-bond, the return of the writ, on which the defendant in the original action was arrested, must be stated with certainty. *Everett* v. *Tunnard*, 2 Chit. 624.

A declaration on a bail-bond stated the condition thereof to be, "to appear before his Majesty's justices at L, on &c."; but, on producing the bond, the words were, "to appear before us, on &c.": Held, no variance, because it is according to the legal effect. *Shaw* v. *Lee*, 3 Stark. 76. [Holroyd]

An action on a bail-bond must be prosecuted in the same court in which bail was given. *Chesterton* v. *Middlehurst*, 2 Ken. 369, s. c. 1 Burr. 643.

The condition of a bail-bond, set out in the record in an action thereon, appeared to be, "to answer the said plaintiff in a plea of trespass, and also to a plea to be exhibited against said defendant, for 60*l.* upon promises;" but, on producing the bond, it did not contain the words "upon promises:" Held to be a fatal variance. *Baker* v. *Newbegin*, 1 R. & M. 93. [Abbott]

An averment in a declaration, that a bail-bond was tendered for execution, is not proved by shewing that the sheriff's officer went to the defendant, and asked him to sign the bail-bond, no bond being produced, he having none with him, and his assistant only having some blank bonds in his pocket, which he always carried. *Jarmain* v. *Algar*, 1 R. & M. 348, s. c. 2 C. & P. 249. [Abbott]

In the Common Pleas, ruling the sheriff to bring in the body, is an election to proceed against him, and cannot afterwards be abandoned, so as to enable the plaintiff to proceed upon the bail-bond. *Blackford* v. *Hawkins*, 1 Law J. C.P. 22, s. c. 1 Bing. 181, s. c. 7 B. Mo. 600.

But, in the King's Bench, ruling the sheriff to bring in the body, does not compel the plaintiff to proceed afterwards, by attachment, against the sheriff. At the expiration of the rule, he may proceed upon the bail-bond. *Whittle* v. *Oldaker*, 6 Law J. K.B. 30, s. c. 7 B. & C. 478, s. c. 1 M. & R. 298.

### (B) OF THE DEPOSIT IN LIEU OF BAIL.

A defendant having deposited money in the hands of the sheriff, under 43 Geo. 3, c. 46, in lieu of bail, and the plaintiff being unable to find him, so as to serve the rule *nisi* for taking the money out of court, it was ordered that it should be served upon his agent. *Anon.* 1 Law J. C.P. 112.

Where the sum indorsed on the writ, and 10*l.* for costs, are deposited with the sheriff, in lieu of bail, under 43 Geo. 3, c. 46, s. 2, and the same are not paid into court at or before the return of the writ, as directed by that statute: the plaintiff's attornies held to be justified in ruling the sheriff and filing declaration, although they had knowledge of such deposit, and though the under-sheriff had written previous to the return of the writ, requesting to be informed of the amount of debt and costs which would be paid. *Offley* v. *Weaver*, 1 Law J. C.P. 28, s. c. 7 B. Mo. 557.

Where a friend of the defendant deposited with the sheriff, on the defendant's arrest, a sum of money, in lieu of bail, but subsequently bail was put in, and the defendant, who had become a bankrupt after the money had been deposited, surrendered in discharge: the Court held, that they were bound by the statute to order the repayment of the deposit to the defendant. *Edelsten* v. *Adams*, 8 Taunt. 557, s. c. 2 B. Mo. 610.

Defendant, on being arrested, placed in the officer's hands, in lieu of bail, a quantity of linen-drapery goods; eight days after the process was returnable, the defendant surrendered himself to prison; and ten days after the process was returnable, the officer who arrested the defendant paid into the hands of the Prothonotaries 30*l.* for the debt in the cause, and 10*l.* for the costs, those being sums which the defendant was supposed, on his arrest, to have deposited with the officer in lieu of bail, under 43 Geo. 3, c. 46. The defendant was afterwards, notwithstanding resistance on the part of the plaintiff, allowed to take his money out of court, on the ground that it had been paid in by mistake. *Hill* v. *Chinn*, 1 Law J. C.P. 4, s. c. 1 Bing. 103, s. c. 7 B. Mo. 332.

The act respecting money thus deposited is subject to the controul of the Court, unless the defendant perfects his bail strictly in time. *Anon.* 4 Law J. K.B. 52.

Where a defendant is arrested, makes a deposit in lieu of bail, under 7 & 8 Geo. 4, c. 71, s. 2, and afterwards desires to pay money into court; when he pleads to the declaration, he is entitled to make use of the money so deposited, for that purpose. *Hubbard* v. *Wilkins*, 6 Law J. K.B. 353.

### (C) RIGHTS OF THE BAIL.

Bail to the sheriff have no right to take their principal into custody, nor have bail in the Palace Court. With respect to bail above, it is otherwise. *Rex* v. *Hughes*, 3 C. & P. 373. [Tenterden]

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## 3. *OF COMMON BAIL AND COMMON APPEARANCE.*

Where two creditors, in order to hold a defendant to bail, join their debts together, and one indorses a promissory note to the other, without any consideration, to make the suit sufficient to authorize an arrest, the Court will discharge the defendant on common bail. *Wigglesworth* v. *Isherwood*, 1 Ken. 371.

The plaintiff cannot, in the second term after the service of the writ, file common bail for the defendant according to the statute, and then sign judgment against him. *Valentine* v. *Peake*, 1 Law J. K.B. 151: s. p. *Gregg* v. *Gordon*, 1 Law J. K.B. 36.

Although a plaintiff may deliver a declaration against the defendant conditionally, before the time for his appearing has expired, and file common bail for him, yet after that time, he must bring the defendant into court before he can declare. *Gregg* v. *Gordon*, 1 Law J. K.B. 36.

An irregularity in practice may be taken advantage of in the first instance, but a proceeding that is a nullity will be set aside at any time: hence, where a party entered common bail, according to the statute, before the time for pleading was out, the Court set it aside, because it was a nullity. *Anon.* 1 Law J. K.B. 156.

A widow, after her husband's decease, continued to use the initials of her husband's christian name, and accepted a bill of exchange with them; but being arrested under those initials, the Court set the bail-bond aside on her entering a common appearance. *M'Beath* v. *Chatterley*, 1 Law J. K.B. 56, s. c. 2 D. & R. 237.

The defendant having been held to bail, as the indorser of a bill of exchange, at the suit of the indorsee, the Court refused to allow the former to be discharged, on entering a common appearance on an affidavit, stating that the bill was founded and given on an usurious transaction. *Isaacs* v. *Silver*, 4 Law J. C.P. 144.

Where a defendant was arrested by the name of William Butcher, his real name being Thomas Butcher,—he was discharged on common bail, it appearing that the plaintiff knew the real name. *Anon.* 3 Law J. K.B. 128.

Where a *capias ad respondendum* was issued against the defendant into Middlesex, on an affidavit of debt filed in the Filazer's Office for that county; and the defendant being resident in Yorkshire, a second *capias* was issued into that county, founded on an office copy of the original affidavit of debt, and under which the defendant was arrested: Held, that he was entitled to be discharged on entering a common appearance, as a new affidavit of debt should have been filed with the Filazer for Yorkshire. *Dorville* v. *Whoomwell*, 3 Law J. C.P. 142, s. c. 3 Bing. 39.

Where the defendant was arrested, and executed a bail-bond by the initials of his christian name only, as the acceptor of a bill of exchange, in which his initials only appeared: the Court of King's Bench ordered the bail-bond to be delivered up to be cancelled, but without costs. *Parker* v. *Bent*, 1 Law J. K.B. 14, s. c. 2 D. & R. 73.

And where the defendant was arrested by the initials of his christian name, and executed a bail-bond in a similar manner, the Court ordered the bail-bond to be delivered up to be cancelled, and a common appearance entered. *Fahrbrodh* v. *Solliers*, 10 B. Mo. 322.

For the like reason, a defendant discharged on entering a common appearance, and undertaking to bring no action. *Taylor* v. *Rietherman*, 5 B. Mo. 264.

But it seems that if a party, having signed a bill of exchange, or other instrument, by the mere initials of his christian name, refuse to give his full name, on being required so to do, and he is afterwards arrested by such initials only, he will not be entitled to costs, or discharged on entering a common appearance. *Fahrbrodh v. Solliers*, 3 Law J. C.P. 143.

If it be manifestly clear that a party ought not to have been arrested, he will be discharged on common bail. *M'Ginnis* v. *M'Curling*, 6 D. & R. 24.

In the Court of King's Bench, a defendant has eight days from the *quarto die post* of the return of a special *capias*, to enter an appearance. *Hunter* v. *Simpson*, 2 Law J. K.B. 210, s. c. 3 B. & C. 110, s. c. 4 D. & R. 713.

A variance between the affidavit of debt and the cause of action, is no ground for discharging the defendant out of custody, on entering a common appearance, before the declaration is filed. *Naylor* v. *Eager*, 2 Y. & J. 90.



## 4. *BAIL ABOVE.*

### (A) PAYMENT OF MONEY INTO COURT, IN LIEU OF.

By statute 7 & 8 Geo. 4. c. 71, the defendant, instead of perfecting and putting in special bail, may deposit and pay into court the sum indorsed upon the writ, together with an additional sum, as a security for costs, to abide the event of the suit; or, having deposited money with the sheriff under 43 Geo. 3. c. 46, may allow the same to remain in court, together with the additional sum of 10*l.* to be paid into court as a further security for costs, to abide the event of the suit. If the plaintiff obtain judgment, he is entitled, on motion, to receive the money out of court, or if judgment be given for the defendant, it shall be repaid to him. And it is further provided by the said statute, that the defendant after making such deposit, may receive the money out of court upon perfecting special bail, or, after perfecting special bail, may make such deposit and payment and file common bail. [See 5 Law J. Stat. 123.]

Where a defendant pays money into court in lieu of bail, under the 7th and 8th Geo. 4. c. 71, the plaintiff, on obtaining judgment, is entitled to be satisfied out of that money, although the defendant has subsequently taken the benefit of the Insolvent Act in respect of the plaintiff's debt.

And *semble*, that the same rule would be applicable in case the defendant became a bankrupt.

The plaintiff's right is not affected by the circumstances of his obtaining his judgment by warrant of attorney or cognovit; the provision of the Insolvent Act 7 Geo. 4. c. 57. s. 34, and that of the Bankrupt Act, 6 Geo. 4. c. 16. s. 108, being applicable only to cases where the plaintiff proceeds by execution against the goods. *Cooper* v. *Welch*, 6 Law J. K.B. 237.

Where separate actions had been brought against two parties to a bill, and one of them had paid the amount into the hands of the Prothonotary, in pursuance of the 7 & 8 Geo. 4. c. 71, together with 20*l.* for costs, the Court allowed the defendant in the second action, to pay into court a sum for the costs in lieu of special bail. *Crace* v. *Hutchins*, 6 Law J. C.P. 121.

### (B) WHO MAY BE BAIL.

Bail will not be rejected, where the attorney has not promised to indemnify him, although he expects that the attorney will see that he comes to no harm. *Thorp's bail*, 1 Law J. K.B. 14.

Bail at the request of the defendant's attorney admissible, if not indemnified by him. *Hunt* v. *Blaquiere*, 4 Bing. 588.

A person by occupying part of a warehouse is a housekeeper, although he does not pay any taxes. *Stapleton's bail*, 1 Law J. K.B. 13.

A person who lets out lodgings, though not resident in the house, is a housekeeper, and eligible as bail. *Cohen* v. *Waterhouse*, 8 B. Mo. 365.

A person, though only a lodger, if he pays his share of rent and taxes of partnership premises, is eligible as bail. *Savage* v. *Hall*, 1 Bing. 430, s. c. 8 B. Mo. 525.

A person who lives in rooms over a stable, and pays a sum of money for them, in which the taxes are included, is a householder. *Montgomery's bail*, 2 Law J. K.B. 76.

An infant was a partner with his mother, who then contracted a debt. Before he became of age, they dissolved partnership. He became possessed of an estate on coming of age. The Court held, that he might be bail for his mother for that debt. *Bristow's bail*, 2 Law J. K.B. 24.

The Court exercise a discretionary power as to the number of bail in an action: and, in relief of a defendant, may divide the sum among more than two bail. *M'Gregor* v. ———, 5 Law J. K.B. 70.

Though an attorney's clerk cannot justify as bail, he is eligible as such for the purpose of surrendering the principal. *Hill* v. *Thompson*, 7 B. Mo. 403.

(C) Who not.

A person who will not, when he is able, pay his own debts, will be rejected if offered as bail. *Mills's bail*, 1 Law J. K.B. 13: s. p. *Earl's bail*, 1 Law J. K.B. 15.

An acknowledgment by the bail, on his examination, that he relies on the honour of the defendant's attorney, to secure him from loss, is sufficient to create an incompetency; and, after rejecting such bail, the Court will not grant further time. *Capon* v. *Dillamore*, 2 Law J. C.P. 64, s. c. 1 Bing. 428, s. c. 8 B. Mo. 516.

Bail once rejected, can never be received; and if allowed, the Court will set aside the rule for their allowance, even though their incapacity has been since removed. *Pickard* v. *Dobson*, 1 Law J. K.B. 149, s. c. 3 D. & R. 5.

Though a party be a housekeeper in Scotland, and usually rents apartments in London for six months during the year, he is ineligible as bail. *Hughes* v. *Stirling*, 11 Price, 158.

A person living in chambers in the city, cannot justify as bail, unless he pays taxes. *Lomax's bail*, 1 Law J. K.B. 16.

The drawer of a bill of exchange, who stated that he had paid the next indorser, but could not tell whether the holder was satisfied, was rejected as bail. *Wyatt's bail*, 3 Law J. K.B. 105.

The circumstance of a man being paid for becoming bail, is conclusive against his being received, whatever may be the amount of his property. *Foxall's bail*, 4 Law J. K.B. 158, s. c. 7 D. & R. 713.

The rule, that a sheriff's officer cannot be bail, is so strict that it cannot be relaxed under any circumstances; and therefore a sheriff's officer cannot justify as bail, though it be for his own father, the defendant in the action. *Hanham* v. *Meader*, 4 Law J. K.B. 300.

(D) Putting in, and excepting to.

Before the defendant had perfected his bail, the plaintiff delivered a declaration *de bene esse*, with a demand of plea, to which the defendant pleaded in abatement, and the plaintiff signed judgment. This course of proceedings was held to be regular, as the defendant should have put in and perfected his bail in time. *Saunders* v. *Owen*, 1 Law J. K.B. 59, s. c. 2 D. & R. 252.

If time be given to pay the debt, it does not follow that thereby time is given to put in bail; and if they be not put in and justified in proper time, the sheriff will be fixed. *Rex* v. *the Sheriff of Middlesex*, 1 Law J. K.B. 111.

The mere notice of an exception to bail is a nullity, it being absolutely indispensable to enter the same; and consequently, the irregularity is not waived by the defendant acting upon the notice of exception. *Thwaites* v. *Glassington*, 4 D. & R. 365.

If one person be excepted to, as bail, and another be added, the name of the former may, with leave of the Court, be struck out of the bail-piece, at any time before an action of *sci. fa.* is commenced; and after it is brought, the proceedings as against him will be staid. *Waller* v. *Green*, 1 Ken. 382.

The defendant having been arrested in Middlesex, original bail were put in there, and afterwards added bail were taken before a commissioner in Wales, and put in before the Filazer for Middlesex: held, that this was not irregular; the commissioner in Wales having full authority to act by virtue of his commission. *Moore* v. *Kenrick*, 4 Law J. C.P. 189, s. c. 3 Bing. 603.

Where bail was put in by the sheriff or bail, the attorney describing himself as the defendant's attorney, though not actually employed by him, and the defendant's own attorney afterwards carried on the subsequent proceedings: Held, that the plaintiff was bound to take notice of the proceedings of both. *Gilmour* v. *Brindley*, 7 D. & R. 259.

Bail for a party named in the proceeding for conformity, though put in without his direction, an indemnity being offered him, held good. *Cleeland* v. *Ryves*, K.B. 1 Ken. 376.

Where a party held to bail obtains time to put in bail to the action, he cannot afterwards object to the writ for irregularity. *Moore* v. *Stockwell*, 6 B. & C. 76, s. c. 9 D. & R. 124.

Where one of two defendants removes a cause from the Lord Mayor's Court, a *procedendo* will be awarded, unless bail be put in for both. *Keate* v. *Goldstein*, 6 Law J. K.B. 33, s. c. 7 B. & C. 525, s. c. 1 M. & R. 305.

A sheriff's officer who has permitted a defendant to continue at large on a promise to put in good bail, cannot afterwards put in bail for his own indemnity, and seize the person of the defendant before his time for putting in bail has expired. *Taylor* v. *Evans*, 2 Law J. C.P. 22, s. c. 1 Bing. 367, s. c. 8 B. Mo. 398.

(E) Notice of Bail and of Justification.

Where time has not been given by the Court, a continuance of notice of bail need not be served before three o'clock, according to the regulation stated in the rule of M. T. 60 Geo. 3. *Williams* v. *Taylor*, 5 B. Mo. 472.

"At Leeds" is too general a description in a notice of bail, although it may have been ascertained that they actually reside there. The Court, however, gave time to amend the notice, and make further inquiry as to the sufficiency of the bail. *Baxter's bail*, 6 B. Mo. 44.

Where the bail were called *householders*, instead of being described as *housekeepers*, the Court would not permit them to justify. *Bristol's bail*, 1 Law J. K.B. 147.

Where a party was described as living at "*Clapham*": Held, that the notice was sufficient, although his residence was in the Clapham-road. *Piesse* v. *Gibson*, 6 B. Mo. 352.

A person who had been a butler, and lived on his

wife's property, was described in the notice as a gentleman, and permitted to justify. *Lloyd's bail*, 1 Law J. K.B. 147.

It is no objection to bail, that he is described as a widower in the notice. *Rossiter's bail*, 3 Law J. C.P. 197.

The notice described a clerk in a mercantile house as "gentleman": Held a misdescription. *Moss* v. *Heavyside*, 7 D. & R. 772.

A builder described as a gentleman: Held insufficient. *Anon.* 4 Law J. C.P. 51.

It is a sufficient service of a notice on an attorney, if it be given to a woman at his chambers, and it is sworn that she is accustomed to take in papers for him. *Holloway's bail*, 3 Law J. K.B. 104.

A voluntary notice of justification by a defendant, without any previous exception by the plaintiff, will not dispense with the necessity of an exception before any proceedings be taken against the sheriff. *Rex* v. *the Sheriff of Middlesex*, 4 Law J. K.B. 207, s. c. 5 B. & C. 389, s. c. 8 D. & R. 149.

If a plaintiff, who has caused the defendant to be arrested, receive several notices of justifying bail, *all* signed by different persons, but each "as defendant's attorney," he cannot treat any one of them as a nullity, but must except to all of them, if he wishes to oppose the bail. *Buckland* v. *Brindley*, 4 Law J. K.B. 43.

In the Exchequer, notice of justification of bail must be given in the name of attornies or clerks of court. *Walker* v. *Rushbury*, 9 Price, 148.

Where a party has given three notices of justifying bail, the costs must be paid before his bail will be allowed to justify; but it is optional whether he will pay the costs, or permit the bail to attempt to justify. *Richardson's bail*, 1 Law J. K.B. 150.

Notice of justification of bail, for a day the Court does not sit, is irregular, but time granted. *Heath* v. *Harris*, 2 Law J. C.P. 65, s. c. 1 Bing. 430, s. c. 8 B. Mo. 528.

Bail not allowed to justify, unless the hour be stated in the notice of justification. *Abney's bail*, 2 Law J. C.P. 1.

There must be a notice of justification, although the bail have not been changed. *Partridge's case*, 2 Law J. K.B. 76.

A defendant who gives several notices of justification by affidavit, but each notice referring to the same bail, is not bound to pay costs in respect of former notices. *Fennell's bail*, 5 Law J. K.B. 199.

By the practice of the Court of Exchequer, the plaintiff is entitled to costs, upon the second notice of justification, if a brief be delivered to counsel to oppose the bail upon the first notice. *Barrow* v. *Whitehead*, 2 Y. & J. 2.

The names and descriptions of original bail intended to justify, or added bail to be put in and justify, must be inserted in the notice, or no rule for the allowance of the same shall be drawn up. *Reg. Gen.* 5 Law J. C.P. 51, 6 Bing. 51.

### (F) JUSTIFYING AND OPPOSING.

In general, bail once rejected can never afterwards justify. *Picard* v. *Dodson*, 1 Law J. K.B. 149, s. c. 3 D. & R. 5.

Unless the debt be very large, two persons will not be permitted to justify in the place of one bail. *Jones's bail*, 1 Law J. K.B. 15.

More than two persons will not be permitted to justify as bail in the Exchequer, unless leave is obtained from the Court. *Anon.* 13 Price, 448.

Where the defendant was arrested for 80,000*l.*, the Court allowed several recognizances to be entered into by different sets of bail, and gave four days' time to inquire into their sufficiency before they came up to justify. *Mendezabel* v. *Machardo*, 3 Law J. C.P. 205.

Where one of the bail has justified at chambers, it is necessary to obtain an order for the other to justify in open court, or he will be rejected. *Cohen's bail*, 1 Law J. K.B. 150.

Bail given in the vacation may be changed in term. *Woodhouse's bail*, 1 Law J. K.B. 13.

If, in the notice of justification of bail, one of them be misnamed, and by mistake sworn by that name, the Court will permit him to justify, on his swearing that he has sufficient property for that purpose. *Levi's bail*, 7 B. Mo. 282.

The Court permitted bail to justify, although the name of the attorney to the notice of bail was not the same as that to the proceedings in the cause. *Bisham's bail*, 1 Law J. K.B. 83.

It is no objection to the justification of bail, that the bail are put in by one clerk in court, and the notice of justification and of added bail given by another, if the latter are added by the bail to the sheriff. *Hancock* v. *Grew*, 1 Y. & J. 456.

It is sufficient if bail swear that they are worth the amount required, after payment of all their *just* debts. *Anon.* 2 Y. & J. 101.

A person who comes to justify as bail is not bound to state the particulars of his dealings; it is sufficient if he tell the nature of his property, swear to an amount that will cover double the sum, and disclose the place where it may be found. *Smith's bail*, 1 Law J. K.B. 148.

Persons becoming bail, are not bound to give minute statements of their property; it is sufficient that they describe enough to shew that they are good bail. *Dobson's bail*, 1 Law J. K.B. 83.

Bail who has asked for time to pay a small debt of his own, cannot justify. *Grey's bail*, 1 Law J. K.B. 14.

A man who is able, but unwilling, to pay his own debts, cannot justify as bail. *Earl's bail*, 1 Law J. K.B. 15: s. p. *Mills's bail*, 1 Law J. K.B. 13.

If it can be shewn that a person, who has compounded with his creditors, and paid the composition, owes any sum of money, however small, he will not be permitted to justify as bail. *Waitman's bail*, 1 Law J. K.B. 147.

One of the bail will be allowed to justify, although the other has been misdescribed. *Jones's bail*, 3 Law J. K.B. 105.

In all cases where the writ is in London or Middlesex, the defendant must justify his bail, or render within four days after exception, unless in the case after mentioned.

And in all other cases, the defendant must justify or render within four days after exception, unless the plaintiff has ruled the sheriff to bring in the body.

But in all cases where the sheriff has been ruled to bring in the body, the defendant has the same time to justify or render, as the sheriff has to bring in the body; that is to say, four days, where the writ is in London, and six days, where the writ is

in any other county, from the day of serving the rule. *Whittle* v. *Oldaker*, 6 Law J. K.B. 30, s. c. 7 B. & C. 478, s. c. 1 M. & R. 298.

If a defendant put in bail above sooner than he is bound to do, he still must perfect his bail within four days after exception; and if he fail, the plaintiff may proceed on the bail-bond. But the *sheriff* is not to be prejudiced by the defendant wasting his own time; and therefore, the rules, and the proceedings against the sheriff, must always be uniform, and without reference to the course taken by the defendant. *Bond* v. *Evans*, 4 Law J. K.B. 51, s. c. 4 B. & C. 864, s. c. 7 D. & R. 374.

After an action has been brought against the sheriff, when no bail-bond has been given, the Court will not allow him to put in and justify. *Robinson* v. *Bacchus*, 2 Law J. C.P. 3.

The Court will not prevent bail from justifying, until the costs of former oppositions have been paid, unless the three notices given were necessary, and the plaintiff might have acted upon them. *Clarke's bail*, 2 Law J. K.B. 149.

The time for justification of bail expired on the 7th, and time was given till the 9th of February to add and justify other bail; and on that day the defendant was rendered, and notice thereof given: Held, that the sheriff was liable to be attached on the 10th, if the plaintiff had lost a trial for the Sittings after term. *Rex* v. *the Sheriff of Middlesex*, 8 D. & R. 137.

Unless bail are in attendance, and their counsel instructed by half-past ten o'clock, they will not be permitted to justify. *Reg. Gen. Exchequer*, 9 Price, 57.

Where bail came after *ten* o'clock, the Court permitted them to justify conditionally, provided the attorney had not instructed counsel to oppose them. *Atkinson's bail*, 1 Law J. K.B. 84.

Further time to justify bail will only be granted when the cause creating the incapacity to justify is of an unexpected kind. *Wells's bail*, 2 Law J. C.P. 19, s. c. 1 Bing. 359, s. c. 8 B. Mo. 378.

Time will be given for putting in and justifying bail, where a serious question of doubt is raised, whether the defendant was properly held to bail. *Cope* v. *Joseph*, 9 Price, 155.

Time to justify and add a new bail can only be obtained where he is prevented from justifying by an act of God. Therefore, where, on the morning of justification, the defendant ascertained that one of his bail had been recently discharged under the Insolvent Act, the Court refused to give time to justify and add another bail. *Watson's bail*, 8 B. Mo. 208.

If there be strong grounds for the absence of bail, time will be granted to justify, although he is opposed. *Levis's bail*, 1 Law J. K.B. 15.

It is not a sufficient reason, to obtain time to justify a bail, that he has not come in consequence of threats of the opposite attorney, unless he is not opposed. *Wells's bail*, 1 Law J. K.B. 15.

Where it appeared that the bail had become insolvent after his name had been put on the bail-piece, the Court allowed time to add and justify another bail. *Seal's bail*, 1 Law J. K.B. 83.

Where one of the bail could not, from extreme illness, attend to justify, the Court granted time, without requiring an affidavit of merits. *Apelgarth's bail*, 1 Law J. K.B. 84.

The Court will not give leave to add and justify another bail, merely because the bail had been obliged to go from London on particular business. *Smith's bail*, 2 Law J. K.B. 149.

Where bail are of such a desperate description as ought not to have been proposed to the Court, they will not grant time to add new bail. *Anon.* 8 Price, 8.

Where the time allowed for justifying bail in several causes expired on a *dies non*, the Court permitted them to justify on the following day; and ordered that the rule for serving the notice before three o'clock might be dispensed with, in order to prevent the issuing of attachments. *Pratt* v. *Oddy*, 3 Law J. C.P. 79, s. c. 2 Bing. 440.

If a bail is not in attendance, the Judge will grant time, on condition that an affidavit is produced to him at chambers, giving a satisfactory reason for his absence. *Bond's bail*, 3 Law J. K.B. 105.

The christian name of one of the bail being incorrect, the Court granted time to justify, on producing an affidavit of merits at chambers. *Want's bail*, 2 Law J. K.B. 76.

The Court of Exchequer will now give time to justify bail at chambers. *Bell* v. *Horton*, 11 Price, 741.

Where a Judge, sitting in the bail-court, gives time for justifying the bail, on producing an affidavit of merits, that affidavit must be produced to the clerk of the rules before he will draw up the rule. *Cotterell's bail*, 2 Law J. K.B. 25.

An affidavit of the justification of bail is properly sworn before a commissioner for the purpose of taking bail. *Anon.* 2 Y. & J. 101.

Where bail justify by affidavit, if the jurat does not state each of their names, they will be rejected. *Wellings* v. *Marsh*, 11 Price, 509.

An affidavit to justify as bail, stating that they were worth a certain sum, "exclusive of all debts due from them to any other persons whatsoever," is not sufficiently explicit. *Hiron's bail*, 1 Law J. C.P. 51.

Where the justification of bail is by affidavit, and is opposed by another affidavit, alleging that one of the bail is insolvent, the Court will not permit the matters of the latter affidavit to be answered by a counter-deposition. *Alpin* v. *Fox*, 5 B. Mo. 482.

The Court would not give time to correct informalities in the jurat, although occasioned by the error of the commissioner in the country, without an affidavit of merits. *Burford* v. *Holloway*, 1 Law J. K.B. 83, s. c. 2 D. & R. 362.

Where the attorney, before whom an affidavit of justification was sworn, had omitted the word *commissioner* after his name, the Court granted time to justify the bail. *Osborne's bail*, 1 Law J. K.B 83.

Where the name of the parish in the recognizance, and that in the affidavit of justification, were different, the Court granted time to justify the bail. *Scott's bail*, 2 Law J. K.B. 75.

Where time was applied for to send an affidavit of justification into the country, to amend a mistake in the jurat, the Court made the attorney pay the costs of the application. *Shillitoe's bail*, 9 D. & R. 6.

Bail being rejected, time was given for new bail, on condition that the plaintiff's situation should not be altered thereby. In the meantime, the plaintiff demanded a plea: Held, that the justification of bail

was not thereby waived. *Rex* v. *the Sheriff of Middlesex*, 4 D. & R. 834.

(G) ALLOWANCE OF.

Although bail justify at chambers by consent, yet it is necessary to serve the party with the rule for the allowance of the bail. *Bignold* v. *Lee*, 1 Law J. K.B. 85, s. c. 1 B. & C. 285, s. c. 2 D. & R. 436.

The Court refused to discharge the rule for the allowance of bail, on the ground of perjury in one of them, but left the party to his remedy by indictment. *Shee* v. *Abbott*, 5 B. Mo. 321, s. c. 2 B. & B. 619.

Rule for allowance of bail discharged, because the bail had received money from the defendant. *Jones's bail*, 1 Law J. K.B. 16.

A person had been rejected as bail; he afterwards justified in another cause; upon a motion to set aside the rule for the allowance of bail, the Court made the rule absolute, with costs, saying, that bail once rejected could never afterwards justify. *Picard* v. *Dodson*, 1 Law J. K.B. 149, s. c. 3 D. & R. 5.

Where it appeared that bail who had justified, had been paid for his trouble and loss of time, the Court refused to set aside the allowance; but compelled the defendant to produce an affidavit of merits, and bring the sum sworn to into court, and take short notice of trial. *Wyllie* v. *Jones*, 2 D. & R. 253.

After the rule for the allowance of bail has been drawn up, the Court will not set it aside on an affidavit disclosing perjury committed by the bail at the time of justifying, although the application is made promptly. *Stockham* v. *French*, 2 Law J. C.P. 19, s. c. 1 Bing. 365, s. c. 8 B. Mo. 381.

If an infant is not opposed, and therefore justifies as bail, the Court will not set aside the rule for the allowance of bail, on a suggestion of fraud, and because the plaintiff's attorney thought that it was his uncle, of the same name, who was about to become bail. *Evans's bail*, 2 Law J. K.B. 24.

The Court will not entertain a motion to set aside a rule for the allowance of bail, on the ground of one of the bail having given a false account of himself and his property, unless the application be made forthwith; upon very strong grounds; and upon some clear tangible fact, which admits of unequivocal proof on the one hand, or contradiction on the other. *Anon.* 5 Law J. K.B. 16.

(H) OF THE RECOGNIZANCE AND BAIL-PIECE.

Where five defendants were named in the affidavit to hold to bail, and distinct bailable process was issued against one, and a bail-piece taken, in which he alone was named, and afterwards serviceable process was issued against the other four, who were not named in the bailable process, but the declaration was against all five—The Court allowed the plaintiff to amend the bail recognizance, by inserting the names of the four defendants who had been at first omitted. *Christie* v. *Walker*, 1 Law J. C.P. 65, s. c. 1 Bing. 206.

Although the description of the bail, in the bail-piece, be so general as to induce the Court to allow the opposition, it would not be sufficient to entitle the plaintiff to costs, since the Court will save that point until the bail justify. *Richardson* v. *Hodgson*, 11 Price, 379.

(I) RIGHTS OF BAIL AGAINST THEIR PRINCIPAL.

A witness who has absconded from his bail may be retaken by the bail in court, although he is attending to give evidence in a court of justice. *Horn* v. *Swinford*, 1 D. & R. N.P.C. 20.

A witness attending to give evidence in a court may, on his return from giving evidence, be taken by his bail for the purpose of being surrendered. *Ex parte Lyne*, 3 Stark. 132: s. P. *Horn* v. *Swinford*, 1 D. & R. N.P.C. 20.

If a person takes a journey to become bail for another, he cannot maintain an action against such person for his trouble or loss of time in such journey. *Reason* v. *Wirdnam*, 1 C. & P. 434. [Park]

*Semble*,—that where bail pay the amount for which they become answerable, each advancing his share, they may maintain a joint action against their principal for the entire sum. *May* v. *May*, 1 C. & P. 44. [Burrough]

*Semble*,—that if the principal make default, and his bail are in danger of forfeiting the amount of their recognizance, they may enter into a fair arrangement to save their recognizance, and recover over against their principal in damages: provided the arrangement be not injurious to the principal; and provided, in amount, it exceed not the penalty of the recognizance, or the sum they would be called upon to pay, in case they had made no arrangement. *Morrison* v. *Graham*, 5 Law J. K.B. 254.

(K) LIABILITY OF.

An agreement for staying proceedings against bail, and giving time to a defendant to surrender in their discharge, entered into by the plaintiff's attorney, at the request of the defendant, and attornies, who represented themselves as employed by the bail, as well as by the defendant, though subsequently confirmed by the bail agreeing that their liability should continue: Held not to authorize proceedings against the bail (the defendant not having surrendered), on the ground, that their liability under their recognizances having ceased, by time having been given to the defendant without their actual concurrence in the first instance, the ratification of such agreement could not revive that liability, the fact of their responsibility as bail having ceased, not being known to them at the time of such ratification. *West* v. *Ashdown*, 1 Law 7. C.P. 26, s. c. 1 Bing. 164, s. c. 7 B. Mo. 566.

The prevarication of bail, as to his circumstances, is a ground for sending him to Newgate. *Wilson* v. *Bodkin*, 8 D. & R. 41.

In the Common Pleas, it seems, that if either of the writs are bailable, all the defendants should be named in the *ac etiam* clause of the bailable writ, in order to fix the bail.

Where an action is brought against more than four defendants, and two writs are sued out, it is unnecessary to name all the defendants in each writ, except with a view of fixing bail. *Christie* v. *Walker*, 1 Bing. 48, s. c. 7 B. Mo. 362.

(L) PROCEEDINGS AGAINST BAIL.

In all actions against bail, the affidavits must be entitled in the action against them, and not in the original action. *Ham, assignee &c.* v. *Philcox*, 1 Law J. C.P. 21, s. c. 1 Bing. 142, s. c. 7 B. Mo. 521.

[illegible]

## VI. Reversing and entering an Exoneretur.

A defendant may be surrendered at any time before the rise of actual business. *Rex* v. *the Sheriff of* [illegible], 2 Law J. C.P. 64, s. c. 1 Bing. 423.

A defective notice of render may be cured by the consent of the plaintiff's attorney, at the time of the service of that notice. *Williams* v. *Gooch*, 4 Law [illegible] 32.

An attachment shall not stand as a security against the sheriff, unless the plaintiff has lost a trial *within* the term, but where the defendant has been rendered before the last day of term. *Rex* v. *Sheriff of Middlesex*, [illegible] 3 [illegible].

When a defendant has surrendered in discharge of his bail, in the vacation subsequent to the term, in which judgment was signed, that term is considered as one of the two terms within which the plaintiff must charge him in execution. *Niel* v. [illegible], [illegible] s. c. 3 B. Mo. 8.

A defendant will not be to remove proceedings into a superior court, so as the bail below may surrender the defendant, who is in the custody of the [illegible]. *Harrison* v. *Zane*, 2 D. & R. 177.

A [illegible] in the bail court had given the plaintiff time to inquire whether the bail, whose last day of justifying was on a Saturday, were worth the property they represented themselves to be worth. [illegible] they were expected; and, although they [illegible] not appeared, yet an attachment granted [illegible] before notice of the render, was held to be [illegible], but under the circumstances, the [illegible] of costs. *Rex* v. *the Sheriff* [illegible], 1 Law J. K.B. 55, s. c. 2 D. & R. [illegible].

A sheriff's officer had arrested A, and taken [illegible] with a promise to pay the [illegible] a week was due at a future day, and [illegible] to go at large, without taking a bond, and without the previous consent of the [illegible]. That he could not, under these circumstances, be surrendered in discharge of his bail, and the Court refused to set aside an attachment which had issued against the sheriff for not returning the writ, nor would they relieve him, by [illegible] bail. *Collins* v. [illegible], 2 [illegible].

When the defendant is in criminal custody, the Court will [illegible] the time for the bail to surrender him in their discharge. *Everett* v. *Thurtell*, 2 Law J. C.P. 93.

The Court will not enlarge the time for bail to surrender their principal, on the ground that he was so [illegible] that he could not be removed without endangering his life. *Warrington* v. *Sammell*, 3 Law J. C.P. 100.

The Court will enlarge the time for the bail to surrender their principal, if he be confined in the county gaol under sentence of the Court of King's Bench. *Roach* v. *Boucher*, 8 Price, 104.

The Court enlarged the time for bail to surrender their principal, till a week after the expiration of the term of his imprisonment in the county gaol of D, under conviction and sentence for a misdemeanor. *Ashmore* v. *Fletcher*, 13 Price, 523, s. c. M'Clel. 252.

A writ of error had been brought from a judgment in the Common Pleas to the Court of King's

Bench, and the judgment affirmed there: the defendant subsequently appealed to the House of Lords, and, pending the appeal, surrendered in discharge of his bail in the Court of King's Bench; after such surrender, application was made to the Court of Common Pleas for permission to enter an *exoneretur* on the bail-piece: Held, that the application was properly made to the Court of Common Pleas; and that, as the principal was in the custody of the marshal, a performance of the terms of the recognizance was impossible. *Sherratt* v. *Floyer*, 2 Law J. C.P. 106, s. c. 2 Bing. 18, s. c. 9 B. Mo. 65.

A defendant was rendered in time, but no notice of it was given to the plaintiff's attorney, who proceeded against the bail, and executed an execution on the goods of one of them: the Court set aside the execution, and ordered an *exoneretur* to be entered on the bail-piece, on payment of costs. *Thorne* v. *Hutchinson*, 2 Law J. K.B. 211, s. c. 3 B. & C. 112, s. c. 4 D. & R. 712.

The Court directed an *exoneretur* to be entered on the bail-piece, although the defendant had become a bankrupt, and had not taken advantage of his certificate, to plead *it puis darrein continuance*, but had allowed a judgment to pass against him. *Todd* v. *Maxfield*, 2 Law J. K.B. 222, s. c. 3 B. & C. 222, s. c. 5 D. & R. 258.

The Court of Common Pleas have no jurisdiction to remove a party in criminal custody, for the purpose of charging him in execution, and then to commit him again for the criminal matter: hence, not charging the defendant in criminal custody, in execution, within two terms, is not laches to entitle him to be discharged. *Freeman* v. *Weston*, 1 Law J. C.P. 72, s. c. 1 Bing. 221, s. c. 8 B. Mo. 81.

If an action be brought in the Court of Exchequer against bail upon their recognizance of bail entered into in the Court of King's Bench, they must render their principal as if the recognizance had been taken in the former court. The bail have only four days to render their principal by the practice of that court, after the return of the writ, although there be not so many days remaining in the term. *Dibbins* v. *Taylor*, 1 Y. & J. 15.

Where a bankrupt was about to be taken in execution, the Court would not, upon an affidavit which omitted to state where the commission was sued out, or where the commissioners resided, enlarge till a month after his final examination, the time for the bail's surrendering him. *Shaw* v. *Cash*, 4 Bing. 80.

### (N) DISCHARGE OF, BY OTHER MEANS THAN RENDER.

Where the principal had become a bankrupt, and, on the day that his certificate was allowed, his bail were fixed, but before the rising of the Court, an *exoneretur* was entered on the bail-piece, on payment of costs. *Lindsey's bail*, 1 Law J. K.B. 84.

The Court will order an *exoneretur* to be entered on the bail-piece, where a bankrupt has obtained his certificate before the rising of the Court, on the day when the second *sci. fa.* against the bail was returnable. *Johnson* v. *Lindsay*, 1 B. & C. 247, s. c. 2 D. & R. 385.

The Court will not enter an *exoneretur* on the bail-piece, on the ground that the defendant has obtained his certificate in Ireland, but will direct an issue, to try under what circumstances the original debt was contracted. *Bamfield* v. *Anderson*, 5 B. Mo. 331.

The bankrupt obtaining his certificate after the bail are fixed, will not exonerate them. *Woolley* v. *Cobbe*, 1 Ken. 504, s. c. 1 Burr. 244.

Where a defendant put in bail and pleaded in abatement, but afterwards, exception having been taken to the bail, gave notice of adding and justifying fresh bail, and subsequently rendered in due time: Held, that the render was equivalent to a justification of the bail, and that the plea was well pleaded. *Cassen* v. *Bond*, 2 Y. & J. 531.

### 5. *BAIL BY HABEAS CORPUS.*

The writ and return to a *habeas corpus* must be annexed to the bail-piece, before the bail can justify. *Young's bail*, 1 Law J. K.B. 13.

The general rule is not to allow time for justification of bail upon *habeas corpus*; and this rule will not be relaxed in any case except that of the sudden illness of the bail. *Archer's bail*, 5 Law J. K.B. 63.

Time allowed to add and justify bail by *habeas corpus*, where one of the bail of whom notice had been given was taken suddenly ill. *Gilbank's bail*, 9 D. & R. 6.

But although one of the bail by *habeas corpus* was prevented by illness from attending to justify, time to add and justify another was refused. *Small's bail*, 1 Law J. K.B. 148.

If there is any mistake in the notice of justifying bail by *habeas corpus*, the Court will not grant any time. *Thomason's bail*, 1 Law J. K.B. 148.

Where it appeared that the absence of the bail had arisen from mistake, and that a very important question was to be tried in a cause, the Court granted time to justify bail by *habeas corpus*. *Harborow's bail*, 1 Law J. K.B. 148.

In the Palace Court, one of the King's yeomen of the guard had been arrested, and by *habeas corpus cum causâ* he removed the cause into the Court of King's Bench, and put in and perfected bail upon the *habeas*: Held, that, even supposing the defendant was privileged from arrest, the bail could not be exonerated. *Sard* v. *Forest*, 1 Law J. K.B. 31, s. c. 1 B. & C. 139, s. c. 2 D. & R. 250.

Where it appeared that the affidavit of justification was not in court, but that it was in London, the Judge gave leave to produce it at chambers, although the bail justified under a *habeas corpus*. *Poole's bail*, 2 Law J. K.B. 75.

### 6. *ON AN ATTACHMENT.*

The Court admitted a party to bail, in custody upon an attachment, although the notice of bail was defective in form. *Anon*, 4 D. & R. 393.

### 7. *BAIL IN NE EXEAT REGNO.*

A court of equity, with regard to bail on writs of *ne exeat regno*, proceed by analogy to the proceedings at law. *Pannell* v. *Taylor*, 1 Turner, 103.

### 8. *IN THE ADMIRALTY COURT.*

Bail must be given in the case of a real *bonâ fide* appeal. *Woodbridge*, 1 Hag. 77.

A Greenland trader ran down a Leith smack, and sunk her. The owners of the trader, being very desirous that their ship should proceed with the least possible delay on her fishing voyage, proffered bail to meet an action entered against them by the owners of the smack.

In the undertaking to lead the bail, the engagement was thus expressed—"To meet an action, &c. against the ship (Dundee), tackle, apparel, furniture, and appurtenances."

When the action was tried, the owners of the Dundee contended, that the fishing stores on board her, at the time of the accident, ought not to be made liable; and that the introduction of the word "appurtenances," into the undertaking, was purely accidental.

But the Court held, that the stores were liable under the term "appurtenances," and that its introduction into the undertaking was not casual, for that it was a strict and legal term, and had been recited in the act of 53 Geo. 3, which diminished the responsibility of owners of ships that occasion damages to other vessels. *Dundee*, 1 Hag. 109.

A bail-bond given to the amount of the share of a part-owner of a ship, for the safe return thereof, contemplates only the safe return of the ship, or the payment of the stipulated sum; and the Court will look only to that object, and will not move beyond those limits. *Apollo*, 1 Hag. 312.

Possession of a ship decreed upon bail, in a dispute between the original owner and the purchaser upon a sale by the master abroad. *Partridge*, 1 Hag. 81.

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### 9. *IN CRIMINAL PROCEEDINGS.*

[See 7 Geo. 4. c. 64—4 Law J. Stat. 92.]

The Court will not listen to a motion for admitting a person to find bail on a charge of felony, if the affidavits have been sworn before a magistrate instead of a commissioner of the Court of King's Bench. *Rex* v. *Sweets*, 2 Law J. K.B. 77.

A prisoner, on the charge of rape, was admitted to bail, where affidavits were procured that the prosecutrix was a girl of bad character, and the prosecution only commenced to extort money. *Rex* v. *Booth*, 2 Ken. 172.

The Court will not require a defendant indicted for a misdemeanour, to pay the costs of giving several notices of bail, before they allow the bail to justify. *Rex* v. *Edward Clifford*, 2 Law J. K.B. 210.

A defendant removed an indictment from the quarter sessions, and gave bail pursuant to 5 & 6 W. & M. c. 11; he was found guilty, but died before the day in banc. The Court held, that the bail were liable for the costs. *Rex* v. *Turner*, 2 Law J. K.B. 222, s. c. 3 B. & C. 160, s. c. 4 D. & R. 816, s. c. 1 R. & M. 49.

In cases of felony, there must be four bail, unless all the parties are before the Court, so that they can judge as to the respectability of two. *Rex* v. *Shaw*, 6 D. & R. 154.

A prisoner, committed for manslaughter, was allowed to put in bail before a country justice, by reason of his poverty, which rendered him unable to appear with bail in court. *Rex* v. *Massey*, 6 M. & S. 108.

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## BAILMENT.

A person let a room in his house at two shillings a week, for the purpose of goods being deposited in it. The room was broken open, and the goods stolen by some one belonging to the family. The Court held, that he was not a bailee of the goods, and, consequently, not answerable for the loss. *Peers* v. *Sampson*, 2 Law J. K.B. 212, s. c. 4 D. & R. 636.

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## BANKER.

[See ACCOUNT, APPROPRIATION, DEBTOR AND CREDITOR, and BANKRUPT; and 7 Geo. 4. c. 46.]

A banker is bound to know the handwriting of those who draw on him, as far as regards paying bills so drawn, but not when discounting a bill; therefore, where a banker discounted a bill forged on a party who banked with him, the Court held, that he might maintain an action for money paid against the indorser. *Fuller* v. *Smith*, 1 C. & P. 117, s. c. 1 R. & M. 49. [Abbott]

The risk of forgery, as to cheques upon bankers, must be borne by them; and a banker cannot charge his customer with the amount of a cheque which has been properly drawn and signed by the customer for one particular sum, and which, in its passage, has been feloniously altered to a larger, and, on that larger sum, paid by the banker. *Hall* v. *Fuller*, 4 Law J. K.B. 297, s. c. 5 B. & C. 750, s. c. 8 D. & R. 464.

The plaintiff gave to his wife certain cheques, signed by him in blank, to be filled up by her as occasion required. One of these cheques she caused to be filled up by her husband's clerk for 50*l.* 2*s.* 3*d.*; but the clerk so placed the words and figures in the cheque, that, when it was delivered to him again by the plaintiff's wife for the purpose of receiving the amount, he interposed "*three hundred*," and received from the bankers 350*l.* 2*s.* 3*d.*: Held, that the plaintiff was guilty of negligence, and that, consequently, the bankers, who could have no means of detecting the fraud, were not liable to repay to the plaintiff the sum so fraudulently obtained. *Young* v. *Grote*, 5 Law J. C.P. 165, s. c. 4 Bing. 253.

Where a banker has advanced money to the testator, by discounting his note for 1000*l.*, renewable at the end of three months, and debiting the testator with the discount, he cannot, in an action brought by the executors, set off such note before it is due, upon allowing a rebate of interest; but he may write off a bill, accepted by testator, payable at his banking-house, and discounted by him, although the testator died before the bill became due, the banker not having received intelligence of the testator's death until the day the bill became due, and after he had so written it off. *Rogerson* v. *Ladbroke*, 1 Law J. C.P. 6, s. c. 1 Bing. 93, s. c. 7 B. Mo. 412.

A creditor of one partner in a bank cannot draw on the firm for a debt due to him, without making himself liable to the firm for money advanced to him. *Stoveld* v. *Upperton*, 1 Law J. K.B. 6.

An account was kept at the Lancaster Bank. The bankers (now bankrupts) had entered certain bills of exchange received from the plaintiffs as bills,

and had not paid them away. The account of the plaintiffs was not overdrawn.

It was the custom of the bankers in Lancaster to require an indorsement, or an equivalent for it, to all bills of exchange received by them, and they were accustomed to pay out those bills again, whether that particular customer's account was overdrawn or not: The Court held, that such a custom was most unreasonable, and that bankers had not any right to pay away bills of exchange indorsed and left with them, unless the account of that customer was overdrawn; and, consequently, that the plaintiffs could recover these bills from the assignees of the bankrupts. *Thompson* v. *Giles*, 2 Law J. K.B. 48, s. c. 2 B. & C. 422, s. c. 3 D. & R. 733.

The firm of a country bank gave a bond to their corresponding London bankers, conditioned for the repayment of all sums of money, &c. which the latter persons might advance to them, or any of them, associated or not with other persons.

On the death of one of the country bankers, there was a large balance due to the London ones. In the following month large sums were remitted to the London bankers, who continued to pay them away, and they were respectively placed to the old account; but no monthly statement was sent into the country. At the end of the second month, two accounts were sent from London: the old one, up to the death of the partner, and a new one, which included all the remittances since his death, taken from the old account.

If the remittances had remained in the old account, then nothing was due on it; but if the London bankers could alter their books, then the defendants were liable for the balance in the old account: The Court held, that inasmuch as no communication had taken place, the first entries made by the London bankers were not an appropriation of the money, and that they were entitled to put it to the new account. *Simson* v. *Ingham*, 1 Law J. K.B. 234, s. c. 2 B. & C. 65, s. c. 3 D. & R. 249.

The testimony of a banker's clerk, as to an alteration made in a customer's pass-book, is evidence against the banker. *Price* v. *Marsh*, 1 C. & P. 60. [Burrough]

A person having lost his pocket-book, containing a bill of exchange for 300*l.*, inserted an advertisement in the newspapers, stating that his pocket-book had been stolen, containing papers of no use to any person but the owner, and offering a trifling reward for its recovery. The bill was, six days afterwards, presented at a country bank, by a person who said that he was the son of one of the indorsers, and it was accordingly cashed: Held, that it was properly left to the jury to say—1st, whether the plaintiff had done all he ought with respect to giving notice as to the loss of the bill; and, 2dly, whether the defendant had used due caution in receiving it; and the jury having found that the plaintiff had not given due notice, and returned a verdict for the defendant,—the Court refused to disturb it. *Beckwith* v. *Corrall*, 4 Law J. C.P. 139, s. c. 3 Bing. 444, s. c. 2 C. & P. 261.

A and two other persons carried on business as bankers; at the time of A's death the balance due from S to the bank was upwards of 14,000*l.*, more than which sum he paid in within a few months afterwards, but drew out, during the same period, a larger sum; and these subsequent dealings wer continued in the same account with the preceding dealings: Held, that the balance due from S at A's death, was to be considered as discharged by the payments subsequently made by S to the bank. *Pemberton* v. *Oakes*, 6 Law J. Chanc. 35.

A country banker, who receives the notes of another bank to obtain payment for them in the ordinary course, is not justified in parting with the possession of them without actual payment, even though he shew it to be the practice to do so, by one banker sending the notes of another to himself in a parcel, and waiting the return of the post for the amount in cash, or in account between the two. *Gillard* v. *Wyse*, 4 Law J. K.B. 88, s. c. 5 B. & C. 134, s. c. 7 D. & R. 523.

In 1823, T C drew upon the defendant two bills of exchange, which he afterwards indorsed and paid in generally to his account with the plaintiffs, his bankers, who *credited* him for their amount. The bills being dishonoured, the plaintiffs debited them in the account of T C; and the latter subsequently paid in (generally on account) various sums, more than sufficient to balance all items in the account to the time of the return of the bills. The defendant paid the amount of the bills to T C, but did not require them to be given up to him.

In 1826, T C became bankrupt, at which time a large sum was due from him to the plaintiffs, for which they proved, but took no notice, or made no exhibit, of the defendant's acceptances; neither did they make any demand on the defendant in respect of them, until twelve months after the date of T C's commission, when they sued him for their amount: Held, that they were not entitled to recover, having treated the bills as paid. *Field* v. *Carr*, 6 Law J. C.P. 203, s. c. 5 Bing. 13, s. c. 2 M. & P. 46.

Where bankers employed to receive dividends in the funds, had in their own books credited their employers with the dividends as received, and had allowed them to draw without having any other funds in their hands: Held, that the bankers were bound by the entries so acted on, though not communicated, and that they could not set up as a defence, that the entries had been fraudulently made by one of the partners, the money never having been received by the house. *Hume* v. *Bolland*, 1 R. & M. 371. [Best]

The term "acceptance" in a banker's deposit note does not render it necessary for the holder to leave such note with the banker for acceptance. *Sutton* v. *Toomer*, 6 Law J. K.B. 49, s. c. 1 M. & R. 125.

The holder of banker's notes is bound to present them for payment, and give notice in the ordinary course, though the banker has stopped payment, and is notoriously insolvent.

And it is no excuse for the want of presentment and notice, that the banker had stopped payment at the time when the holder received the notes; the payer and receiver of the notes being then ignorant of that fact.

But it may be otherwise, if a person fraudulently pay such notes, with the knowledge, at the time, that the banker has stopped payment. *Camidge* v. *Allenby*, 5 Law J. K.B. 95, s. c. 6 B. & C. 373.

## BANK OF ENGLAND.

It is the duty of the Governor and Company of the Bank of England to prevent the entry of a transfer of stock standing in their books, until they are satisfied that the person claiming to make such transfer is duly authorized to do so; and, therefore, where, under a forged power of attorney, stock is illegally transferred, such stock in law continues the property of the stockholder whose stock is so illegally transferred, and it is the bank, and not such stockholder or the new proprietor of such stock, who is to suffer by such transfer; the original stockholder being entitled, at the expense of the bank, to a replacement of his stock and the dividends thereon. Misprision of felony being a misdemeanor, and punishable not by any forfeiture, but by fine and imprisonment; the mere concealment of the existence of such forgery by the stockholder, in the absence of proof of assent to, or adoption of, such forgery on his part, will not operate to divest the right of action of such stockholder, which vested immediately on such illegal transfer being permitted. *Davis* v. *the Bank of England*, 3 Law J. C.P. 4, s. c. 2 Bing. 393.

In an action on the case, charging a breach of duty, every fact which contributes towards shewing the duty must be expressly stated; and the omission of any one fact in the statement cannot be aided by verdict.

Accordingly, in an action against the Bank of England, for not paying dividends on stock, it is necessary to state, among other facts, that they actually received the amount of the dividends from government; and a count omitting to state that fact was held to be defective, even after verdict. *Bank of England* v. *Davis*, 4 Law J. K.B. 145, s. c. 5 B. & C. 185, s. c. 7 D. & R. 828.

Where bank stock was specifically bequeathed, —it was holden, that in the absence of the legatee's dissent, the bank were bound to transfer it to the executor; because, until the executor consents, the legatee is not entitled to the legacy. The bank having refused to make such transfer, a decree was made with costs against them. *Franklin* v. *Bank of England*, 4 Law J. Chanc. 214, s. c. 1 Russ. 575.

An action lies against the Bank of England for unreasonable delay in the passing of a power of attorney to transfer stock. *Sutton* v. *the Bank of England*, 1 C. & P. 194, s. c. 1 R. & M. 52.

## BANK NOTES.

Whether a lost Bank of England note has been transferred fairly and *bonâ fide*, in the ordinary course of business, is a question for the jury. *Egan* v. *Threlfall*, 5 D. & R. 326.

Where a Bank of England note for £500 was lost in London, among others, in September 1824, by a servant of bankers there, and they immediately advertised its loss, and in April following, the note was presented for change by a stranger, at a country bank in Lincolnshire, and the clerk changed it for smaller notes of such bank, without asking any questions of the holder, as to how he became possessed of it: Held, in an action of trover by the London bankers, that it was properly left to the jury to say, whether they had used due diligence in advertising the lost notes, and giving intelligence of the robbery; and whether the clerk of the country bankers had exercised due caution in changing a note of such value for a stranger, without first making some inquiry into the manner in which he became possessed of it;—and the jury having found a verdict for the plaintiffs, on the ground that there had been a want of due caution on the part of the defendants, the Court refused to disturb it. *Snow* v. *Peacock*, 4 Law J. C.P. 120, s. c. 3 Bing. 406, s. c. 2 C. & P. 215.

Where, on Friday at 1 o'clock, a servant took country bank notes in payment for goods, and did not give them to his master until 3 o'clock on Saturday, and the bank stopped payment at 4 o'clock, —it was holden, that the master had not been guilty of laches, in not presenting the notes before the bank stopped. *James* v. *Holditch*, 8 D. & R. 40.

A person receiving a stolen bank note, without a knowledge of the larceny, is entitled to maintain trover against a cashier of the bank, who refuses to pay it, and retains the note at the request of the party robbed. *Miller* v. *Race*, 2 Ken. 189, s. c. 1 Burr. 452.

## BANK STOCK.

The dividends of the moiety of a residuary fund, invested in bank annuities in the name of executors, being given to A, during his life, he assigns his right and title to them to B, upon certain trusts, of which the first is to secure an annuity granted by him to B; but no notice of this charge is given to the executors; A subsequently, for valuable consideration, assigns the dividends to C, who has no knowledge of the former assignment, and before he concludes his agreement, or pays his money, inquires of the executors as to the state of the fund, and is informed by them, that they will pay him the dividends: Held, that C's priority of notice will prevail over B's priority of assignment, and that C is entitled to the dividends in preference to B. *Dearle* v. *Hall*, 2 Law J. Chanc. 62.

A tenant for life of the "interest, dividends, profits and proceeds" of bank stock, was holden not entitled to the principal, but only dividends of a *bonus* declared on such stock, under a resolution of the general court, and 56 Geo. 3. c. 96, although residuary legatee of the testator's estate; and his executors charged with costs of a suit for transferring such *bonus* to the reversioners, but allowed the expenses of taking out administration *de bonis non* to the original testator. *Hooper* v. *Rossiter*, M'Clel. 527.

## BANKRUPT.

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(Z) Of the Jurisdiction of the Great Seal.

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## (A) Persons liable to become Bankrupt.

[See Stat. 6 Geo. 4. c. 16. s. 2,—3 Law J. Stat. 15.]

On the question being raised, whether a clergyman could be a bankrupt, this Court directed an issue at law. *Gawthorne* v. *Meymott*, 2 Ken. 20, Chanc.

Whether a person engaged in the Greenland whale fishery, who has made three purchases of oil, at distant periods, and sold one, is a trader within the meaning of 1 Jac. 1. c. 15. s. 2, is a question for the jury.

*Semble*—that, under these circumstances, he is not a trader. *Gale* v. *Halfknight*, 3 Stark. 56. [Abbott]

It is a question for the jury to decide, whether a man who buys merchandize, and represents himself as a dealer, and offers goods in exchange, but who does not buy to sell again, is subject to the bankrupt laws.

But, if it appears that he has bought goods, &c. in connexion with others, to carry on a system of fraud; it is not a trading within the meaning of the bankrupt laws. *Millekin* v. *Brandon*, 1 C. & P. 380. [Abbott]

A person who purchases dead horses, expressly for the sustenance of his own dogs, but sells their skins and bones, is not a trader within the bankrupt statutes. *Summersett* v. *Jarvis*, 6 B. Mo. 56, s. c. 3 B. & B. 2.

An innkeeper, as such, was not a trader, under the bankrupt laws, previous to 6 Geo. 4; neither was an innkeeper, selling wine and brandy, and other liquors, by the dozen, to customers out of his inn, necessarily a trader. *Willett* v. *Thomas*, 2 Chit. 651.

A person having no stock in trade, who buys

goods of A, and sells them to B, in his own name, is a trader.

But a person who sold goods by commission was not, previous to the 6 Geo. 4. c. 16, subject to the bankrupt laws. *Doe d. Barraud* v. *Lawrence*, 2 C. & P. 134. [Abbott]

The widow of a livery-stable-keeper and horse-dealer purchased horses to let out to hire, and occasionally sold some, but had taken out no licence: Held, that this was sufficient to constitute a trading within the meaning of the bankrupt laws; and where, on the judge's intimating such an opinion, the defendant's counsel acquiesced, and the question of trading was not left to the jury, the Court refused to grant a new trial. *Martin* v. *Nightingale*, 4 Law J. C.P. 127; s. c. 3 Bing. 421.

A husband being, in right of his wife, seised of a farm during the coverture, converts the soil into bricks, of which he manufactures and sells great quantities: he is not a trader within the meaning of the bankrupt laws. *Ex parte Burgess*, 5 Law J. Chanc. 182, s. c. 2 G. & J. 183.

A commission of bankrupt cannot be supported against a person under age. *O'Brien* v. *Currie*, 3 C. & P. 283. [Burrough]

(B) ACTS OF BANKRUPTCY.

[See the several acts of bankruptcy specified in the third and five following clauses of 6 Geo. 4. c. 16,—3 Law J. Stat. 15.]

(*a*) *Departing the realm.*

Going abroad being an equivocal act, and departing the realm being a continuing act of bankruptcy: Held, that letters written by the party absconding, during his departure and absence, shewing the motive of his departure, were admissible in evidence, and sufficient to establish an act of bankruptcy; but statements or declarations of a bankrupt made at a time long subsequent to the departure, or unconnected with the state of his mind at the time, are not receivable. *Rawson* v. *Haigh*, 2 Law J. C.P. 130, s. c. 2 Bing. 99, s. c. 1 C. & P. 77, s. c. 9 B. Mo. 217.

(*b*) *Departure from dwelling-house and otherwise absenting himself.*

To constitute an act of bankruptcy, by a debtor absenting himself, in order to delay creditors, it is not indispensably necessary that a creditor should be delayed. *Hallen* v. *Homer*, 1 C. & P. 108. [Park]

An omission to keep an engagement to meet a creditor at a given place, without any intention to delay creditors, is not an act of bankruptcy. *Tucker* v. *Jones*, 2 Bing. 2, s. c. as *Toleman* v. *Jones*, 9 B. Mo. 24.

If a debtor make an appointment to meet and pay his creditor, at a certain time and place, and fail in keeping his appointment, this will be an act of bankruptcy, with intent to delay the creditor, unless the cause of failure be satisfactorily explained. *Widger* v. *Browning*, 5 Law J. K.B. 77.

Two partners left their shop, under the pretence of getting bills discounted to pay their creditors, and told their shopman, if any person called, to make some excuse, and say they were not in the way. On the following day, the shopman, without any further directions, denied them to a creditor, although they were then at home: Held, that, in the absence of evidence of the bankrupts' having actually tried to get the bills discounted, the jury were warranted in finding they had left the place to delay creditors. *Deffle* v. *Desanges*, 8 Taunt. 671.

If a trader absents himself, not in order to avoid a creditor, with whom he has made an appointment, but merely to avoid the execution of a bail-bond, which he had undertaken, on being discharged out of custody from an arrest, to execute, this is not an act of bankruptcy. *Schooling* v. *Lee*, 3 Stark. 149. [Abbott]

A trader appointed a creditor to meet him at his house on a particular day, the creditor accordingly went, when the trader's wife said that her husband was gone out; and having waited for more than half an hour, the creditor went away, the bankrupt not having returned: Held, that it was properly left to the jury to say, whether the trader had left his house to avoid or delay a creditor; and they having found in the affirmative, the Court refused to disturb the verdict. *Charrington* v. *Brown*, 4 Law J. C.P. 141.

(*c*) *Beginning to keep house.*

An act of bankruptcy is committed by a denial to a collector of the King's taxes. *Sanderson* v. *Laferest*, 1 C. & P. 46. [Burrough]

The denial of a trader to a person who calls to inform him of the dishonour of a bill, is an act of bankruptcy, without further proof of the party being a creditor, if the bankrupt so considered him. *Bleasby* v. *Crossley*, 2 C. & P. 213. [Best]

A, a trader at W, on coming to London, went to the counting-house of C, where he generally transacted business with other persons; however, he desired C to deny him to a creditor, and concealed himself in C's house when the creditor called: Held to establish an act of bankruptcy. *Curtois* v. *Willes*, 4 D. & R. 224, s. c. 1 R. & M. 58, s. c. 1 C. & P. 211.

If a man has a private house and a place of business, a denial at the former to a creditor, is an act of bankruptcy. *Park* v. *Prosser*, 1 C. & P. 176. [Abbott]

A trader ordered his servant to say, that he was not at home if any creditors called, and he was accordingly denied, but was at that period ill in bed: Held, that it was properly left to the jury, whether this was a beginning to keep house with an intent to commit an act of bankruptcy, and that they were warranted in finding that it was. *Lazarus* v. *Waithman*, 5 B. Mo. 313.

On the 20th of May a partner in a banking firm having been arrested at his private dwelling, distant several miles from the house of business, and having promised to execute a bail-bond when required, immediately ordered his servants not to let into the house any person whom they did not know, as he was fearful of being arrested again; on the 21st the doors were kept shut, and no person was admitted until it had been ascertained from the window who the applicant was: Held, that although no creditor was actually denied, an act of bankruptcy was committed on that morning. *Harvey* v. *Ramsbottom*, 1 Law J. K.B. 25, s. c. 1 B. & C. 55, s. c. 2 D. & R. 142.

Where a trader confined in the King's Bench prison obtained a day-rule and went to his place of

business, and instead of returning to the rules, slept at his house, and caused the shop to be closed earlier than usual, and ordered himself to be denied to the clerk of a creditor: Held, that this was sufficient evidence to constitute an act of bankruptcy; and that it was properly left to the jury to say, whether the shutting up the shop at an earlier hour than usual, was not done as a colour to enable the party to cause himself to be denied to his creditors. *Hughes* v. *Gilman*, 3 Law J. C.P. 199, s. c. 10 B. Mo. 480, s.c. 1 C. & P. 32.

(*d*) *Fraudulent conveyance or transfer.*

[See *post*, L.]

An act of bankruptcy is committed within the meaning of the 1 Jac. 1. c. 15, by a trader conveying all his property to a particular creditor. *Worsley* v. *Demattos*, 2 Ken. 218, s. c. 1 Burr. 467.

Where a lease was to become void, upon assignment without the lessor's consent,—it was holden, that the lessee having assigned all his property, real and personal, to the trustee, for the benefit of his creditors, had not thereby forfeited the lease, such deed amounting to an act of bankruptcy. *Doe d. Lloyd* v. *Powell*, 5 B. & C. 308, s. c. 8 D. & R. 35.

A fair and *bonâ fide* sale of the whole of a trader's property is not, of itself, an act of bankruptcy.

The party who impeaches the sale of the whole of a bankrupt's property, must shew some facts from which fraud may be inferred. *Rose* v. *Haycock*, 5 Law J. K.B. 210.

Where A and B, being in embarrassed circumstances, conveyed to C all the machinery in their mills, and all the machinery to be substituted in lieu thereof, to secure 3,029*l.* 9*s.* 7*d.*, with interest, defeasible, however, upon the payment of that sum with interest, by instalments of 50*l.* in each succeeding month, but had other property: Held, that this was not *per se* an act of bankruptcy, but that it should have been left to the jury to say, whether the conveyance was a fraudulent preference. *Balme* v. *Hutton*, 2 Y. & J. 101.

(*e*) *Lying in Prison.*

To constitute an act of bankruptcy, by lying in prison for two months, the whole of the day of arrest might be reckoned. *Saunderson* v. *Gregg*, 3 Stark. 72. [Abbott]

An act of bankruptcy was complete by lying in prison two months, even though the bankrupt had the benefit of day-rules, and was seen once at his own shop during that period. *Soames* v. *Watts*, 1 C. & P. 400. [Best] [See 6 Geo. 4. c. 16. s. 5, whereby lying in prison for 21 days is declared an act of bankruptcy.]

An escape is not constituted within 21 Jac. 1. c. 19. s. 2, by a prisoner being carried through another county, with permission of the sheriff, and calling upon his attorney; hence the bankruptcy will run from the day of the arrest. *Baby* v. *Rose*, 2 Ken. 173, s. c. 1 Burr. 437.

*Quære*, whether the act of bankruptcy, by lying in prison twenty-one days, under the stat. 6 G. 4. c. 16. s. 5, have relation back to the first day of the imprisonment? *Tucker* v. *Barrow*, 3 C. & P. 85, s. c. 1 M. & M. 137. [Tenterden]

(*f*) *Compounding with Petitioning Creditor.*

Where the bankrupt's assets in the hands of the assignee are greater than the amount of his debts, and the creditors who have proved consent to the *supersedeas*, and the petitioning creditor receives the whole amount of his debt, interest, and costs, it is not a compounding within the 8th section of 6 Geo. 4. c. 16. *Ex parte Smith*, 2 G. & J. 291.

(C) OF THE PETITIONING CREDITOR.

(*a*) *Who may be.*

A commission is not valid, where a married woman, as petitioning creditor, in respect of a debt due to her *in autre droit*, strikes the docket alone, without the husband joining. *Ex parte Mogg*, 6 Law. J. Chanc. 162, s. c. 2 G. & J. 397.

To enable a secretary to a company to sue out a commission, particular words must be used; therefore, where a private statute authorized an insurance society to *sue* and *be sued* in the name of their secretary, and to commence all actions and suits in his name as nominal plaintiff,—It was held, that those words did not comprehend a petition for a commission. *Guthrie* v. *Fiske*, 3 B. & C. 178, s. c. 5 D. & R. 24, s. c. 3 Stark. 153.

(*b*) *Duties and Liabilities.*

Where a petitioning creditor, previous to issuing a commission, had taken out execution against the bankrupt, for part of the debt on which the commission issued, the Court directed him to furnish the assignees with the particulars of his debt, and the time at which it was contracted. *Ex parte Glover*, 2 G. & J. 60.

A petitioning creditor, under a separate commission, will be ordered to exhibit the proceedings, in order to support a subsequent joint commission. *Ex parte Harrison*, 2 G. & J. 135.

Where the bankrupt's assets in the hands of the assignees are greater than the amount of his debts and the creditors who have proved consent to the *supersedeas*, and the petitioning creditor receives the whole amount of his debt, interest and costs, it is not a compounding within the 8th section of 6 Geo. 4. c. 16. *Ex parte Smith*, 2 G. & J. 291.

The petitioning creditor is liable to the messenger for his charges for services before the party is declared a bankrupt, although there be a due declaration of bankruptcy, and the messenger's bill is ordered by the commissioners to be paid by the assignee out of the estate. *Burwood* v. *Cant*, 2 C. & P. 123. [Abbott]

(*c*) *Debt, amount and nature of.*

Interest cannot be added to the principal due on a bill of costs, so as to constitute a valid petitioning creditor's debt. *In re Burgess*, 8 Taunt. 660, s. c. 2 B. Mo. 745.

To prove a good petitioning creditor's debt, it must be shewn, that on the specific day, as much as 100*l.* was due. *Gresley* v. *Price*, 2 C. & P. 48. [Abbott]

A good petitioning creditor's debt is not proved by shewing that the bankrupt has drawn or indorsed a bill for £100, which is dishonoured, unless it appear, that the acceptor has made default. *Giles* v. *Powell*, 2 C. & P. 259. [Best]

The petioning creditor having given a cheque on

his bankers, to a person who afterwards became bankrupt; and such petitioning creditor being appointed one of his assignees, and becoming possessed of his papers: Held, that the payment of the cheque must be proved, in order to constitute the petitioning creditor's debt. *Bleasby* v. *Crossley*, 4 Law J. C.P. 136, s. c. 3 Bing. 430, s. c. 2 C. & P. 213.

A commission may issue at the instance of a creditor, whose debt has been omitted in the schedule by an insolvent who had obtained his discharge. *Ex parte Shuttleworth*, 2 G. & J. 68.

Before application for the substitution of a new petitioning creditor's debt to support the commission, the one on which it was founded must be expunged. *Ex parte Chappell*, 2 G. & J. 131: s. P. *In re Williams*, 5 Law J. Chanc. 76.

*(d) When contracted.*

A debt barred by the Statute of Limitations is not a valid debt, to support a petition for a commission of bankruptcy. [But by the new Bankrupt Act, 6 Geo. 4. c. 16. s. 18, if, after adjudication under a commission, the petitioning creditor's debt be found insufficient to support the commission, the Lord Chancellor, upon the petition of any creditor who has proved a sufficient debt, may order the commission to be proceeded in; provided the debt of the second petitioning creditor has not been incurred anterior to that of the first.] *Gregory* v. *Hurrill*, 4 Law J. K.B. 262, s. c. 5 B. & C. 341, s. c. 8 D. & R. 270.

Where a writ has been issued and continuances entered, the Statute of Limitations does not apply, so as to deprive the creditor of his right to issue a commission of bankruptcy against his debtor. *Gregory* v. *Hurrill*, 1 Law J. C.P. 115, s. c. 1 Bing. 324.

Where, in an action by the assignee of a bankrupt, for goods sold by the latter to the defendant before the bankruptcy, it did not appear that a petitioning creditor's debt, amounting to £100, had been contracted within six years before the suing out of the commission, and the jury found a verdict for the assignee,—the Court refused to disturb it. *Mavor* v. *Pyne*, 4 Law J. C.P. 36, s. c. 3 Bing. 285, s. c. 2 C. & P. 91.

The petitioning creditor's debt must have arisen whilst the trader was in business; but the circumstance of his discontinuing trade, does not prevent the issuing of a commission. *Doe d. Barraud* v. *Lawrence*, 2 C. & P. 134. [Abbott]

Where a petitioning creditor's debt arises on a note *indorsed*, or a bill *accepted*, by the bankrupt, evidence must be given that the indorsement or acceptance was prior to the act of bankruptcy: the mere production of the instrument, bearing an earlier date, is insufficient. *Cowie* v. *Harris*, 1 M. & M. 141. [Tenterden]

(D) OF THE COMMISSION.

*(a) Striking the Docket.*

The circumstance of the affidavit of debt, on striking the docket, having been sworn before the solicitor suing out the commission, is no ground of supersedeas. *In re Elford*, 2 G. & J. 65.

Where a commission issued on the petition of a solvent partner, who was one of the assignees of his bankrupt co-partner, in respect of a partnership debt; it was held regular, though the other assignees were not joined in the affidavit. *Ex parte Blakey*, 1 G. & J. 197.

In order to make a sufficient petitioning creditor's debt, A and B had to join; and in making their affidavit, upon striking the docket, the amount of one of the debts was misstated: Held, that a supplemental affidavit might be made without new bonds; and that it was not essential that the bond and affidavit should bear the same date. *Ex parte Maughan and Smith*, 1 G. & J. 365.

After a valid act of bankruptcy, a commission may issue at the instance of the bankrupt. *Shaw* v. *Williams*, 1 R. & M. 19.

The first regular docket in the office has the priority. *Ex parte Stocker and Collins*, 1 G. & J. 249.

Held, that a docket was regularly struck after the V. C. had pronounced an order for the superseding of a commission against the same party, on the production of the necessary consents, but before the order was drawn up. *Ex parte Bower*, 1 G. & J. 262.

A docket struck with an act of bankruptcy, upon the belief by the creditor that an act of bankruptcy had been committed, will support a commission under a subsequent act. *Ex parte Webster—Ex parte Stonehouse*, 2 G. & J. 252.

A commission of bankrupt, sued out after the statute 6 Geo. 4. c. 16, came into operation, on an act of bankruptcy committed before the passing of that statute, cannot be supported. *Maggs* v. *Hunt*, 5 Law J. C.P. 130, s. c. 4 Bing. 212.

A statute authorising a company to sue and be sued in the name of their secretary, does not empower the secretary to sue out a commission of bankruptcy as upon a debt due to himself. *Guthrie* v. *Fiske*, 3 Stark. 151. [Abbott]

*(b) Opening the Commission.*

The time for opening a commission will be enlarged, where the witness, who is to prove the act of bankruptcy, secretes himself in concert with the bankrupt. *In re Hayes*, 1 G. & J. 255.

*(c) Declaring the Bankruptcy.*

The advertisement of bankruptcy in the Gazette will be delayed upon an affidavit made by the creditors for that purpose. But it will not be delayed on the application of the bankrupt. *Anon.* 1 Law J. Chanc. 92.

In the absence of a defect on the face of the proceedings, the Court will not suspend the advertisement of the bankruptcy in the Gazette. *Ex parte Ainsworth*, 2 G. & J. 89.

*(d) Errors.*

A commission against L. H. M. of Finsbury Square, in the city of London, instead of the county of Middlesex, not a material misdescription. *Ex parte Smith*, 1 G. & J. 256.

A misnomer in the bankrupt's name, in a commission, may be amended before it has been proceeded in. *Ex parte Harman*, 2 G. & J. 25.

But a description in a commission consistent with the one in which the bankrupt carries on his trade, is sufficient, though it be not the legal description of residence. *Ex parte Wride*, 2 G. & J. 99.

Where a commissioner was misnamed in a commission, and after the bankruptcy declared, motion was made for leave to amend, the Court ordered the other commissioners to proceed to a new adjudication. *In re Barber*, 2 G. & J. 81.

A commission wholly omitting to describe the bankrupt of the place where he had chiefly been known as a trader, is bad, though the last place of trading be correctly described. *Ex parte Parrey*, 2 G. & J. 225.

The omission to describe the bankrupt, as of the place where he actually traded, is fatal. *Ex parte Beadles*, 2 G. & J. 243.

(*e*) *Validity of, when and how to be disputed.*

As to what is a fraudulent commission, see *Ex parte Gane*, 2 G. & J. 319.

The Court allowed a general demurrer to a bill for want of equity, by the assignees of a bankrupt, to restrain an action by him, to try the validity of the commission. *Kirkpatrick* v. *Dennett*, 1 S. & S. 408.

Where the parties to an alleged concert make affidavits to support the commission, which are not so satisfactory as to enable the Court to come to a conclusion, the Court will direct an issue to try the concert, and will direct the parties thereto to be examined at law. *Ex parte Carter*, 1 G. & J. 326.

An issue, directed upon the bankrupt's petition for a supersedeas, to try the validity of a commission of bankrupt, having been found against the bankrupt, and he having submitted to the verdict, and his petition having been dismissed, he will be restrained from afterwards bringing any action to question the validity of the commission. *Anon.* 1 Law J. Chanc. 23.

A person who has obtained his discharge out of custody, on the ground of bankruptcy, cannot afterwards dispute the validity of the commission in a court of law: the commission, if objectionable, must be superseded in equity. *Watson* v. *Wace*, 5 B. & C. 153, s. c. 7 D. & R. 633.

Where a party intends to dispute the validity of a commission, and brings an action against the person who caused it to be issued: Held, that he cannot require particulars of the act of bankruptcy, on which such commission is to be supported. *Hughes* v. *Gilman*, 3 Law J. C.P. 120.

No objection can be taken to the validity of a commission of bankrupt, unless the requisite notice be given, although the objection appears upon the proceedings, and requires no evidence to support it. *Bevan* v. *Lewis*, 1 Sim. 376.

Where the bankrupt acquiesces, the Lord Chancellor will, upon petition, restrain him from disputing his commission at law. *Ex parte Leigh, in re Claughton*, 2 G. & J. 332.

A petitioning creditor, on whose affidavit a commission issues, cannot afterwards dispute the validity of the commission. *Ledbetter* v. *Scott*, 6 Law J. C.P. 147, s. c. 4 Bing. 623. s. c. 1 M. & P. 597.

Where a commission of bankrupt is impeached by a creditor, and the debt which he claims is alleged to be usurious, it ought to be ascertained that the bankrupt is indebted to him, before the validity of the commission is inquired into at his instance. *Ex parte Hudson*, 2 Russ. 456.

A reference to the commissioners to review the proof of the trading, and of the petitioning creditor's debt, substituted for the trial of an issue as to the validity of the commission. *Ex parte Hudson*, 2 Russ. 456.

(*f*) *Effect of a Commission.*

The Statute of Limitations does not run against a debt after a commission of bankrupt has issued. *Ex parte Ross*, 2 G. & J. 46.

(*g*) *Second Commission.*

A second commission against a bankrupt who has not obtained his certificate under a previous subsisting commission, is void at law. *Hill* v. *Wilson*, 6 Law J. K.B. 127.

One set of commissioners not being able to proceed, from the death of one on their list, the Court permitted another commission to issue upon the same docket, directed to another list. *Ex parte Stead*, 1 G. & J. 301.

Under a second commission, the writ of supersedeas of the first, is sufficient proof of its having issued. *Ledbetter* v. *Scott*, 6 Law J. C.P. 147, s. c. 4 Bing. 623, s. c. 1 M. & P. 597.

After a bankrupt had not paid 15*s.* in the pound, under a second commission, he became a bankrupt again: Held, that the last commission was voidable, and not absolutely void. *Todd* v. *Maxfield*, 3 B. & C. 222, s. c. 5 D. & R. 258.

In an action to try the validity of a second commission of bankruptcy, the former having been superseded, as being founded on a concerted act of bankruptcy, the Court refused to order the bankrupt's books and papers to be produced to the assignees, under the second commission, on the ground that the application should have been made to the Lord Chancellor. *Wilson* v. *Legge*, 7 B. Mo. 400.

Although it may appear from the depositions, that a prior act of bankruptcy has been committed, the Court will not, in the absence of evidence, presume, that the petitioning creditor was cognizant of the fact. *Thackrah* v. *Wood*, 3 Stark, 141. [Abbott]

*Quære*—Whether the assignees under a second commission of bankrupt, (the first commission having been superseded) can, by petition, call the messenger under the first, to account for property possessed and disposed of by him under the first commission, without bringing the assignees under the first commission before the court? *In re Howard & Gibbs*, 1 Law J. Chanc. 31.

A commission directed to new commissioners, cannot issue after judgment by another list of commissioners against the bankruptcy. *Ex parte Nicholls, in re Summersett*, 2 G. & J. 266.

(*h*) *Costs.*

The commissioners have no right to decline to tax bills of costs, on the ground that the whole business of the commission is not concluded. *Ex parte Gore*, 2 G. & J. 117.

At the taxation of costs, before the commissioners, the parties have a right to attend. *Ex parte Palmer*, 2 G. & J. 34.

(E) OF THE MESSENGER.

Where a bankrupt has abandoned a petition for a supersedeas, and has joined in a conveyance of part of his property, and solicited and procured the re-

[illegible] 2 C. & P. 123.

[illegible] bankrupt is not liable to the [illegible] before the choice of [illegible] to employ him [illegible] 2 Law J. K.B. 204, [illegible] & B. 621.

[illegible] sustain an action for his [illegible] in respect of which [illegible] been superseded. *Ex parte* [illegible] Chanc. 54.

[illegible] messenger is possessed of property, [illegible] which has been superseded; [illegible] him to account for the same to [illegible] under a subsequent commission. *Ex* [illegible] & J. 73.

[illegible] 6, c. 16, authorizing magistrates to [illegible] to search for the goods of a bank- [illegible] the houses of third persons, means, that [illegible] is to be given to the messenger, and not [illegible] *Ny* v. *Newman*, 2 C. & P. 464. [Best]

(E) OF THE PROVISIONAL ASSIGNEE.

A & Co. and B & Co. respectively carried on the business of bankers at M. B & Co. became bankrupts, and at the period of the act of bankruptcy, the two banks held notes and other securities of each other, to nearly the same amount. The provisional assignee of B & Co. knowing that fact, presented and obtained payment of the notes of A & Co. partly at their bank, and partly at their agent's house in L. who did not know in what situation the parties stood: Held, that A & Co. might recover the amount so received, against the provisional assignee, in an action for money had and received. *Kinnear* v. *Newman*, 1 B. & C. 418, s. c. 2 D. & R. 568.

Where the commissioners execute a provisional assignment, the reasons for adopting that measure ought to be stated on the proceedings. *Ex parte Norris*, 1 G. & J. 237.

(G) OF THE COMMISSIONERS.

(*a*) *Authority.*

Commissioners of bankrupt are not authorized by the 5 Geo. 3. c. 30, to enlarge the time for the disclosure of the bankrupt's estates and effects, beyond the limited period. *Claughton* v. *Leigh*, 1 Law J. K.B. 103, s. c. 1 B. & C. 652, s. c. 2 D. & R. 831.

A bankrupt who has been apprehended under a judge's warrant, may be examined by the commissioners, although the time for his surrender has expired; and if the answers given by him are satisfactory, he may be discharged, unless indicted; or they may when necessary commit him for another examination. *Ex parte Hunt*, 2 J. & W. 560.

The Court will not order a creditor, whose proof has been admitted, and who refuses to produce to the commissioners books and accounts relating to his dealings with the bankrupt's estate, to produce them before the commissioners.

*Semble*—That the commissioners have power to examine him, with respect to the statements and entries in his books, and, in default of satisfactory answer, to commit him.

The Great Seal cannot give the commissioners a power, which the law has not given them; but it will lend its assistance to enforce obedience to the authority given them by the statute, where they have not power to punish for disobedience. *Ex parte Woolley*, 2 Law J. Chanc. 147, s. c. 1 G. & J. 395.

The allowance by the commissioners of the assignees' accounts can only be revised by the Court as to the principle upon which they have proceeded, and not as to the consideration of the *quantum* of the allowance. *Ex parte Anthony*, 2 G. & J. 55.

If the creditors consent to a supersedeas, and all the commissioners, except one, are dead, the surviving commissioner will be directed to certify to the Lord Chancellor the names of the creditors who have proved. *Ex parte Wallis*, 1 G. & J. 25.

Commissioners of bankrupt, under the statute 6 Geo. 4. c. 16. s. 33, may issue a warrant for the apprehension of a person who has failed to appear before them in obedience to a summons, although the fact of service of the summons has not been verified upon oath. But in such a case they take upon themselves the responsibility of shewing the fact, that the person was summoned.

The question as to the reasonableness of the notice given by summons to a person to attend the commissioners, is a question for a jury. *Grocock* v. *Cooper*, 1 Law J. K.B. 265, s. c. 8 B. & C. 211, s. c. 2 M. & R. 78.

(*b*) *Duty.*

It is the duty of the commissioners to proceed in the commissions as they come before them, without reference to any other commission against the same party. *Ex parte Pryce*, 2 G. & J. 161.

It is the duty of the commissioners, under whose direction a sale is to be held, to ascertain the expenses of the sale, as directed by the general order of March, 1794. *Ex parte Mathew*, 1 G. & J. 342.

(*c*) *Liability.*

An action of trespass does not lie against commissioners of bankrupt for committing a witness, who does not answer to their satisfaction, when examined by them concerning the estate and effects of a bankrupt. *Doswell* v. *Impey*, 1 Law J. K.B. 99, s. c. 1 B. & C. 163, s. c. 2 D. & R. 350.

(*d*) *Examination before.*

Where a question is put to a bankrupt, whether he had not within six months prior to the commission, executed two conveyances of his estate and effects, or part thereof, to his son, and he answered "not to my knowledge;" it was held, that this answer was sufficiently explicit, no further question being put to him. *Norris's case*, 2 J. & W. 437.

(*e*) *Commitment by.*

In the warrant of the commissioners committing a bankrupt, the whole of the examination ought to

be set forth, and not merely that part of it, in which the answers of the bankrupt to the questions put to him were deemed unsatisfactory. *In re Tomline*, 2 Law J. Chanc. 120.

If a bankrupt be committed, under a warrant of the commissioners, for not answering satisfactorily, it must set forth all the questions and all the answers. *Tomlin's case*, 1 G. & J. 373.

Held, that a single question, followed by a direct answer, which question is unvaried in terms, and not followed up by any further examination respecting the transaction, which has excited the suspicion of the commissioners, is not a sufficient ground to justify a commitment. *Walker's case*, 1 G. & J. 371.

A warrant stating that various questions had been proposed, "and among others the following" is defective. *Lawrence's case*, 2 G. & J. 209.

A warrant is defective which refers to documents in a former examination, without setting them forth, so as to enable the judge to decide upon the same information as the commissioners possessed. *Price's case*, 2 G. & J. 211.

A warrant is defective which refers to, without setting out, previous examinations, and without which, the Court cannot judge of the sufficiency of what appears. *Hooton's case*, 2 G. & J. 215.

The omission to set out a previous examination, does not vitiate a commitment upon a distinct ground. *Atkinson's case*, 2 G. & J. 218.

The warrant of committal of a bankrupt being by mistake dated the 2nd March instead of the 2nd February: Held, that this is not such an error as can be amended under the 18th section of 5 Geo. 2, c. 30. *Ex parte M'Gee*, 6 Mad. 206.

On a question of the legality of the commitment of a witness by commissioners of bankrupt, all the questions and answers must be looked at as forming one examination; and a witness cannot be committed for not answering as to his belief of the intention of the bankrupt, unless other parts of his examination shew such belief to be material with reference to the person, trade, dealing, or estate of the bankrupt. *Ex parte Baxter*, 6 Law J. K.B. 124, s. c. 7 B. & C. 675, s. c. 1 M. & R. 572.

If commissioners of bankrupt order the bankrupt to be imprisoned under a warrant of commitment, for not answering a question put to him by them satisfactorily, and it does not appear on the face of such warrant, that the answer was altogether unsatisfactory, or that he ought to have been interrogated further, the Court will order a writ of *habeas corpus* to issue, to bring up the bankrupt before them. *In re Willment*, 3 Law J. C.P. 144.

If a bankrupt be committed without any protection, a detainer may be lodged against him by the assignee, between the time of applying to be re-examined and his examination. *Ex parte Wright*, 2 G. & J. 202.

Where the last examination of a bankrupt was repeatedly adjourned, in order that he might produce a written account; and the bankrupt referred to a written account as the only mode of explaining his trade and dealings; and the last adjournment was made upon his assurance, that he would produce such account, if further time was given: Held, that such account not being produced, nor any satisfactory reason given for not producing it on the day to which the adjournment was made, the commissioners were justified in committing. *Stanley Goddard's case*, 1 G. & J. 45.

Where a bankrupt was, after repeated examinations, finally committed by the commissioners for not satisfactorily answering, the Court of King's Bench granted a mandamus conditionally to the commissioners to issue their warrant for a further examination, on a suggestion that the bankrupt was desirous of fully disclosing his estate and effects. *In re Bromley*, 3 D. & R. 310.

(*f*) *Proceedings on* habeas corpus.

Notice must be given to the assignees, when a bankrupt has been committed by the commissioners, and is brought up by *habeas corpus*; and notice on Saturday afternoon, for Monday, is not sufficient, unless his right to be discharged is perfectly clear. *Bromley's case*, 2 J. & W. 453.

A person who is lawfully committed by commissioners of bankrupt for not giving satisfactory answers to their questions, may cause himself to be brought by *habeas corpus* before them, in order to his giving satisfactory answers; but he must himself bear the expense. *Ex parte Baxter*, 6 Law J. K.B. 369, s. c. 8 B. & C. 344, s. c. 2 M. & R. 467.

(H) PROOF OF DEBTS.

(*a*) *In general.*

Where a creditor is disabled by age and imbecility of mind from proving, by his own oath, a debt against the estate of a bankrupt, the commissioners will be directed to admit the proof upon such evidence as shall be satisfactory to them, though the debt be of considerable amount. *Ex parte Clarke*, 2 Russ. 575.

A petitioning creditor allowed to prove her debt, at the opening of the commission, by affidavit. *Ex parte Wise*, 4 Law J. Chanc. 115.

A proof cannot be made by one person on behalf of several creditors, entitled to prove, unless from necessity or by consent. *Ex parte the Bank of England*, 2 G. & J. 363.

Although a party is not precluded from proving a debt under a commission of bankruptcy, because there is a question to be tried concerning it; yet, if a dividend be announced, its payment on that debt will be suspended. *Ex parte Ackroyd*, 1 G. & J. 391.

The commissioners ought not to reject the proof of a debt against the bankrupt's estate, on the ground that the creditor has received payment of part of it, under such circumstances as to render it questionable whether he ought not to refund that payment.

The proper course is to allow the proof, but to retain the dividends upon it till the question is determined. *Ex parte Ackroyd*, 2 Law J. Chanc. 158.

If, after an arrest and before the return of the writ, the defendant become bankrupt, and obtain his certificate, the bail, as the bail-bond was not forfeited, are discharged, and the debt consequently proveable under the commission. *Littlewood* v. *Crowther*, 3 D. & R. 533.

A bankrupt was appointed, by his assignees, to be their agent for getting in his estate. He had had many dealings with merchants in America. After his bankruptcy, the proceeds of a ship, consigned to him before that event, came to his hands whilst acting as such agent. The Court held, that those

merchants could prove under the commission for those proceeds. *Ogden* v. *Peele*, 3 Law J. K.B. 100.

Equitable creditors cannot prove their debts under a decree for the proof of debts, without a declaration of their right by the Court, or some special direction to the Master. Therefore one partner having died, and the surviving partners afterwards becoming bankrupt,—creditors, by promissory notes of the original partnership, cannot, under a common decree, prove their claims against the estate of the deceased partner. *Bowles* v. *York*, 1 Law J. Chanc. 134.

(*b*) *Creditors' election.*

Where a party tenders the claim or proof of a debt under a commissino, he is entitled to the judgment of the commissioners, upon his right to prove or claim before he discharges the bankrupt or relinquishes his action; but the bankrupt must be discharged, and the action, and all the benefit from it, relinquished, before the claim or proof is admitted upon the proceedings. *Ex parte Frith*, 1 G. & J. 165.

Proving one debt under a commission, does not preclude the creditor from electing to sue for another. *Bridget* v. *Mills*, 4 Bing. 18.

A creditor for goods sold may prove on a bill for part of the debt, and proceed at law on a bill for the remainder, which he had negotiated before the bankruptcy, and taken up after the proof. *Ex parte Sly*, 2 G. & J. 163.

(*c*) *Judgments.*

The 46 Geo. 3. applies to a judgment for damages and costs in assumpsit; and, consequently, such judgment is a debt proveable under a commission of bankrupt, though final judgment be not entered up until after a commission issues. *Ex parte Birch*, 3 Law J. K.B. 118, s. c. 4 B. & C. 880, s. c. 7 D. & R. 436.

The defendant, in an action of tort, became a bankrupt, and afterwards obtained his certificate. The plaintiff signed judgment between the day of the act of bankruptcy and that of the commission issuing: The Court held, that under 46 Geo. 3, c. 135, the judgment was a debt which might have been proved under the commission, and discharged the defendant out of custody, who had been taken on a *capias ad satisfaciendum*. *Robinson* v. *Vale*, 2 Law J. K.B. 171, s. c. 2 B. & C. 762, s. c. 4 D. & R. 430.

A judgment, though in an action of tort, signed in the term after a commission of bankrupt has issued against the defendant in the same term, will relate back to the first day of the term, so as to enable the plaintiff to prove under the commission, and the defendant to be relieved by his certificate. *Greenway* v. *Fisher*, 6 Law J. K.B. 34, s. c. 7 B. & C. 436, s. c. 1 M. & R. 330.

(*d*) *Mortgages.*

Petitioner being an equitable mortgagee of lands of the bankrupt A B, for the sum of 1200*l.*, advances to him the further sum of 1350*l.*, and takes a warrant of attorney to secure the last-mentioned sum: afterwards the bankrupt executes to the petitioner a conveyance of the lands, in trust to sell; and after payment of the 1200*l.* and interest, to pay the surplus to the bankrupt; and on the day on which the conveyance is executed, judgment is entered up, and execution levied under the warrant of attorney for the 1350*l.*, and part of that sum is satisfied by the levy: Held, that the petitioner was not entitled to tack the residue of the judgment debt to the mortgage. *Ex parte Pettit*, 2 G. & J. 47.

An equitable mortgagee held to be entitled to the produce of the mortgaged estate, from the time of presenting his petition for a sale. *Ex parte Bignold*, 2 G. & J. 273, (Leach, V. C.) But *contrà*, per Eldon, L. C., who held, he was not entitled to the rents and profits previous to the sale. *Ex parte Alexandre* 2 G. & J. 275.

(*e*) *Contingent demands.*

[See 6 Geo. 4. c. 16. s. 56.]

A debt, payable after a certain period of notice, is proveable under a commission, although notice may not have been given before the bankruptcy. *Clayton* v. *Gosling*, 4 Law J. K.B. 176, s. c. 5 B. & C. 360, s. c. 8 D. & R. 110.

Where money was lent upon condition, that six months' notice should be given before repayment was required,—it was holden, upon the bankruptcy of the borrower, not a debt proveable in the absence of proof that notice had been given. *Ex parte Downman*, 2 G. & J. 85.

Where two years' interest had been paid on a promissory note, which purported to become due *after three months' notice*, proof was allowed, under a commission issued against the maker, although no such notice had been given; the payment of interest evidencing that the parties dealt with the note as an *immediate* debt. *Ex parte Algar*, 2 G. & J. 1.

(*f*) *Marriage Articles.*

A sum covenanted by the husband to be paid when demanded by the trustees, on the request of the wife, is proveable, if demanded before the bankruptcy. *Ex parte Blenchley*, 2 G. & J. 174.

(*g*) *Annuities.*

The rule in bankruptcy applicable to the value of an annuity, is not influenced by the state of the money market. *Ex parte Webb*, 2 G. & J. 29.

Since the 6 Geo. 4, on proof of an annuity, the commissioners are not at liberty to enter into the consideration of the altered health of the annuitant. And if the consideration be property, and not money, the price paid by the grantee for that property is not the criterion of value, provided such value be altered by accidental circumstances. *Ex parte Fisher*, 2 G. & J. 102.

An annuity was purchased by B from C, through the agency of D, to whom the money was paid, as C's agent, and placed to his account; D soon afterwards became bankrupt: Held, (in the absence of proof, that the grant of the annuities was merely colourable, and contrived for the purpose of obtaining B's money, in payment of the debt due from C to the bankrupt;) that B could not prove the consideration paid for the annuities under the commission against D. *Ex parte Shaw*, 2 G. & J. 106.

(*h*) *Apprentices.*

Where an apprentice fee has been paid, but the articles have not been executed from inattention,—

on the bankruptcy of the master, the father is entitled to a return of part of the premium, under the 6 Geo. 4, c. 16, s. 49. *Ex parte Haynes*, 2 G. & J. 122.

(*i*) *Bonds.*

Where a creditor held a bond as a security, and special circumstances appeared, the Court refused to direct its sale; but allowed the creditor to prove his whole debt under the commission. *Ex parte Smith*, 2 G. & J. 105.

(*k*) *Bills of exchange and promissory notes.*

Where part of the account between two mercantile houses which have become bankrupt, consists of bills that may be proved against both estates, there can be no proof, in respect of those bills, as between the two houses, unless there is a surplus after satisfying the holders of the bills. *Ex parte Rawson*, and *Ex parte Lloyd*, 1 Jac. 274.

C & Co. being embarrassed, the Bank of England agreed to advance them 40,000*l.* upon acceptances of the friends of C & Co. The acceptances were given; and the acceptors, or in case of any of them dying, declining, omitting, or ceasing to renew, any substituted acceptors, were secured by C & Co. assigning to trustees, for that purpose, certain property in America. Two of these acceptances were thus: C & Co. drew a bill on I and W I for 2,500*l.*, which they accepted, and that was indorsed by C & Co. to the bank; R accepted another bill to that amount, drawn by I and W I, which was also given to the bank. The bills, when they became due, were renewed: before the renewed acceptance of I and W I became due, they stopped payment; and R, the acceptor, being called upon, he obtained an acceptance from C T T, and indorsed it to the bank, and the acceptance of I and W I was thereupon delivered to him: I and W I becoming bankrupt, R proved the amount of their acceptances in his possession, and received 18*s.* in the pound: Held, on appeal, that the proof was right. *Ex parte Hunter*, 2 G. & J. 7.

The drawer of certain bills having absconded, became bankrupt before they were due, and never surrendered to his commission. His house was kept open in the possession of the messenger till after the bills became due. While they were running, the holder knew that two persons were appointed assignees of the drawer. The acceptor also became bankrupt before the bills became due. The holder never gave, or attempted to give notice of the dishonour of the bills to the drawer or his assignees: Held, that the bills were not proveable under the commission issued against the drawer, because the holder by his laches had abridged the possible remedy over, of the drawer's assignees against the acceptor, and had thereby made the bills his own. *Rhode* v. *Proctor*, 3 Law J. K.B. 188, s. c. 4 B. & C. 517, s. c. 6 D. & R. 610.

Where a petitioner was a creditor of the bankrupt on a cash balance, and having given acceptances for the bankrupt's accommodation, which acceptances were not paid at the bankruptcy, and having received a larger amount of bills of exchange and promissory notes than the cash balance, which the petitioner had negotiated, he was not permitted to prove the cash balance, on the principle of excluding the unpaid acceptances on both sides, or otherwise. *Ex parte Read*, 1 G. & J. 224.

If a creditor proves for several bills of exchange under a commission, and one of them be afterwards paid, the Court will order so much of the proof as relates to that bill to be expunged. *Ex parte Barratt*, 1 G. & J. 327.

Where a London banker and a country banker both became bankrupt, and the London banker was at the time of his bankruptcy in possession of short bills, and a mortgage deposited with him in the usual course of dealing, as a security against the acceptances of the London banker, and the assignees of the country banker did not relieve the estate of the London banker from the outstanding acceptances: Held, that the holders of such acceptances were entitled to have a preference to the general creditors, by having the proceeds of the short bills and mortgage applied in liquidation of the acceptances. *Ex parte Waring*, and *Ex parte Inglis*, 2 G. & J. 403.

Upon a promissory note as follows:—"Borrowed and received of S D, August 20, 1816, four hundred pounds, which I promise to pay, with five per cent. interest for the sum,—it is agreed that six months' notice shall be previously given before payment is required;" and interest was paid until fourteen months before the commission issued against the maker: although no notice was given or demand made before the date of such commission, the debt is proveable. *Ex parte Downman, in re Downman and Offley*, 2 G. & J. 241; overruling, s. c. 2 G. & J. 85.

(*l*) *Costs and damages.*

Costs are not proveable under a commission, if the verdict, as well as the judgment, be given after the party becomes a bankrupt; though *semble* that the certificate is a bar. *Ex parte Poucher*, 1 G. & J. 385.

Where, in an action of contract, there is a verdict before bankruptcy, but judgment is not entered up till after bankruptcy, both the debt and costs are proveable under the commission.

Where there is a verdict proceeding upon tort and judgment after bankruptcy, neither the damages nor the costs are proveable.

In no case are costs proveable where the verdict is not before bankruptcy. Where the verdict is not before bankruptcy, the costs, though not proveable, are barred by the certificate. *Ex parte Poucher*, and *Ex parte Parkinson*, 2 Law J. Chanc. 168.

(*m*) *Executors.*

An order of court must be obtained, before an executor, who has become bankrupt, can prove under his own commission, a debt due from him to the testator's estate.

Where an order admits an executor to prove, it is not declaratory of an anterior right, but is the first origin of his title to prove. *Ex parte Shaw*, 1 G. & J. 163.

If the creditor, being also one of the executors of his original debtor, makes no demand for many years upon the new firm, to pay the sum to the original debtor's estate, he will not be allowed, after the bankruptcy of the new firm, to claim it as a debt due to him from his testator's assets. *Campbell* v. *Campbell*, 3 Law J. Chanc. 129.]

The executors of the petitioning creditor, who died between the issuing and the opening of the commission, permitted to prove the debt before the commissioners at the opening. *Ex parte Winwood*, 1 G. & J. 252.

(*n*) *Trustees.*

A and B were trustees of a bequest of stock, and the dividends were to be paid by them to the testator's brother for life, and at his decease, to testator's sister, and upon the death of the survivor, to A absolutely. A, the surviving trustee, became bankrupt; but prior to his bankruptcy, sold out the stock, and applied the same to his own use. Upon a petition by testator's sister and her husband to prove the value of the stock sold, it was ordered, that the value of the stock so bequeathed, should be computed by the commissioners, and that the husband should be at liberty to prove the amount of such value, and the dividends in the meantime to be paid into the bank, subject to the further order of the court. *Ex parte Fairchild and wife*, 1 G. & J. 221.

A sum of money being assigned to the bankrupt, as a trustee, to invest and pay the interest to the settlor for life, and after as to 100*l.* part thereof to himself, for his care and pains, and the residue for the benefit of A and B, retaining 20*l.* a year to himself for his trouble. He never invested the fund, but applied it to his own use, continuing to pay the dividends during the life of the settlor, and shortly after her death became bankrupt: Held, that the parties entitled could only prove for the same, subject to the sum of 100*l.*, which, upon the death of the settlor, became the absolute property of the bankrupt. *Ex parte Kettlewell*, 1 G. & J. 321.

A bequest to J B and J T, in trust for the wife of J B during her life, and after her death, for the children of the wife of J B and in such shares as J B and his wife, or the survivor of them, should appoint; and if no appointment was made, for all the children to share equally, and to be divided at twenty-one. J B and his wife had five children, and no appointment was made; but J B advanced and sold out part of the trust funds for J B the younger and G F B, two of the children; and J B, J B the younger, and G F B became bankrupts: Held, that M B the younger, one of the five children who had each a vested interest of one-fifth part of the trust funds after the death of their mother, subject to the power of appointment, was entitled to prove one-fifth part of the trust funds so misapplied against the estate of J B, the dividends to be paid into the bank, subject to the further order of the court. *Ex parte Beilby*, 1 G. & J. 167.

(*o*) *Sureties.*

Where a surety in a bond for the bankrupts, after the failure, joined with the bankrupts in a new bond to the representatives of the creditor, and the old bond was delivered up to the surety: Held, not to be equivalent to payment by the surety, so as to entitle him to prove under the commission. *Ex parte Serjeant*, 1 G. & J. 183; affir. on appeal s. c. 2 G. & J. 23.

A surety paying a debt after proof made, is thereby allowed to stand in the creditor's place, not only with respect to dividends, but in respect of the certificate. *Ex parte Cler*, 1 G. & J. 330.

A surety who discharges a debt after his principal's bankruptcy, and after the creditor has proved, stands in the same situation as the creditor did. *Ex parte Houston*, 2 G. & J. 36.

The Court will not, without the consent of the assignees, direct the proof of a debt against a bankrupt's estate to be made by a party not a creditor, but who, being bound to indemnify the creditor, is entitled to the benefit of the proof. *Ex parte the Bank of England*, 6 Law J. Chanc. 140.

(*p*) *Effect of proving.*

A creditor by proving a debt is, under the 49 Geo. 3, c. 121, s. 14, bound to discontinue an action *previously* brought for another demand, but not, as it seems, an action for a distinct demand brought *subsequently*. *Ex parte Glover*, 1 G. & J. 270.

A debtor in custody on a detainer, is not discharged at law from such detainer, until his bail have justified, and a Judge's order for his discharge issued; and even where such detaining creditor had proved his debt,—it was holden, that an order for the bankrupt's discharge was essential. *Ex parte Cross*, 2 G. & J. 100.

Proving one debt under a commission of bankrupt, does not preclude the creditor from electing to sue for another. *Bridget* v. *Mills*, 4 Bing. 18; *Ex parte Sly*, 2 G. & J. 163.

A creditor who has proved, will, upon a petition by the assignees, be restrained from issuing execution against the property of the bankrupt in the possession of the assignees. *Ex parte Bernasconi*, 2 G. & J. 381.

(I) OF SET-OFF AND MUTUAL CREDIT.

[See sec. 50, 6 Geo. 4.]

If the holder of a bill of exchange is a debtor to the bankrupt's estate, and has obtained the bill after he has had notice of the bankrupt's insolvency, such bill cannot be set off; he not being a *bonâ fide* holder. *Ex parte Stone*, 1 G. & J. 191.

Where the bankrupt had granted an annuity, the consideration for which was only payable at the grantee's death, and as collector and agent for the grantee, had fraudulently misapplied large sums received for other purposes; and after the death of the grantee, became bankrupt: Held, that the executor could not set off the consideration money then due, against the sums so misapplied. *Whitaker* v. *Hall*, 1 G. & J. 213.

A legacy, given by a testator to the wife of a bankrupt, may be set off by his creditors against a debt from the bankrupt to their testator. *Ex parte O'Ferrall*, 1 G. & J. 347.

In an action of trover, by the assignees of a bankrupt, the defendants, to shew their right to retain the proceeds for which the action was brought, produced an agreement made before the bankruptcy, from which it appeared that the defendants undertook to accept bills, to enable the bankrupt, by his agent abroad, to purchase cargoes, and transmit them to the defendants, who were to pay their acceptances out of the proceeds, and to place the surplus to the account of the bankrupt: Held, no defence to an action for proceeds received after the bankruptcy. *Carter* v. *Barclay*, 3 Stark. 43. [Abbott]

Where A B brought an action against C D, to

recover the price of a horse sold by the former to the latter; and A B was afterwards declared a bankrupt, after which C D obtained judgment as in case of a nonsuit; and the assignees of A B afterwards sued C D, for the same cause of action, and obtained a verdict: Held, that the costs in the former action could not be set off against the damages and costs of the latter. *West* v. *Pryce*, 3 Law J. C.P. 95, s. c. 2 Bing. 455, s. c. 10 B. Mo. 154.

A colonel of a regiment, after being indebted to the army-agent for clothing furnished to the regiment, appointed him his lawful agent, and authorized him to receive from the paymaster-general all sums due to the regiment; the agent, after receiving several sums, became bankrupt: in an action by his assignees against the colonel, for the sum due for clothing—it was holden, that the colonel might set off the sums received by the agent from the paymaster. *Knowles* v. *Maitland*, 4 B. & C. 173, s. c. 6 D. & R. 312.

In an action of trover, for cloth deposited by the bankrupt, prior to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed, it was decided, that the defendant could not detain them for his general balance for such work done by him for the bankrupt before the failure, there being no mutual credit within stat. 5 Geo. 2, c. 30, s. 28. *Rose* v. *Hart*, 8 Taunt. 499, s. c. 2 B. Mo. 547.

Under commissions prior to 6 Geo. 4, c. 16, the assignees are entitled to deprive a debtor of his set-off, in respect of all transactions within two months of the commission. In such cases they might, therefore, take only one side of the account against the debtor; and leave him to come in as a creditor, as to the items on the other side.

But, by 6 Geo. 4, c. 16, s. 50, the mode of taking the account is altered; and the two sides are fairly placed against each other, up to the time of the commission, and the balance struck accordingly; provided the party dealing with the bankrupt had no notice of a prior act of bankruptcy. *Kinder* v. *Butterworth*, 5 Law J. K.B. 23, s. c. 6 B. & C. 42, s. c. 9 D. & R. 47.

Where a bill of exchange has been discounted by a trader for his customer, is entered in account, and is by the trader paid away to a third person, and becomes due after the bankruptcy of the trader, his assignees cannot sue the customer upon this bill, without allowing him his right of set-off upon the general account between him and the bankrupt; although the assignees have been forced to allow the bill in account with the third person after the bankruptcy. *Bolland* v. *Nash*, 6 Law J. K.B. 244, s. c. 8 B. & C. 105, s. c. 2 M. & R. 189.

### (K) OF THE ASSIGNEES.

#### (*a*) *Choice of.*

Persons cannot vote in the choice of assignees, who are appointed by the Court to prove and receive dividends. *Ex parte Shaw*, 1 G. & J. 151.

The deposition of the petitioning creditor, at the opening of the commission, is not a proof to entitle him to vote in the choice of assignees. *Ex parte Rawson*, 2 G. & J. 358.

Where creditors are elected assignees by the major part, in value, of the creditors who have proved, the commissioners are bound to execute an assignment, though the latter may merely wish to make a postponement for the purpose of investigating the sufficiency of the choice. *Ex parte Woolley*, 1 G. & J. 366.

Where a clear case of preference, by assigning goods in reduction of a debt, was disclosed, the Court ordered the choice of assignees to be proceeded in, after the party had tendered sufficient proof for the commissioners to determine on. *Ex parte Barclay*, 1 G. & J. 272.

Upon a joint choice of three persons as assignees, when the Court rejects the nomination of one out of the three, it invalidates the choice of the whole. *Ex parte Shaw*, 1 G. & J. 155.

A new choice of an assignee will be directed, where he is chosen before one commissioner, and the assignment executed to him by three. *Ex parte Moore*, 1 G. & J. 190.

#### (*b*) *Rights.*

Although a meeting of creditors may have been convened by advertisement, and they may have sanctioned the sale of the bankrupt's property to one of the assignees at a fair valuation, the Court will not permit the assignee to become the purchaser, unless a reference is made to the commissioners, to ascertain whether the property can be disposed of more advantageously. *Ex parte Serle*, 1 G. & J. 187.

Leave given to assignees to bid for part of the bankrupt's estate, a meeting of the creditors having previously given their sanction to the application. *Anonymous*, 2 Russ. 350.

Mode of proceeding where the assignees apply as mortgagees for a sale. *Ex parte Cowdry*, 2 G. & J. 272.

An application, by creditors, to restrain the assignees from selling the bankrupt's effects, was refused, on the ground that they act upon their own responsibility. *Ex parte Montgomery*, 1 G. & J. 238.

An executor, who has assets of the testator in his hands, becoming bankrupt, his assignees are made parties to a suit relating to the testator's property: these assignees will not be allowed their costs out of the testator's estate. *Thorne* v. *Balfour*, 2 Law J. Chanc. 16.

On a petition, by a petitioning creditor, against a removed assignee, for payment of his bill of costs, taxed by the commissioners: Held, that no order could be made, as there was no evidence of collusion between the removed and present assignee. *In re Gibson*, 1 G. & J. 303.

If the assignees of a bankrupt obtain an *ex parte* order to enlarge the time for the last examination, when the bankrupt is ready to attend, the Court will discharge it, as being irregular. *Ex parte Dayrie*, 1 G. & J. 281.

A bill of foreclosure being filed by a mortgagee, against a bankrupt mortgagor and his assignees, the assignees cannot, without the concurrence or consent of the bankrupt, apply under the 7 Geo. 2, c. 20, s. 2. *Garth* v. *Thomas*, 3 Law J. Chanc. 94, s. c. 2 S. & S. 188.

Assignees of bankrupt, having failed in an action for want of proving an act of bankruptcy sufficiently early, cannot litigate the point in a second action; and though the record in the former action is not a conclusive estoppel, it is admissible in evidence

without being pleaded. *Stafford* v. *Clark*, 1 C. & P. 403. [Best]

A having accepted bills for the accommodation of B, the latter discounts them with his bankers; they become bankrupts before the bills are due, being indebted to B in a cash balance exceeding the amount of the bills: upon the joint petition of A and B, held, that the assignees were not entitled to sue A upon these bills; and that the bills ought to be delivered to B, in part discharge of the balance due to him. *Ex parte Hippins*, 4 Law J. Chanc. 195, s. c. 2 G. & J. 93.

The assignees of a bankrupt mortgagor cannot maintain assumpsit against the brokers to a mortgagee of a ship, who has taken possession, and received the freight, if a sum equal in amount has been applied by the mortgagee to the payment of the seamen's wages. *Dean* v. *M'Ghie*, 2 C. & P. 387. [Best]

A new assignee of a bankrupt, who has been chosen after an assignment to former assignees has been vacated by the Lord Chancellor, may sue as such for goods sold by the preceding and displaced assignee. *Altridge* v. *Kittridge*, 2 Law J. C.P. 15, s. c. 1 Bing. 355, s. c. 8 B. Mo. 372.

Assignees under a joint commission against two partners, may recover separate debts due to each, as well as joint debts due to both. *Graham* v. *Mulcaster*, 5 Law J. C.P. 118, s. c. 4 Bing. 115.

The assignees of a bankrupt, though neither of them be the petitioning creditor, cannot avail themselves of an act of bankruptcy from which the petitioning creditor would be estopped from availing himself. *Tope* v. *Hockin*, 5 Law J. K.B. 342, s. c. 7 B. & C. 101.

The assignees of a bankrupt, having once affirmed the acts of a person who wrongfully sold the property of the bankrupts, cannot afterwards treat him as a wrong-doer, and maintain trover.

The accepting of a balance produced by a sale of goods wrongfully converted, or the accepting of other goods purchased with money the produce of the bankrupt's goods wrongfully converted, may be considered as evidence of affirmance by the assignees of the act which was originally tortious. *Brewer* v. *Sparrow*, 6 Law J. K.B. 1, s. c. 7 B. & C. 310, s. c. 1 M. & R. 2.

(c) *Liabilities.*

The fourth section of the 49 Geo. 3, c. 121. applies only to a solvent, and not to a bankrupt assignee. An assignee who receives money belonging to the bankrupt's estate, in order to remit it, and who, instead of remitting it, pays it into a bank in which he is a partner, to the credit of the assignees, falls within the 49 Geo. 3, c. 121. *Ex parte Goldsmith*, 2 Law J. Chanc. 150, s. c. 1 G. & J. 405.

In order to charge the assignee of a bankrupt, under the 49 Geo. 3, c. 121, s. 4, with interest at £5 per cent. for wilfully retaining a balance, there must be a special count framed upon the act, where that sum is not recoverable under the money counts: though it seems, a different rule would have prevailed if the commissioners had settled an account, and charged the defendant with such interest. *Bassford* v. *Birch*, 1 C. & P. 373. [Abbott]

The assignee under a commission of bankrupt, is not liable for the amount of the bill of the messenger, for the business done before he was chosen, although he has continued to employ him.

If the assignee promise to pay that amount when he has sufficient funds, he cannot be made liable by proof of his having a sum not equal to that amount in his hands. *Burwood* v. *Felton*, 2 Law J. K.B. 204, s. c. 3 B. & C. 43, s. c. 4 D. & R. 621.

After an order of dividend, the assignee retains in his hands the sums which ought to have been paid to several creditors; his assets cannot, after his death, be charged with interest at the rate of 20 per cent. on the sums so misapplied by him. *Wackerbarth* v. *Powell*, 5 Law J. Chanc. 9, s. c. 2 G. & J. 151.

If one assignee hands money over to his co-assignee, whose solvency is unimpeachable at the time of the delivery, for the purpose of having it distributed among the creditors, the former is not liable for any fraudulent misapplication. *Ex parte Griffin*, 2 G. & J. 114.

Where the assignees of a bankrupt employed a broker to sell tobacco, and the broker received the money and failed, without having paid it over: Held, that the assignees were not liable to the creditors for the proceeds received by the broker. *Belchier* v. *Parsons*, 1 Ken. 38, s. c. Amb. 218.

A bankrupt's reversionary interest being offered for sale by public auction, and a party having bid £950, it was bought in at £1000 upon a reserved bidding, and upon a subsequent sale only fetched £510: Held, that it was not such a case as to render the assignees liable for the difference. *Ex parte Buxton*, 1 G. & J. 355.

The assignee of a bankrupt is not guilty of a breach of trust in neglecting to pay the costs of the solicitor under the commission. *In re Sheppard*, 1 Cress. 109.

(d) *Removal of.*

Prior to the execution of an assignment, the Court has jurisdiction to remove persons nominated by the creditors as assignees. *Ex parte Shaw*, 1 G. & J. 127.

(L) Of the Assignment.

(a) *Of the conveyance.*

A bankrupt who is disputing the commission at law cannot, although nonsuited, be compelled to convey. *Ex parte Thomas*, 2 G. & J. 278.

(b) *Of the bankrupt's property, real and personal.*

Where A, by deed, conveyed certain premises to B, on condition of his paying certain sums by way of rent for four years, by half-yearly payments, the whole of which would amount to the value of the premises, and the deed contained a clause of security by A, in case the rent should be in arrear, or nonperformance of the covenants contained therein by B; in which cases he might take possession of the premises and sell the same, and pay the overplus, if any, to B: Held, that this deed was usurious:—and B, having been let into the premises under it, and continued in possession four months when he became bankrupt: Held, that the property passed to his assignees under the statute 21 Jac. 1, c. 19, s. 11. *Sinclair* v. *Stevenson*, 3 Law J. C.P. 60, s. c. 2 Bing. 514, s. c. 1 C. & P. 542.

A testator gives an annuity to A B for life, and

afterwards directs that it shall not be subject to his debts or engagements, and that it shall be paid into his own hands: A B becomes bankrupt: Held, that the annuity vested absolutely in his assignees. *Graves* v. *Dolphin*, 5 Law J. Chanc. 45, s. c. 1 Sim. 67.

Where a bankrupt is a legatee, but owes a larger sum to the testator's estate than the amount of the legacy given to him, his assignee is not entitled to take any part of the legacy. *Richards* v. *Richards*, 9 Price, 219.

Where a company had power given them to retain the salaries and dividends due to certain directors, but had not exercised that authority previous to one of them becoming bankrupt: It was holden, that his salary and dividends passed to his assignees, but did not divest the company of their right to set off such sums against the principal debt. *Nelson* v, *London Assurance Company*, 2 S. & S. 292.

A vendee of bankrupt's mortgaged estate, which had been sold before the commissioners under the general order, was, upon petition in bankruptcy, ordered to complete his purchase. *Ex parte Gould*, 1 G. & J. 231.

Where the mortgagor was in possession as tenant at will, by express contract to the mortgagee: Held that the crops upon the mortgaged premises did not belong to the mortgagee at the bankruptcy of the mortgagor, or at the time of the order for sale by the commissioners. *Ex parte Temple*, 1 G. & J. 216.

*Quære*—Where a mortgagee has parted with the possession of his title deeds without fraud or gross neglect, and they are deposited with another person equally innocent, whether the court will take the possession from him? *Ex parte Cawthorne*, 1 G. & J. 240.

The circumstance of a mortgagee not having tendered any proof until the third meeting, will not prevent him from presenting a petition. *Ex parte Whitehurch*, 2 J. & W. 548.

Where a bankrupt was permitted for several months to continue in possession, and trade for the benefit of the estate, the assignees supplying him with funds: It was holden, that the assignees could not afterwards reject the lease, even though they had given a notice of their intention to do so, within a month after the bankruptcy, because they had accepted the lease by using the premises for the benefit of the estate. *Clark* v. *Hume*, 1 R. & M. 207. [Abbott]. See 6 Geo. 4. c. 16.

A landlord sent a man to distrain for rent, who entered the premises after *sunset*, on the 23d December, and possession was kept until an officer entered, on the 26th December, with a warrant, and gave notice of the distress. The tenant having become a bankrupt, his assignee brought an action of trover, to recover the goods:—The Court held, that the first taking was unlawful, and that the second distress was not a distinct distress, independent of the first, and consequently, that the assignee might recover the goods. *Brice* v. *Hare*, 2 Law J. K.B. 194.

On an application by a vendor, who had not conveyed, for a sale of the premises, in discharge of his lien, for the unpaid purchase-money, and to prove for any deficiency, the Court held it regular, and granted it. *Ex parte Gyde*, 1 G. & J. 323.

A deposit of deeds, under a verbal agreement, is extendable by a subsequent parol agreement. *Ex parte Lloyd*, 2 Law J. Chanc. 162, s. c. 1 G. & J. 389.

An agreement, by way of deposit of title deeds, with a firm of five, one of whom was a nominal partner only, reduced by subsequent agreement to the actual partnership of four. *Ex parte Alexander*, 2 Law J. Chanc. 159, s. c. 1 G. & J. 409.

The defendant having agreed with a person, who afterwards became bankrupt, that if he would furnish J S with timber to complete the carpenter's work of the defendant's house, he would pay the bankrupt £50 when the work was completed: Held, in an action by the assignee, that he was entitled to recover, although the timber was furnished by the bankrupt before the contract was entered into between him and the defendant; and although the work was not entirely completed by J S, as, if the terms of the contract had been substantially complied with, it was sufficient to entitle the plaintiff to recover for goods sold and delivered. *Dixon* v. *Hatfield*, 3 Law J. C.P. 59, s. c. 2 Bing. 439, s. c. 10 B. Mo. 32.

A bargain, between the bankrupt and a third person, that the former shall obtain property from his assignees, for the latter, at a certain sum, in consideration of another sum being paid to the bankrupt, is void in law, though the assignees consent, it being a fraud on the creditors. *M'Shane* v. *Gill*, 1 C. & P. 149. [Abbott]

(*c*) *Property of the bankrupt's wife.*

A married woman having a vested reversionary interest in a legacy, who, after the bankruptcy of the husband, institutes proceedings against him in the Ecclesiastical Court for adultery and ill usage prior to the bankruptcy, and there obtains a sentence of divorce, cannot, when the legacy comes into possession, claim to have the whole of it paid to her, as against the assignees of the husband's estate. *Green* v. *Otte*, 1 Law J. Chanc. 87, s. c. 1 S. & S. 250.

Where an estate was conveyed to husband and wife, and their heirs, as joint tenants, "in consideration of 200*l.* now in hand, duly paid by husband and wife,"—it was holden, on the bankruptcy of the husband, that exclusive evidence might be given, shewing that the money belonged to the wife, thereby defeating the claims of the creditors, under the 21 Jac. 1. *Doe d. Bainbridge* v. *Statham*, 7 D. & R. 141.

(*d*) *Trust Property.*

Where a trustee becomes bankrupt, it will be referred to the Master to approve of a new one, and the assignees will be directed to transfer the property to such substituted trustee. *Ex parte Saunders*, 2 G. & J. 132.

But a new trustee may be appointed, under 6 Geo. 4, c. 16, s. 79, without a reference to the Master. *Ex parte Inkersole*, 2 G. & J. 230.

(*e*) *Reputed ownership.*

[6 Geo. 4, c. 16, s. 72.]

A warrant of attorney was given by a person who was becoming insolvent, to the defendants, who entered up judgment, and took out execution, under which the sheriff seized his goods, and sold them by a bill of sale to the defendant, who let them

[illegible] Law J. K.B. [illegible] x R. 240.

[illegible] does not require [illegible] of the person to [illegible] delivered. The [illegible] and to whom it is [illegible] sufficient to satisfy the [illegible] therefore, the plain- [illegible] that they had sold [illegible] the bagage on the [illegible] as sold to him: [illegible] from shew- [illegible] sale to T L, it was [illegible] on the condition that [illegible] plaintiffs, and not to [illegible] right for it: and T [illegible] the corn was in the [illegible] the plaintiffs [illegible] that the plaintiffs [illegible] 5 Law J. C.P. [illegible] 261.

[illegible] afterwards [illegible] in con- [illegible] the [illegible] of [illegible] [illegible] to the statute [illegible] against the [illegible] the property [illegible] the tenant [illegible] an act of [illegible] maintain [illegible] the goods [illegible] into the [illegible] of the [illegible] bankrupt, [illegible] bankrupt," [illegible] to [illegible] time when a [illegible] *Ex parte* v. [illegible] 334, s. c.

[illegible] of goods will [illegible] with the right of [illegible] assignees a [illegible] order

and disposition" of the bankrupt, according to 21 Jac. 1. c. 19. s. 11, incorporated in 6 Geo. 4. c. 16. s. 72. *Foster* v. *Frampton*, 5 Law J. K.B. 71, s. c. 6 B. & C. 107, s. c. 9 D. & R. 108.

When the sale of property by a bankrupt is complete, though it remains in his occupation, it will not pass under the commission, if it can be ascertained clearly to be the property of the vendee. *Ex parte Marrable*, 1 G. & J. 402.

A carriage finished and paid for before the bankruptcy of the maker, but suffered to remain on his premises at the request of the owner, on account of his being abroad, cannot be taken by the assignees as in the order or disposition of the bankrupt, although such bankrupt put it in his front shop, and actually sell it to another. In such case, an actual delivery of the carriage at the house of the person for whom it was made, is not necessary to constitute him the owner. *Bertram* v. *Payne*, 3 C. & P. 175. [Gaselee]

Property at a wharf is transferred by lodging the delivery-order with the wharfinger, though it be not re-weighed nor re-housed: therefore, if the party giving the order afterwards become bankrupt, his assignees cannot maintain trover. *Tucker* v. *Ruston*, 2 C. & P. 86. [Best]

Trover for warrants, or orders for delivery of lac-dye. P sold to the plaintiff some lac-dye, lying in the East India Company's warehouses, and having retained the delivery warrants, pledged them to the defendant for 500*l.*, and became bankrupt without redeeming them: The property in the warrants did not vest in his assignees, under 21 Jac. 1. c. 19. s. 11. *Greening* v. *Clark*, 3 Law J. K.B. 229, s. c. 4 B. & C. 316, s. c. 6 D. & R. 375.

Timber sent by B, under the care of his servant, to be disposed of at A's wharf, does not pass under a commission of bankruptcy against A. *Boddy* v. *Eaksile*, 1 C. & P. 62. [Burrough]

Where the owner of furniture lent it to the plaintiff, under the terms of a written agreement, and he placed it in a house occupied by the wife of J S, who had previously become a bankrupt, and his assignees having ordered the furniture to be seized by the messenger, under the commission: Held, that the plaintiff might recover in trover, without producing the agreement made between him and the owner, on the ground that a simple bailee has a sufficient interest to maintain such action. *Burton* v. *Hughes*, 3 Law J. C.P. 241, s. c. 2 Bing. 173, s. c. 9 B. Mo. 334.

If an innkeeper borrow a chaise from a coach-maker while he has a new chaise making, and use it in the course of his trade, but has not his name painted upon it, under the statute 4 Geo. 4. c. 62. s. 11, this is not such a reputed ownership of the borrowed chaise, as will entitle the assignees of the innkeeper to detain it from the coach-maker. *Newport* v. *Hollings*, 3 C. & P. 223. [Vaughan]

If A let a house to B, with a covenant that the lease shall determine on B's committing any act of bankruptcy, on which a commission of bankrupt should issue; and by another deed of the same date, A grants the use of the furniture to B in like manner, and with a similar covenant, to allow A to resume the possession of the furniture on the commission of an act of bankruptcy: if B become bankrupt, and the jury find that B was the reputed owner of the furniture, it will pass to the assignees notwithstanding these covenants; and if it be proved, on the one side, that several of the servants of B, and many of his customers knew that the goods belonged to A; and on the other side, several of B's creditors prove that they considered the goods to belong to B, and gave him credit upon the faith of them; and that he acted as master of the house, &c.; it will be for the jury to say, whether B was held out to the world as the owner of the goods, and obtained credit by the possession of them. *Hickenbotham* v. *Groves*, 2 C. & P. 492. [Abbott]

If a father appoints his son his servant, for the purpose of selling goods for his benefit only, the goods, on the son becoming a bankrupt, do not pass under the statute 21 Jac. 1. c. 19. *Stafford* v. *Clark*, 1 C. & P. 24. [Burrough]

### (*f*) *Voluntary Settlement.*

Although a voluntary settlement is unavailable as against creditors, yet it is valid as to the parties in whose favour it is made. *Ex parte Bell*, 1 G. & J. 282.

Upon a bill by assignees to set aside a settlement, made by a trader in favour of his children, on the ground that he was insolvent at the time of the execution of the settlement, the Court considered that the insolvency mentioned in the late bankrupt act, 6 Geo. 4. c. 16. s. 73, must mean a total insolvency, such as a general inability to pay debts in the ordinary course of trade, or the entering into a composition with creditors; and that notice of inability to meet a particular demand was not notice of insolvency; and in the present case held, that evidence that the bankrupt had accepted two bills prior to the date of the settlement, and which were from time to time renewed, and ultimately not paid, was not alone sufficient evidence of insolvency, within the meaning of the act. *Cutten* v. *Sanger*, 2 Y. & J. 459.

## (M) OF RELATION.

### (*a*) *Payments made by, to, and on account of the bankrupt.*

A person is *insolvent* within the meaning of the bankrupt laws, when he is not able to make his payments, in the usual course of trade, even if he have sufficient property ultimately to pay all his debts in full.

Payments made by a person, after he has become embarrassed, and given a warrant of attorney to another to secure a debt, are not made in the course of trade; and, having occurred after an act of bankruptcy, the assignees can maintain an action to recover the amount of them. *Shone* v. *Lucas*, 1 Law J. K.B. 226, s. c. 3 D. & R. 218.

A payment to a bankrupt subsequent to the issuing of a commission, although made without actual knowledge of the commission, was held not to be protected under the 1 Jac. 1. c. 15. s. 14, the issuing of the commission being considered of itself notice to all the world of a prior act of bankruptcy. *Brooks* v. *Sowerby*, 8 Taunt. 783, s. c. 3 B. Mo. 157. But judgment reversed, in error, *Sowerby* v. *Brooks*, 4 B. & A. 523.

In the bankrupt laws it is a general rule, that if a person pay a sum of money, knowing that he must become bankrupt, unless under the influence of a threat, it is a voluntary payment, although the

payee receive it in the ordinary course of business, without any knowledge that he is being preferred to the other creditors. Therefore, where a person being deeply indebted, paid his bankers, who had merely written to him for a small sum of money, it was held, that such a demand was not a threat; and that, inasmuch as it could, from the circumstances, be predicated that a bankruptcy would follow, the assignees had a right to the money back again. *Poland* v. *Glyn*, 1 Law J. K.B. 72, s. c. 2 D. & R. 310.

Where the bankrupt, during the period he was lying in prison (which constituted the act of bankruptcy), paid the balance of disbursements on a vessel, and received back the papers, on which the creditor had a lien for the balance: Held, that the assignees having been thereby enabled to obtain possession and dispose of the ship, could not divest the defendants of the money which they might have secured by retaining possession of the ship. *Thompson* v. *Beatson*, 1 Law J. C.P. 22, s. c. 1 Bing. 145, s. c. 7 B. Mo. 548.

Where, on the day after a trader had stopped payment generally, he sent 100*l.* to a particular creditor, to assist him in paying a large accommodation bill, which he had accepted for the trader, and soon afterwards became bankrupt,—it was holden, that the assignees were entitled to such 100*l.*; and as the creditor's name was attached to the bill, he could not be deemed the agent of the bankrupt, because he was paying the money in his own discharge. *Guthrie* v. *Crossley*, 2 C. & P. 301. [Abbott]

Some merchants, in London, sent an order for goods, to the manufacturer, in the country, with whom they had been accustomed to deal, and whose bills of exchange they had been accustomed to accept before the goods were received. The manufacturer committed an act of bankruptcy, and afterwards sent the goods. The merchants accepted a bill of exchange, of a much greater amount than the value of the goods, without knowing of the act of bankruptcy: The Court held, that the assignees could recover back the goods, as the payment was not protected by 1 Jac. 1. c. 15. *Bishop* v. *Crawshay*, 3 Law J. K.B. 65, s. c. 3 B. & C. 415, s. c. 5 D. & R. 279.

Where a trader, having no knowledge that his debtor had committed an act of bankruptcy, supplied him with goods to be paid for weekly: It was holden, that such payments were not protected by the 19 Geo. 2. *Bolton* v. *Jager*, 1 R. & M. 265. [Abbott]

If a bankrupt's goods be delivered to a purchaser on the day on which the bankrupt went to prison, and paid for the next day, the payment will be defeated by the relation of the act of bankruptcy, by lying in prison for two months to the day of the arrest. *Sanderson* v. *Gregg*, 3 Stark. 72. [Abbott]

If A deliver a bill of exchange to a person, not knowing that he is a bankrupt, who returns it again to A, his assignees cannot recover the amount of it as money paid by the bankrupt, after he became a bankrupt. *Moore* v. *Barthrop*, 1 Law J. K.B. 4, s. c. 1 B. & C. 5, s. c. 2 D. & R. 25.

A payment made by a person on the verge of bankruptcy to another having claims on him, but who is aware of his insolvency, is valid as a *bonâ fide* transaction within the statute 6 Geo. 4. c. 16. s. 81, if no commission issue till more than two months after the payment. *Tucker* v. *Barrow*, 1 M. & M. 137. [Tenterden]

On a commission issuing on May the 14th, a dealing on March the 14th is valid, as "more than two calendar months" before the issuing of the commission. *Cowie* v. *Harris*, 1 M. & M. 141. [Tenterden]

A bill of exchange, given to a trader before an act of bankruptcy, is good payment, although the bill does not become payable till after the bankruptcy; if the creditor did not know that the bankrupt was insolvent at the time. *Bennet* v. *Spackman*, 1 C. & P. 274. [Best]

In the absence of any evidence of fraud, the delivering to a party a bill dishonoured by him, for goods subsequently purchased under an agreement for ready money, may be equivalent to payment, and on the bankruptcy of the vendor, cannot be impeached by his assignee. *Mayer* v. *Nias*, 1 Law J. C.P. 113, s. c. 1 Bing. 311, s. c. 8 B. Mo. 275.

L was possessed of the lease of a public-house, which was deposited with the defendants as security for 1275*l.* due to them from L. T, having a sum of 650*l.* in the hands of the defendants, agreed with L to purchase his lease for 1690*l.*, but, he not having sufficient to complete the purchase, the defendants consented to advance the sum required, retaining the lease as security. L, T, and one D, a clerk of the defendants, met to effect the transfer, when T drew a draft on the defendants in favour of L for 1690*l.*, which was handed over to D, who, on L's executing the transfer to T, gave him a draft on the defendants for 414*l.*, the difference between the amount of their debt, and that of the purchase-money. L had committed an act of bankruptcy, and the defendants received notice from a creditor not to pay the draft, as a docket would be struck against him. The defendants refused to pay the draft when presented, but they afterwards paid it under an indemnity: Held, that the assignees of L might recover the amount against the defendants in an action for money had and received; and that the defendants had sufficient notice of L's bankruptcy. *Spratt* v. *Hobhouse*, 5 Law J. C.P. 147, s. c. 4 Bing. 173.

A, being a trader, before any act of bankruptcy, directed his broker, who had authority to distrain for rents due to him, to pay a certain sum to B in satisfaction of a debt, and the broker, *bonâ fide*, agreed with B to pay him as soon as he received the rents, and after this A became bankrupt: Held, that the assignees of A could not recover this sum from the broker, though he did not in fact pay it over to B, till after the commission issued. *Bedford* v. *Perkins*, 3 C. & P. 90. [Tenterden]

When a bankrupt has given a voluntary preference to a creditor for a *bonâ fide* debt; whether the act is fraudulent or not, (according to the 6 Geo. 4. c. 16. s. 82,) is properly presented to the jury by the question, whether the debtor had bankruptcy in contemplation at the time. *Gibbins* v. *Phillips*, 6 Law J. K.B. 98, s. c. 7 B. & C. 529, s. c. 1 M. & R. 238.

September 24, 1824, D, the obligor, who, on 14th of August preceding, had quitted premises he held of the obligee, paid the obligee the balance on a bond due October 19th following; the fixtures left

on the premises, which were valued on the 24th September, being taken in discharge of the other portion of the sum payable under the bond.

In July preceding, D, upon looking into his affairs, found he could pay only 17*s.* in the pound; and he sold his watch and part of his stock to satisfy some claims upon him; D became bankrupt, October 28th, 1824, but said he had no intention of becoming bankrupt at the time he paid the obligee, though he made the payment because he expected other creditors would get possession of his property.

In an action by D's assignee against the obligee: Held, that the jury were properly directed to consider whether the payment were made by D, with a view to the probability of his becoming bankrupt, and in fraudulent preference of the obligee. *Flook* v. *Jones*, 5 Law J. C.P. 21, s. c. 4 Bing. 20.

Where a trader, being possessed of a beneficial lease, proposed, after an act of bankruptcy, to dispose of it to a purchaser, who refused to take it, unless the premises should be first discharged from all arrears of rent which were then due to the landlord, and the rent was afterwards paid to the latter out of the money which the purchaser had agreed to give for the lease, the landlord being aware of the situation of the bankrupt, and there being no property to distrain on the premises at the time, but the landlord having a right of re-entry according to a proviso in the lease: Held, that the assignee of the bankrupt could not recover from the landlord the rent so paid to him, in an action for money had and received, as the estate of the bankrupt had been benefited by such payment, and as the landlord had thereby waived his right to distrain as well as to proceed by ejectment, for a breach of the proviso contained in the lease. *Mavor* v. *Croome*, 1 Bing. 261, s. c. 8 B. Mo. 171.

(*b*) *Other Dispositions of the Bankrupt's Property.*

In a lease, the name of A is inserted as the lessee upon a trust for B, but there is no declaration of trust in writing: A commits an act of bankruptcy, and then executes a declaration of trust: afterwards, a commission of bankruptcy issues against A: Held, that this declaration of trust, though executed after the bankruptcy, will prevail in favour of B, against the assignees. *Gardner* v. *Rowe*, 3 Law J. Chanc. 220, s. c. 2 S. & S. 346.

A sale of goods in an open shop, in the usual course of trade, and paid for before a commission of bankrupt has issued against the trader, although it was made after a secret act of bankruptcy, is valid by 1 Jac. 1. c. 15. s. 14; and the assignees cannot recover the goods in an action of trover, without giving back the money that has been paid for them. *Cash* v. *Young*, 2 Law J. K.B. 72, s. c. 2 B. & C. 413, s. c. 3 D. & R. 652.

Money or goods, lodged by a person who is afterwards a bankrupt, with another, as an arbitrator, or as a gratuitous carrier, and paid or delivered over without knowledge of any act of bankruptcy, cannot be recovered back from such arbitrator or carrier. *Tope* v. *Hockin*, 5 Law J. K.B. 342, s. c. 7 B. & C. 101.

If it appears in an action of trover by the assignees of a bankrupt, that certain proceeds, constituting part of an account stated, came into the hands of the defendants after the act of bankruptcy, it is incumbent on the defendants to shew that they had a right to retain the goods, notwithstanding the balance is in their favour. *Carter* v. *Barclay*, 3 Stark. 43. [Abbott]

Where the bankrupt, who was a bill-broker, after he had committed an act of bankruptcy, sent bills to the defendants, who were creditors, on which bills the bankrupt had only lent money, and had not discounted or given the full value for them: It was holden that his assignees might recover them in trover. *Hall* v. *Barnard*, 1 C. & P. 382. [Abbott]

Upon the question, under the stat. 46 Geo. 3. c. 135, (repealed from the 1st Sept. 1825, by the stat. 6 Geo. 4. c. 16,) whether a party dealing with a trader knew him to be insolvent; the jury may infer such knowledge from the fact of the party buying goods of the trader to a great extent for a period of near two years, at prices more than thirty *per cent.* under prime cost. *Yates* v. *Carnsew*, 3 C. & P. 98. [Tenterden]

(*c*) *Judgments and Executions.*

The assignees of a bankrupt may maintain trover against a sheriff who, under an execution, seizes before the assignment to the commissioners, and who levies or pays over after an act of bankruptcy. *Cooper* v. *Chitty*, 1 Ken. 395, s. c. 1 Burr. 20, s. c. 1 Blac. Rep. 65.

If goods have been legally taken in execution by the sheriff, and the proprietor thereof subsequently becomes a bankrupt, and the sheriff disposes of them at one time after the bankruptcy sufficient to satisfy that execution, and another execution, which was delivered to him after the bankruptcy, the latter is void; and therefore the assignees of the bankrupts may recover in trover, for such of the goods as were sold after the sheriff had raised money sufficient to satisfy the first execution. *Stead* v. *Gascoigne*, 8 Taunt. 527.

The 6 Geo. 4. c. 16. s. 108. does not render void an execution issued upon a judgment obtained by default, confession, or *nil dicit*, and levied upon the goods of the bankrupt before his bankruptcy. *Taylor* v. ——, 5 B. & C. 392, s. c. 8 D. & R. 159.

Where a trader committed an act of bankruptcy, on 9th Nov. and the sheriff took his goods in execution on 15th, and sold them on 21st December, and a commission issued on the 23rd, and an assignment was made on 6th January following: Held, that the assignees might maintain trover against the sheriff, although he had sold before the assignment was made, as the bankrupt's property vested in them by such assignment, from the act of bankruptcy, by relation. *Lazarus* v. *Waithman*, 5 B. Mo. 313.

Two persons, *James* and *Robert*, residing at different places, were partners in trade. James committed an act of bankruptcy on the 11th August 1818. He, on the 29th August consigned some goods to the defendants, as factors, who received them on the 11th September, and sold them on the 16th. Robert committed an act of bankruptcy on the 23rd September; and a joint commission was taken out against them on the 5th October.

The defendants, on 19th September, seized, under an execution against James and Robert, some joint property of the bankrupts, and also some private property of each of them; and, on 28th September, they seized all the joint property of the two bank-

rupts under a similar execution. The Court held, that the assignees were entitled to recover back the joint property seized after the 23d September, and the private property of James, seized under the first execution: but were not entitled to the value of the goods consigned to the defendants, and sold by them, nor to the amount of the private property of Robert, so seized before he became a bankrupt. *Ryland* v. *Ryland*, 3 Law J. K.B. 71.

The statute 3 Geo. 4. c. 39. s. 2, (as to the filing warrants of attorney to render the judgments entered on them effectual against subsequent commissions of bankruptcy,) is not repealed by the statute 6 Geo. 4. c. 16. s. 81.

*Quære*, whether the stat. 3 Geo. 4. c. 39. s. 2. extends to cases where there has been no act of bankruptcy at the time of giving the warrant of attorney. *Wilson* v. *Whitaker*, 1 M. & M. 8. [Abbott]

According to the 108th section of the 6 Geo. 4. c. 16, an execution creditor of the bankrupt, whose judgment has been obtained by confession or *nil dicit*, is not entitled to avail himself of his execution as against the assignees, unless the bankrupt's goods have been sold under the execution, and the money paid over before the act of bankruptcy.

Where A, having a debt from B, secured to him by warrant of attorney, entered up judgment by *non sum informatus*, issued a *fi. fa.*, and took from the sheriff a bill of sale of the goods seized, and B having soon afterwards became bankrupt, his assignees took possession of and sold the goods so transferred to A, who brought an action of trover for them: Held, that he was not a creditor having security for his debt within 6 Geo. 4. c. 16. s. 108, and that he was entitled to recover. *Wymer* v. *Kemble*, 5 Law J. K.B. 232, s. c. 6 B. & C. 479.

A creditor had obtained judgment by default against his debtor, since the statute 6 Geo. 4. c. 16. s. 108, and the goods having been seized by the sheriff before, but not sold until after an act of bankruptcy was committed by the debtor, the Court refused to compel the sheriff to pay over the proceeds of the sale to the assignees of the bankrupt. *In re Washbourn*, 6 Law J. K.B. 370, s. c. 8 B. & C. 444, s. c. 2 M. & R. 374.

A obtains a judgment by confession or by *nil dicit* against B, and issues a *fi. fa.*, under which B's goods are seized: whilst the goods remain unsold in the sheriff's hands, B commits an act of bankruptcy, on which a commission is issued. The sheriff, after notice of the commission, sells the goods, and pays over the proceeds to A. The amount may be recovered from the sheriff by the assignees of B, as money had and received to their use.

Whether the sale by the sheriff, after such notice, was wrongful, and would support an action of trover, *quære*. *Bailey* v. *Buck*, 6 Law J. K.B. 271, s. c. 8 B. & C. 160, s. c. 2 M. & R. 68.

*(d) Notice of the Act of Bankruptcy.*

*Before* the stat. 6 Geo. 4, the mere issuing of the commission was considered notice to all the world of a prior act of bankruptcy. *Brooks* v. *Sowerby*, 8 Term. 733, s. c. 2 B. Mo. 55, but see s. c. in error, 4 B. & A. 523.

A letter, written by the attorney of a trader, to the solicitor of a judgment creditor, requiring the creditor to delay his execution, which he would be entitled to sue out in a few days, giving as the reason for the application, lest he should so involve the debtor as to render him unable immediately to satisfy his engagements, and proposing to pay the debt by instalments, as the only means of enabling the creditor to realise the whole amount of his demand,—was holden not to be such a sufficient notice of the insolvency of the trader, as to preclude the creditor, under the 49 Geo. 3. c. 121, from levying under his execution, as having been brought, by such notice, within the terms of the second section of that statute, by fixing him with previous knowledge of the bankrupt's insolvency. *Abraham* v. *George*, 11 Price, 423.

Notice to a sheriff's officer, after he has entered the premises of a trader (two months antecedent to the date of a commission of bankruptcy) to levy under a writ of execution, of the committing of a prior act of bankruptcy, is not, in point of time, such a notice to the creditor, at whose suit the writ has issued, as will satisfy the provisions of 49 Geo. 3. c. 121. s. 2, and 6 Geo. 4. c. 16. s. 81; or protect the goods of the trader, and the interests of the assignees, against the full operation of the judgment. *Martin* v. *Fitzgerald*, 5 Law J. K.B. 245.

(N) OF PARTNERS.

Where a separate commission issued against one of three partners, and afterwards a commission issued against two of the firm, ordered that the first commission should be superseded, and that the costs should be paid out of the joint estate. *Ex parte Smith*, 1 G. & J. 256.

Gilpin carried on the business of an army-clothier. Enderby advanced £20,000, and became a dormant partner with him for ten years, and agreed to receive £2000 a year, he not being required to perform any part of the business; and that at the end of ten years he should receive back the £20,000, in six quarterly payments.

The ten years expired, and some time afterwards Enderby received part of the £20,000. Gilpin, after the expiration of the partnership, continued to carry on the business as before, in his own name, and became a bankrupt: The Court held, that the effects of the late partnership, and the debts due to Gilpin on the partnership account at the time of its expiration, and at the time of his bankruptcy, were in his order and disposition, within the meaning of 21 James 1. c. 19, and therefore distributable among the new creditors of Gilpin. *Ex parte Enderby*, 2 B. & C. 39, s. c. 3 D. & R. 636.

Where, on the dissolution of partnership, it was agreed, that all debts due to the firm should vest in one partner; but notice to that effect was not given to the debtors; it was, upon the bankruptcy of the firm, held, that the debts remained in the order and disposition of the partnership, and formed part of the joint estate. *Ex parte Usborne*, 1 G. & J. 358.

Where a joint creditor has a separate security, he may, without giving up the separate security, prove against the joint estate. *Ex parte Peacock*, 2 G. & J. 27.

Where joint creditors have no interest in the separate estates, the Court will appoint an inspector to protect the interests of the separate creditors. *Ex parte Batson*, 1 G. & J. 269.

Where the petitioning creditor under the first commission, is a joint creditor, he is entitled to prove against the joint or separate estate. *Ex parte Smith*, 1 G. & J. 256.

Where a debt of £27,620. 19*s*. 10*d*. was due from the bankrupts, at the bankruptcy, to their bankers, on a balance of account, and such balance was covered by joint promissory notes of the bankrupts, to the extent of £18,000, and also by a mortgage of some property belonging to one of the bankrupts, with joint and several covenants from each of them for the payment of the whole balance; and part of the debt, to the amount of £17,000, had been permitted to be proved by the bankers against the joint estate, on their petition for the purpose of their commanding the choice of assignees: Held, that the bankers were entitled to a proof of the £18,000 against the joint estate, and to prove the residue against the separate estate of one of the bankrupts. *Ex parte Ladbroke*, 2 G. & J. 81. s. p. *Ex parte Mills*, 4 Law J. Chanc. 192.

A commission against a person as surviving partner of another, only entitles the joint creditor to claim against the joint estate. *Ex parte Barned and Mosley*, 1 G. & J. 309.

A and B were in partnership—B was a dormant partner.—A drew bills on B, and paid them to C, who was ignorant of the partnership. A and B became bankrupts: Held, that C could only prove against the separate estates, and not the joint. *Ex parte Husbands*, 1 G. & J. 4.

A partner cannot claim against the separate estate of his co-partner before payment of the joint debts. *Ex parte Carter*, and *Ex parte Gibson*, 2 G. & J. 233; *Ex parte Ellis*, 2 G. & J. 312.

Where one partner is intrusted with the entire management of the partnership concern, and he withdraws monies for his separate use, which he duly and openly enters in the partnership books, this is not a sufficient fraud to entitle the joint estate to prove against the separate; but it would be otherwise, if, by the entries in the books, he disguised the transaction, or wholly omitted and concealed it. *Smith in re Hay*, 6 Mad. 2.

A partner cannot prove against his co-partner upon indemnifying the joint estate. Proof not payment. *Ex parte Moore*, 2 G. & J. 166; *Ex parte Gibson*, 2 G. & J. 233.

The interest of partners, as tenants in common, where the estate has been purchased out of the joint property, and mortgaged by the firm for a joint debt, is a joint security. *Ex parte Free*, 2 G. & J. 250.

Where some of the partners in a large firm are in a distinct trade, and the aggregate become bankrupt, being indebted to the partners in the distinct trade; such partners can prove against the larger firm. *Ex parte Cattell*, 2 G. & J. 124.

Where different firms are engaged in a joint adventure, the creditors of the adventure may prove against the joint estates of the minor partnerships. *Ex parte Notte*, 2 G. & J. 295.

A and B being partners with C and D, as bankers, and carrying on a separate trade as ironmongers, a debt was incurred between the separate and the joint firm, in respect to monies procured for the joint firm, under the credit of the separate firm: Held, that the debt owing to A and B could not be proved against A, B, C, and D.

If A, B, C, and D are partners, and A carry on a separate trade, proof is admissible in behalf of the separate trade, against the aggregate firm, only in respect of dealings between trade and trade. *Ex parte Sillitoe*, 1 G. & J. 374.

Seven partners carried on a bank, in Durham, and also in London, where the two managing partners also carried on a separate trade as ironmongers. Monies were from time to time raised for the banking firm by the indorsements of the partnership of two; and a commission of bankrupt having issued against all the seven, it was found that a large sum was due from the banking firm to the partnership of two: Held, that that sum could not be proved by the partnership of two against the estate of the banking firm, because it was not a debt arising from dealings in those articles which were the subject of the separate trade. *In re Goodchilds*, 2 Law J. Chanc. 137.

Five persons are co-partners in one bank, and four of them are co-partners in another bank; in consequence of their banking transactions, the smaller firm becomes indebted to the larger, and a commission issues against the five co-partners: Held, that the larger firm is entitled to prove against the less, the debt due to it from the latter. *Ex parte Castell*, 5 Law J. Chanc. 71.

A, B, and C were co-partners as bankers; B and C were partners as distillers; the bankers having advanced money to the distillers, and a commission having issued against the three: Held, that a proof might be made by the estate of the three co-partners against the estate of the two, in respect of the debt due from the two to the three. *Ex parte Brenchley*, 5 Law J. Chanc. 73.

A and B are partners; B and C form another partnership; B dies, being indebted to the former partnership: Held, that A may prove against C a debt due from B and C to A and B. *In re Richardson*, 5 Law J. Chanc. 129.

A being entitled, under a parol partnership agreement with B and C, to three eighths of the capital and profits of the business, became bankrupt, being at the time indebted to the partnership in respect of bills in which the partnership name had been used for his personal accommodation: the assignees claim a share of profits made subsequently to the bankruptcy, while the continuing partners insisted, that the bankrupt's interest in the profits ceased at that time; in consequence of this difference, no settlement of accounts between his estate and the partnership took place, and the assignees filed their bill; but B and C, and afterwards C alone, pending the litigation with the assignees, carried on the business for many years with the stock and capital which existed at the time of the bankruptcy, and stock and capital substituted in the usual course of trade for such former stock and capital, aided by the expenditure of considerable sums by C: Held, that the assignees of A were entitled to three eighths of the profits which had been made or should be made until the concern was finally wound up, and to three eighths of the money to be produced by the sale of what remained in specie of the capital and stock: A's proportion of the profits was not to be lessened, nor the proportion of C to be increased, in respect of the debt which A owed to the partnership, or of the money which C brought into the business, be-

yond his share of the original capital. *Crawshay* v. *Collins*, 2 Russ. 325.

The solvent partner is eligible to be appointed receiver of the partnership effects, though the Court will not allow him a salary. *Ex parte Stoveld*, 1 G. & J. 303.

By an award, A, one of two partners, was directed to pay a sum of money to B, the other, and also to pay several of the partnership debts; and he gave a warrant of attorney to secure the payment, and stipulated, that if his former partner should be called on to pay any of those debts, then that judgment might be entered up against him. He became a bankrupt, and B proved his private debt under the commission. B was afterwards sued by one of the creditors. He then entered up judgment against A on the warrant of attorney, *before* he had obtained his certificate, and the Court held, that he might do so. *Dally* v. *Wolferston*, 1 Law J. K.B. 246, s. c. 3 D. & R. 269.

One of two partners had committed a secret act of bankruptcy, and afterwards accepted a bill of exchange in the name of the firm, but without the privity or consent of his partner, and applied it to his own private use. A commission was taken out and properly worked. In an action against the two partners by an innocent holder, the Court held that the action had been well brought. *Lacy* v. *Woolcott*, 1 Law J. K.B. 143, s. c. 2 D. & R. 458.

The partner of the bankrupt ordered to attend before the commissioners to be examined, and to produce the partnership books and papers, there being no suggestion of his being indebted to the bankrupt, or having property of the bankrupt in his possession. *Ex parte Levett*, 1 G. & J. 185.

A and B being partners, A was declared a bankrupt under a separate commission: afterwards a joint commission issued against A and B, under which all the requisites were proved, except an act of bankruptcy against A:—an order was made that the assignees under the separate commission should permit the petitioning creditor who had sued out the joint commission, to inspect the proceedings under the separate commission, to enable him to ascertain the act of bankruptcy proved under it. *Ex parte Harrison*, 5 Law J. Chanc. 77.

### (O) Of the Dividend.

If a man has a right to come in under several commissions for the same debt, and proves his whole debt under each, antecedent to any dividend received by him under any of the commissions, he is entitled to receive a dividend under each commission, equal with the other creditors, until he has received the whole amount of his debt. *Ex parte Clarke*, 2 Ken. 302.

When interest attaches to a dividend, it is at the rate of five per cent. *Ex parte Loxley*, 1 G. & J. 345.

### (P) Of the Bankrupt.

#### (a) *Surrender.*

A bankrupt will be allowed to surrender, where his omission to do it in due time has arisen from being apprehensive of a criminal prosecution. *Ex parte Berryman*, 1 G. & J. 223.

A bankrupt who has surrendered, is protected from arrest by the statute 5 Geo. 2. c. 30. s. 5, independently of the commissioners' certificate. *Ex parte Leigh*, 1 Law J. Chanc. 235, s. c. 1 G. & J. 260.

#### (b) *Other Duties.*

Where a bankrupt refused to give the assignees possession of a cottage and land, the Court ordered the bankrupt to deliver up the premises within 14 days after personal service of the order. *Ex parte Hargrave*, 2 G. & J. 39.

#### (c) *Rights and Privileges.*

[See Arrest.]

A bankrupt, who, at the time of his surrender, is out upon bail, is not in custody in such a sense as to deprive him of his privilege of protection, under the 5 Geo. 2. c. 30. s. 5.

The exemption from arrest for forty-two days from his surrender, is a privilege given to the bankrupt by the statute, and not depending on the certificate of the commissioners.

The only use of the certificate is, to be *primâ facie* evidence of the bankrupt's right to the privilege, and to entitle him to the penalty of 5*l*. from the officer, who, after the production of the certificate, should persist in detaining him. *Ex parte Leigh*, 1 Law J. Chanc. 235, s. c. 1 G. & J. 260.

A bankrupt, who is in custody at the suit of one creditor, at the time of his surrender and submission, is not entitled to be liberated upon being discharged by that creditor, if other detainers have in the meantime been lodged against him. *Ex parte Levi*, 2 Law J. Chanc. 174.

The Court granted a rule to discharge a person, who having been declared a bankrupt, and having passed his second, but not his final examination, had been arrested. *King* v. *Lee*, 1 Law J. K.B. 160.

Where the last examination is adjourned, *sine die*, the bankrupt is not protected from arrest. *Ex parte Woods*, 1 G. & J. 75.

Debt does not lie against a bankrupt on the *reddendum* of a lease, for rent accruing after the commissioners' assignment, the lessor's assent to such assignment being virtually included in the act of parliament authorizing the assignment of the bankrupt's estate. *Quære*, if an action of covenant would, in such case, lie against the bankrupt. *Wadham* v. *Marlowe*, 2 Chit. 600.

A bankrupt may compel an assignee to allow him an inspection of the proceedings, in order to ascertain what debts have been proved. *Ex parte Morgan*, 1 G. & J. 404.

Where a bankrupt petitioned to supersede a commission, and it was directed that an action should be brought against the assignee to try its validity, and the petitioning creditor was ordered to defend the action, and that the proceedings under the commission should be stayed until further order, and the further proceedings connected with the petition were reserved until after the trial, with liberty to apply. The action which the bankrupt brought against the assignee having failed, he was taken in execution for the costs, but he was ordered to be discharged, this not being the proper mode of obtaining the costs, the matter being under the control of the Court of Chancery. *Ex parte Gregory*, 1 G. & J. 177.

The Court refused to compel an attorney to pay a sum of money he had received in his character of

attorney; he having, after the receipt of the money, become bankrupt and obtained his certificate. But, *semble*, it would be otherwise if a case of fraud were established. *Ex parte Culliford*, 5 Law J. K.B. 229, s. c. 8 B. & C. 220.

*Semble*, that under the provisions of the new bankrupt act, 6 Geo. 4, c. 16, s. 59, a bankrupt in custody, by insisting on his discharge, previous to proof of a debt, does not estop himself from disputing the validity of the commission against him. *Mott* v. *Mills*, 3 C. & P. 197. [Park]

A bankrupt is precluded from disputing the commission against him, if he seek protection from arrest in consequence of that commission:

Or if he apply to the Lord Chancellor for his certificate, even though he do not obtain it; for the application alone is an acquiescence under the commission. *Dennett* v. *Kirkpatrick*, 5 Law J. K.B. 67.

A bankrupt is not entitled to his certificate, if in one day he has lost 20*l.* by betting, though he won a greater sum by other bets on the same day. *Anon.* 5 Law J. Chanc. 129: s. p. *In re Jones*, 2 G. & J. 329.

(*d*) *Allowance.*

The bankrupt is not entitled to his allowance, unless a sufficient dividend be paid on the joint and on the separate estate. *Ex parte Goodall*, 2 G. & J. 281.

The bankrupt has no right to his allowance, until his certificate shall have been confirmed by the Chancellor. Whether the allowance is payable where the net produce is only six shillings in the pound—*quære*. *Ex parte Pavey*, 2 G. & J. 358.

A bankrupt obtains his certificate and dies; afterwards his estate pays ten shillings in the pound: Held, that his personal representative is entitled to the allowance of 5 per cent. *In re Safford*, 5 Law J. Chanc. 76, s. c. 2 G. & J. 128.

(*e*) *Of the Surplus.*

Only in cases of surplus, interest subsequent to the commission is payable. *Ex parte Paton*, 1 G. & J. 332.

Under a commission of bankruptcy, creditors are only entitled to interest out of a surplus where interest is payable, either express or implied. *Ex parte Boyd*, 1 G. & J. 285.

Since the 6 Geo. 4, where there is a surplus, interest should be calculated upon the whole debt up to the time of the first dividend, then the amount of the dividend to be subtracted from the whole, and interest to be calculated upon the reduced principal up to the payment of the next dividend. *In re Higginbottom*, 5 Law J. Chanc. 84, s. c. 2 G. & J. 125.

Where a bankrupt had delivered a promissory note as a security for a debt, less than the amount of the note, without indorsement; the Court ordered that the creditor should be at liberty to sue in the name of the assignees, upon his undertaking to account for the surplus. *Ex parte Brown*, 1 G. & J. 407.

Where a surplus remains after all the debts have been paid, and the bankrupt petitions that the assignees may transfer to him the sum admitted to be in their hands, without prejudice to his right to have the accounts taken against them; they will be allowed to retain in their hands a portion of the admitted surplus, in order to meet the expense of taking the accounts. *Ex parte Brown*, 1 Law J. Chanc. 70.

A separate creditor is not entitled to interest from the surplus, until the joint creditors shall have been paid in full. *Ex parte Minchin*, 2 G. & J. 287.

Where a surplus appeared, the Court permitted the bankrupt to sue in the name of one assignee, the other assignee being restrained from setting up his character as such. *Ex parte Archer*, 2 G. & J. 110.

(*f*) *Of Actions and Suits by and against a Bankrupt.*

The Court will not oblige a bankrupt to give security for costs, when he sues in an action with which the assignees do not interfere. *Phillimore* v. *Bing*, 2 Law J. K.B. 211.

Where an action of trespass was brought in Court of C. P. by an uncertificated bankrupt, for false imprisonment after nonsuit in the K.B. for the same cause;—the Court stayed the proceedings until the costs in the first action were discharged. *Crawley* v. *Impey*, 8 Taunt. 407, s. c. 2 B. Mo. 460.

Whenever the plaintiff knows at the time of bringing an action, that the defendant has been a bankrupt, the Court will not, on a motion for judgment, as in case of nonsuit, order a *stet processus*, but require him to give a peremptory undertaking to try. *Bent's case*, 1 Law J. K.B. 111.

Where a bankrupt, before his bankruptcy, had commenced an action, which was subsequently prosecuted by his assignees and failed, and the bankrupt was taken in execution for the costs, subsequent to his having obtained his certificate; an application was made by the bankrupt for the payment of these costs out of the estate, but refused, on the ground of the bankrupt having wilfully misrepresented the facts, and induced the assignees to pursue the action; if the bankrupt had acted fairly he would have been entitled to this indulgence. *Ex parte Seaman*, 1 Law J. Chanc. 147, s. c. 1 G. & J. 260.

Where a plaintiff becomes bankrupt, it is irregular to move that he should make his assignees parties; the proper course is to move that the bill should be dismissed, unless the assignees make themselves parties within a given time, and prosecute the suit; and notice of this motion ought to be served on the assignees. *Anon.* 1 Law J. Chanc. 154.

The Court will not dismiss a bill against a bankrupt plaintiff, for want of prosecution, by an order of course, or with costs. The motion to dismiss must be upon notice to the assignees, and must allow them some time, after the time when the bill would have been dismissed against the original plaintiff, in order to file a supplemental bill. *Sharp* v. *Hullett*, 4 Law J. Chanc. 147, s. c. 2 S. & S. 496.

Where a defendant to a bill of discovery has put in his answer, and obtained the common order for the payment of his costs, it is no reason for discharging that order, that the plaintiff is become bankrupt. —— v. *Fielding*, 3 Law J. Chanc. 199.

The Court will grant an injunction at the instance of a bankrupt, to stay an action at law pending against him after a commission issues. *Baker* v. *Geare*, 2 Ken. 134.

A bankrupt being a necessary party to a suit, relative to the respective claims of his assignees,

and his wife, to property to which she, and he in her right, had become entitled, he will be allowed his costs as between solicitor and client. *Green* v. *Otte*, 2 Law J. Chanc. 123.

### (Q) OF THE CERTIFICATE.

#### (*a*) *Form.*

An application being made to stay a bankrupt's certificate, on the grounds, that the day of the month and year of the signature of the creditors was not inserted at the time, and that the affidavits of the parties witnessing their signatures did not state the time of such signature, the Court refused it. *Ex parte Laing*, 1 G. & J. 348.

A certificate, instead of repeating the day of the month, used the word *ditto*, and in other places omitted the *year*: Held not to invalidate the certificate, as it was signed in the same year in which the commission issued. *Ex parte Davis*, 2 G. & J. 80.

A certificate will be sent back to the commissioners to be rectified, where only signed and sealed by one commissioner, and not attested by the solicitor to the commission, or his clerk, or the messenger, or the clerk of such commissioner, in conformity to the general order of August, 1809. *Ex parte Jones*, 1 G. & J. 186.

#### (*b*) *Signature.*

*Quære*—Whether persons appointed by the Court to prove and receive dividends can sign the certificate? *Ex parte Shaw*, 1 G. & J. 151.

If a creditor, after proving a debt under a commission, assigns it, he cannot sign the certificate without the authority of those who are entitled to the property under the assignment. *Ex parte Taylor*, 1 G. & J. 399.

A creditor having proved a debt, and afterwards sold and assigned it, may sign the bankrupt's certificate, after such assignment, without the consent of the assignee. *Ex parte Herbert*, 2 G. & J. 66; overruling *Ex parte Herbert*, 1 G. & J. 399.

The certificate ought not to be signed by creditors before the bankrupt has passed his last examination. *Ex parte Cusse*, 2 G. & J. 327.

#### (*c*) *Staying.*

A mortgagee may petition to stay a certificate. *Ex parte Whitchurch*, 2 J. & W. 548, s. c. 1 G. & J. 71.

#### (*d*) *Recalling.*

A clear case must be made against the bankrupt, before a certificate can be recalled. *Ex parte Hood*, 1 G. & J. 219.

Where a bankrupt is in the custody of a creditor, and the creditor presents a petition to prove and stay the certificate, or that the certificate be stayed until the petitioner has had sufficient time to ascertain the amount of his debt, and prove it, the bankrupt is entitled to be discharged. *Ex parte Blaydes*, 1 G. & J. 179.

The Court stayed a certificate on a petition being presented by a partner of the bankrupt for that purpose, until the partnership accounts could be taken; no want of due diligence being imputable to the petitioner. *Ex parte Hadley*, 1 G. & J. 193.

A certificate will be lodged in the bankrupt-office, where the amount of a mortgage debt is disputed, until it can be properly ascertained. *Ex parte Whithurch*, 2 J. & W. 548.

The petitioner will have to pay the costs of his petition, where it prays that the certificate may be stayed until he has had sufficient and reasonable time to ascertain the amount of his debt, and prove it. *Ex parte Blaydes*, 1 G. & J. 179.

Where a commission had issued, and eight months had been suffered to elapse before the petitioner applied to prove and stay the certificate; the petition was dismissed with costs. *Ex parte Smith*, 1 G. & J. 195.

Where two persons had become bankrupts, and a joint certificate acquired; but one of them died before making an affidavit of conformity; the allowance as to the survivor was ordered to be advertised. *Ex parte Cossart*, 1 G. & J. 248.

If a petition to stay a certificate, is not served before the next petition day, the practice is, for a short petition to be presented by the bankrupt, praying that his certificate may be allowed. *Ex parte Moore*, 1 G. &aJ. 253.

An acknowledgment by a bankrupt, of having received the copy of a petition to stay his certificate, is not a waiver of personal service. *Ex parte Furnival*, 1 G. & J. 254.

Where an application was made to stay the certificate on the ground of concealment of property, but the property concealed had been delivered over to the assignees before the certificate was signed by the commissioners; the application was refused, but without costs. *Ex parte Bryant*, 1 G. & J. 205.

#### (*e*) *Where void.*

A loss by gaming invalidates a certificate, although the bankrupt on the same day wins more than the sum lost. The Vice Chancellor will, without an issue, decide the fact of gaming where it is not disputed. *Ex parte Newman*, 5 Law J. C.P. 129: s. P. 2 G. & J. 329.

#### (*f*) *Effect of.*

A bankrupt's certificate is no bar to an action brought against him on bills of exchange, indorsed by him to a creditor, for a debt due before the bankruptcy. *Brix* v. *Braham*, 1 Law J. C.P. 103, s. c. 1 Bing. 281, s. c. 8 B. Mo. 261.

A judgment in an action, on a bond given under the 4 Geo. 3. c. 33, by a trading member of parliament, obtained after the bankruptcy, though before he obtained his certificate, is not discharged. *Campbell* v. *Jameson*, 1 Bing. 320, s. c. 8 B. Mo. 281.

As creditors, by accepting the assignment of a debt proved under a commission, stand in precisely the same situation as the assignee, they cannot maintain an action against the bankrupt. *Ex parte Taylor*, 1 G. & J. 399.

Bankruptcy not only exonerates a guarantee from his liability on a bill of exchange, but from the costs of any action which may have been brought against his principal. *Bottomley* v. *Wilson*, 3 Stark. 148. [Abbott]

A bankrupt's certificate, before allowance, does not divest his creditors of their right to a legacy. *Tudway* v. *Bourne*, 2 Ken. 423, s. c. 2 Burr. 716.

A certificate in Ireland is no bar to an action for a debt contracted by the bankrupt in England. *Shallcross* v. *Dysart*, 2 G. & J. 87.

The principal having become a bankrupt, on the day that his certificate was allowed, his bail were fixed; but before the rising of the Court, an *exoneretur* was entered on the bail-piece, on payment of the costs. *Lindsey's bail*, 1 Law J. K.B. 84.

Where the plaintiff was surety for the bankrupt for rent, which had not become due until after the commission issued against him, and the bankrupt obtained his certificate: Held, that he was not a surety within the meaning of the 49 Geo. 3. c. 121. s. 8, which is restrained to debts, existing as debts at the time of the issuing of the commission, and that he was therefore entitled to recover the rent he had been called on to pay as such surety. *M'Dougal* v. *Paton*, 8 Taunt. 584, s. c. 2 B. Mo. 644.

The surety, under an annuity deed, may maintain an action against the principal, for the value of an annuity redeemed by him subsequently to the bankruptcy of the principal. *Watkins* v. *Flanagan*, 1 Bing. 413, s. c. 3 B. & A. 186, s. c. 8 B. Mo. 480, s. c. 13 Price, 34.

A surety under an annuity deed, who has redeemed the annuity subsequent to the commission, may proceed by action against the grantor, who has obtained his certificate, for the arrears of the annuity, and he is entitled to the benefit of the grantee's proof under the commission. *Watkins* v. *Flanagan*, 1 G. & J. 199.

Where a principal proves his debt under a commission of bankruptcy, against the person for whom the surety is bound, he does not discharge the party. And it seems doubtful, whether, when the principal has signed the certificate, he has not discharged the party. But where a bankrupt had conducted himself properly, and the surety had gone abroad immediately after the bankruptcy, the Court determined that the surety was not discharged, although the principal had signed his certificate. *Langdale* v. *Parry*, 2 Law J. K.B. 70, s. c. 2 D. & R. 337.

In an action brought by an accommodation acceptor of a bill against the drawer, after he had become bankrupt and obtained his certificate, for not providing funds, whereby the plaintiff had incurred the costs of an action, and been obliged to sell an estate to raise funds: Held, that as the right to the principal debt was barred by statute, the right to damages, which are accessary and consequent on that debt, was also barred. The 49 Geo. 3, enabling the plaintiff, as surety, to prove his demand in respect of money paid, and enacting that the bankrupt should be discharged of all demands at the suit of the surety, in regard to his debt in respect of such suretyship, makes the certificate a bar, not only to any claim for the parties' money which established the principal debt, but also to any consequential damage arising from that debt not having been duly paid. *Van Sandau* v. *Corsbie*, 8 Taunt. 550, s. c. 2 B. Mo. 602, s. c. (Judgment affirmed,) 3 B. & A. 13.

Where a party, who had been committed for disobedience, under an order in bankruptcy, for not paying money and costs as ordered, became bankrupt and obtained his certificate, he was directed to be discharged. *Ex parte Eicke*, 1 G. & J. 261.

The defendant covenanted with the plaintiff for the due payment by A B, of an annual premium on a life insurance given to the plaintiff as security for a debt, and became bankrupt before the premium was due, and obtained his certificate after: Held, that he was not thereby discharged from his liability to pay such premium. *Atwood* v. *Partridge*, 5 Law J. C.P. 154, s. c. 4 Bing. 209.

Bankruptcy and certificate are no bar to an action in tort, against a broker for selling out plaintiff's stock contrary to orders. *Parker* v. *Crole*, 6 Law J. C.P. 229, s. c. 5 Bing. 63, s. c. 2 M. & P. 150.

A commission of bankrupt issued against the plaintiff in April, and on the 2d of August was superseded. A second commission issued on the 7th August, under which the plaintiff obtained his certificate, and then sued the defendants, who were the commissioners under the first commission, for an alleged wrongful imprisonment. Judgment of nonsuit was entered up by them against him in July, and he was charged in execution for the costs: Held, that as the defendants might have proved under the second commission, the plaintiff was entitled to be discharged. *Holding* v. *Impey*, 1 Bing. 189, s. c. 7 B. Mo. 614.

Verdict for defendant in July; commission of bankrupt against plaintiff in August; judgment against him, and certificate under the commission, in Michaelmas ensuing: Held, that he was liable to an execution for costs, notwithstanding 6 Geo. 4, c. 16, s. 56. *Bire* v. *Moreau*, 5 Law J. C.P. 61, s. c. 4 Bing. 57.

A bankrupt obtained his certificate on the 13th of November; the same day a *fieri facias* was executed on his goods: The Court refused relief on motion, but left the parties to their *audita querela*. *Hanson* v. *Blakey*, 6 Law J. C.P. 70, s. c. 4 Bing. 493, s. c. 1 M. & P. 261.

Where a defendant has been twice a bankrupt, and has not paid 15s. in the pound under the second commission, the Court, (unless he be in actual custody,) will not relieve him on motion, in an action against him at the suit of a creditor whose debt may have been barred by the commission; but will leave him to his plea. *Anon.* 5 Law J. K.B. 212.

A second commission against a bankrupt, who has not obtained his certificate under a previous subsisting commission, is void at law. Consequently a certificate obtained under the second commission is unavailing. *Hill* v. *Wilson*, 6 Law J. K.B. 127.

### (g) *Bankrupt's Liability on a new Promise.*

Upon a debt revived by a new promise after bankruptcy, the Court will, on an arrest, discharge the debtor on common bail. *Bayley* v. *Dillon*, 2 Ken. 436, s. c. 2 Burr. 736.

A bankrupt cannot be arrested upon a subsequent promise to pay a debt due before his bankruptcy, after he has obtained his certificate. *Peers* v. *Gadderer*, 1 Law J. K.B. 16, s. c. 2 D. & R. 240, s. c. 1 B. & C. 116.

A promise or agreement by a bankrupt to pay a debt after he has obtained his certificate, must be in writing, and signed by him, in order to comply with the terms of the statute 6 Geo. 4, c. 16, s. 131; which enacts, that a bankrupt shall not be liable on a promise to pay a debt, discharged by certificate, unless such promise be made in writing, signed by

the bankrupt, or by some person authorized by him. *Hubert* v. *Moreau*, 5 Law J. C.P. 56.

A person, after he became bankrupt, and before he had got his certificate, called at the office of his attorney, to whom he was indebted, and wrote there, the attorney not being at home, a letter promising to pay him a sum of 100*l*. The only signature was a flourish of the pen, which it was contended by the plaintiff formed the letter M, the initial letter of the defendant's name: Held, that if it was an M, it was not a sufficient signature under the statute 6 Geo. 4, c. 16, s. 131. *Hubert* v. *Moreau*, 2 C. & P. 528.

### (R) OF A SUPERSEDEAS.

#### (*a*) *Causes for.*

Where two of the commissioners were creditors of the bankrupt, the commission was superseded upon an *ex parte* application. *Ex parte Matthews*, 1 G. & J. 164.

Where a bill of costs (the petitioning creditor's debt) is, on a reference to the Master, reduced by taxation below the amount requisite to sustain the commission, the commission will be superseded at his expense. *In re Symes*, 1 Law J. Chanc. 68.

Where the act of bankruptcy consisted in the bankrupt having made a conveyance of his estate and effects, which appeared in evidence not to be drawn according to the bankrupt's intention,—The Court superseded the commission. *Ex parte Norris*, 1 G. & J. 233.

A delay of nine months, occasioned by the acts of the bankrupt, and with the concurrence of the creditors, is a good ground for superseding the commission; and that, though the effect of the supersedeas will be to give validity to executions issued out by judgment creditors, which would otherwise be over-reached by the commission. *Ex parte Luke*, 2 Law J. Chanc. 175, s. c. 1 G. & J. 361.

If a commission, issued upon an unjust motive, becomes an efficient instrument of fraud, and the bankrupt cannot be relieved from the fraud of which the commission is an instrument but by a supersedeas, the Court will interfere and supersede the commission, in order to defeat the fraud. *Ex parte Bourne*, 1 G. & J. 311.

Nor will it be allowed to stand, although the fraudulent purpose may be defeated without superseding the commission. *Ex parte Bourne*, 2 G. & J. 137.

A commission issued expressly for the purpose of putting an end to an action by the bankrupt against the petitioning creditor, will not be suffered to stand, even though an intention of working it appear. *Ex parte Bourne*, 2 G. & J. 137.

Whether a commission can be superseded as to one of two bankrupts, in order to give validity to a subsequent commission against the other with a third. *Ex parte Burlton*, 2 G. & J. 344.

A joint commission, invalid in its concoction, may be superseded as to one of the bankrupts. *Ex parte Bygrave*, 2 G. & J. 391.

A bankrupt cannot, after he has obtained his certificate, petition to supersede, because he was not a trader. *Ex parte Lewis*, 2 G. & J. 208.

#### (*b*) *Practice upon petitions to supersede.*

The commission cannot, after the forty-second day, be superseded, on the application of the bankrupt before his surrender, even with consent of creditors. *Ex parte Peuker*, 2 G. & J. 337.

A petition for a supersedeas may be sustained at the instance of the bankrupt, where the petition is presented before the forty-second day. *Ex parte Nicholas*, 2 G. & J. 102.

Commission allowed to be superseded by the consent of all the creditors, where the bankruptcy has been advertised in the Gazette. *Ex parte Ogilby*, 1 G. & J. 250.

A separate commission being sued out against A, and a joint commission against A and B, the assignees having recovered a verdict in *trover* against C, under the first commission; the Court permitted the amount of the verdict, so brought into court, to abide the event of a petition to the Lord Chancellor, to supersede the first commission. *Hodgskinson* v. *Travers*, 1 Law J. K.B. 108, s. c. 1 B. & C. 257, s. c. 2 D. & R. 409.

Upon the petition of the bankrupt's solicitor, and all the creditors who had proved, the Court superseded the commission, though the bankrupt was abroad and had not surrendered. *Ex parte Carling*, 2 G. & J. 35.

#### (*c*) *Effect of.*

When a commission of bankrupt is superseded, the proceedings are to many purposes nullities, but may be retained by the Chancellor for safe custody, and ordered to be deposited in the bankrupt office. *Ex parte Shaw*, 1 Jac. 270.

### (S) SUITS IN EQUITY.

A bill filed by the assignees of a bankrupt, against him, for the purpose of restraining proceedings at law commenced by him, tending to impeach the validity of the commission, was, on demurrer, holden insupportable, the proper course being by petition. *Kirkpatrick* v. *Dennett*, 1 G. & J. 300.

A bill in equity does not lie by the assignees of a bankrupt against a judgment creditor, and the sheriff, for monies levied under an execution upon a judgment by *nil dicit*,—the remedy is by petition. *Mitchell* v. *Knott*, 1 Sim. 397.

To a bill by assignees of a bankrupt against persons indebted to his estate, a plea that the suit was not instituted with the consent of the creditors, at a meeting pursuant to the 5 Geo. 2, c. 30, s. 38, was allowed. *Ocklestone* v. *Benson*, 3 Law J. Chanc. 142, s. c. 2 S. & S. 265.

But upon a bill filed before the bankruptcy of the plaintiff, a supplemental bill may be filed without the consent of creditors. *Bevan* v. *Lewis*, 2 G. & J. 245.

To a bill by assignees of a bankrupt, a plea that the suit had been instituted without the consent of the creditors, or of the commissioners, as required by the statutes 5 Geo. 2, c. 30, and 6 Geo. 4, c. 16, was allowed, chiefly on the ground of a similar plea having been allowed in the Court of Chancery, in *Ocklestone* v. *Benson*. *Boson* v. *Williams*, 2 Y. & J. 475.

### (T) ACTIONS AT LAW.

On a petition to the Vice Chancellor, praying for a change of assignees, his Honour ordered that a new assignment should be executed to the plaintiff, in which the two former assignees should join:

Held, in an action of assumpsit, that as only one of the old assignees had joined in the execution of the assignment to the plaintiff, the other being out of the kingdom, an application should have been made to the Vice Chancellor, as by his order both the former assignees were directed to execute the new assignment to the plaintiff; and it was either necessary, that such order should have been complied with, or a reason assigned and represented to the Vice Chancellor why it could not be done. *Aldritt* v. *Kittridge*, 2 Law J. C.P. 15, s. c. 6 B. Mo. 569.

The 44th section of 6 Geo. 4, c. 16, which provides for the bringing of actions within three months, does not apply to actions affecting the property of the bankrupt. *Frost* v. *Brooks*, 5 Law J. K.B. 231.

*Quære*, whether a sheriff, who seizes and sells goods of a bankrupt before commission, but after an act of bankruptcy, without notice, is liable in trover to the assignees. *Bayley J. dubitante*, at Nisi Prius. *Balme* v. *Hutton*, 2 G. & J. 101.

The correctness of the bond given to the Lord Chancellor under the 13th section of the Bankrupt Act, cannot be disputed at Nisi Prius, in an action to try the validity of the commission, in the case in which it was given. *Folks* v. *Scudder*, 3 C. & P. 232. [Best]

### (U) PLEADING.

A plea of bankruptcy is valid, although the commission was issued subsequent to the filing of the bill. *Turner* v. *Robinson*, 1 S. & S. 3.

To an action by the assignees of a bankrupt, the defendant cannot plead the pending of a former action, brought against him by the bankrupt, for the same cause of action. *Biggs* v. *Cox*, 4 Law J. K.B. 58, s. c. 4 B. & C. 920, s. c. 7 D. & R. 409.

A plea of *puis darrein continuance* of bankruptcy is sufficiently verified by an affidavit averring the plea to be true, to the best of the deponent's knowledge, information, and belief. *Sharpe* v. *Witham*, 1 M'Clel. & Y. 350.

A defendant, who has pleaded the general issue to an action, brought against him by the assignee of a bankrupt, without giving notice of his intention to dispute the bankruptcy, may obtain a judge's order for leave to withdraw such plea, and plead *de novo* on the notice required by the 49 Geo. 3, c. 121, s. 10, being given. *Gardner* v. *Slack*, 6 B. Mo. 489.

A person drew a bill of exchange, payable to an uncertificated bankrupt or order. The bankrupt indorsed it, and it came into the hands of an innocent holder. The assignees did not interfere. The holder brought an action against the drawer, who pleaded the bankruptcy of the payee and the want of consent of the assignees; but the Court held that the plea was bad, and the holder recovered. *Drayton* v. *Dale*, 2 Law J. K.B. 20, s. c. 2 B. & C. 293, s. c. 3 D. & R. 534.

If the defendant plead the bankruptcy of the plaintiff in bar, he must allege as a fact, that the plaintiff was a bankrupt; and it is not sufficient to state that a commission issued, and that the plaintiff under that commission was declared and adjudged to be a bankrupt.

Such a plea should state the trading, the act of bankruptcy, and the petitioning creditor's debt.

This rule applies to the case of a defendant, in England, pleading, that the plaintiff became a bankrupt in Ireland.

The omission to aver, as a fact, that the plaintiff became a bankrupt, is not cured by the plaintiff replying that he has obtained his certificate under the commission.

Whether in debt on judgment, a replication to a plea of bankruptcy in the plaintiff after the accruing of the cause of action, whereon judgment was recovered, that plaintiff obtained his certificate before the judgment was recovered, should allege expressly that the certificate was obtained after the commission issued—*quære*. *Guiness* v. *Curroll*, 6 Law J. K.B. 238, s. c. 2 M. & R. 132.

### (V) EVIDENCE.

#### (a) *In general.*

The declarations of a party suing as assignee of a bankrupt, made before he became such, are not admissible against him. *Fenwick* v. *Thornton*, 1 M. & M. 51. [Abbott]

Declarations of the bankrupt after the act of bankruptcy, tending to shew that the commission was fraudulent: Held to have been properly admitted as part of the *res gestæ*. *Thompson* v. *Bridges*, 8 Taunt. 336, s. c. 2 B. Mo. 376.

Declarations made by a bankrupt after his bankruptcy, are not admissible in evidence. *Schooling* v. *Lee*, 3 Stark. 149. [Abbott]

Books containing transactions between a creditor (to whom they belong,) and the bankrupt, are not admissible, if the former is availing himself of the benefit of the commission. *Ex parte Woolley*, 1 G. & J. 395.

*Semble*—That a letter, written by a bankrupt before the commission issued, though after the act of bankruptcy, is admissible in evidence, in support of the petitioning creditor's debt;—but, on motion, the Court granted a rule to shew cause. *Sanderson* v. *Laferest*, 1 C. & P. 46. [Burrough]

An account stated by the assignees of a bankrupt, is not supported by an admission by a defendant, that he has received money from the bankrupt after an act of bankruptcy. *Stafford* v. *Clark*, 1 C. & P. 403. [Best]

In an action by the assignees of a bankrupt, to support the act of bankruptcy, the bankrupt may allow his attorney to give in evidence privileged communications made before the bankruptcy. *Merle* v. *More*, 1 R. & M. 390. [Best]

An admission by a debtor of the right of the assignee of a bankrupt, dispenses with the necessity of giving the usual proofs in support of the commission; as where such debtor, on being applied to for payment, said, "*I will call and pay the money.*" *Pope* v. *Monk*, 2 C. & P. 112. [Abbott]

An entry in a bankrupt's ledger is evidence, though the witness, who produces it, did not make the entry himself. *Hawkins* v. *Howard & Gibbs*, 1 C. & P. 222. [Gifford]

Examinations of parties before commissioners of bankrupt, are evidence in actions against them by the assignees, unless such examinations were obtained by imposition, or under duress. *Robson* v. *Alexander*, 6 Law J. C.P. 111, s. c. 1 M. & P. 448.

In an action brought by a bankrupt's assignees, a letter written by the defendant entitled in the cause, is not such an acknowledgment of their title as as-

signees, as will render it unnecessary to produce the commission and the subsequent proceedings. *Lancaster* v. *Barker*, 5 Law J. K.B. 265.

The 90th section of the bankrupt act, 6 Geo. 4, c. 16, which enacts, that the proceedings in bankruptcy shall not be received in evidence, unless the same shall have been first entered of record, does not dispense with proof of the execution of the assignment. *Cameron* v. *Serle*, 2 Y. & J. 5.

Under the 81st sect. of the bankrupt act, 6 Geo. 4, c. 16, a *bonâ fide* payment made by a bankrupt more than two months before the issuing of the commission, the receiver having no notice of an act of bankruptcy, is protected; and the fact of his knowing the bankrupt to be in difficulties, makes no difference. An admission by a party in his examination before commissioners of bankrupt, that he has received a sum of money belonging to the bankrupt after an act of bankruptcy, is not evidence of an account stated with the assignees; and the most that an examination before the Commissioners does, is to make out a *primâ facie* case for the assignees, that the party has so much of the bankrupt's money in his hands, so as to call on him for an explanation; but if there be no count for money had and received *to the use of the assignees*, they must be nonsuited. *Tucker* v. *Barrow*, 3 C. & P. 85. [Tenterden]

If one buys goods of a bankrupt under such circumstances as will entitle his assignees to maintain trover for them, such buying is in itself a conversion, and the assignees need not adduce evidence of a demand and refusal. *Yates* v. *Carnew*, 3 C. & P. 98. [Tenterden]

(*b*) *Notice to dispute.*

Where the notice of disputing the act of bankruptcy *only* has been given, the plaintiffs are bound to prove the petitioning creditor's debt; and, as it appeared a doubtful one on the face of the deposition, the Court would not grant a new trial on the ground of surprise. *Andrews* v. *Mercer*, 1 Law J. K.B. 78.

If assignees sue under a commission of bankrupt issued between the 2d of May, and 1st of September 1825, the formal proofs of the commission must be made out, whether notice has been given or not. *Giles* v. *Powell*, 2 C. & P. 259. [Littledale]

A notice to assignees, under the 6 Geo. 4, c. 16, s. 90, must state what particular ingredient in the bankruptcy will be disputed—whether the trading, the act of bankruptcy, or the petitioning creditor's debt, or all of them, enumerating each. A notice that the "bankruptcy" would be disputed, was held to be too general; and not to put the assignees to proof in support of the commission. *Trimley* v. *Unwin*, 5 Law J. K.B. 218, s. c. 6 B. & C. 537.

If notice of disputing an act of bankruptcy be served on the clerk of the assignee, at his counting house, that is a good service of it. *Widger* v. *Browning*, 2 C. & P. 523, s. c. 1 M. & M. 27. [Abbott]

In an action by the assignee of a bankrupt, a plea was delivered to the plaintiff's attorney by a clerk of the defendant's attorney, who, through mistake, omitted to deliver with it a notice to dispute the bankruptcy. A few hours after, as soon as the omission was discovered, the plea was fetched away on the pretence that there was some error in it; and, in the course of the same day, a fresh plea was delivered, accompanied by a notice: It was held, at Nisi Prius, that, although the time for pleading had not expired, the notice was not sufficient under the 90th section of the 6 Geo. 4, c. 16; but the Court of Common Pleas, under the circumstances, granted a new trial, on payment by the defendant's attorney of the costs as between attorney and client. *Lawrence* v. *Crowder*, 6 Law J. C.P. 123, s. c. 1 M. & P. 511, s. c. 3 C. & P. 230.

It cannot be considered at Nisi Prius, whether the defendant's attorney has agreed to accept a notice to dispute which had been delivered after the time mentioned in the act of parliament. *Folks* v. *Scudder*, 3 C. & P. 252. [Best]

In an action brought by the assignees, unless notice to dispute the bankruptcy has been given, not only will they not be required to adduce proof in support of the commission, but no proof will be received against it. *Bernasconi* v. *Earl of Glengall*, 6 Law J. K.B. 26, s. c. 1 M. & R. 326.

There is not any necessity for putting in the proceedings as evidence, where there is no notice to dispute the commission. *Bevan* v. *Lewis*, 2 G. & J. 245.

In an action by the assignees of a bankrupt, where no notice of disputing the commission has been delivered, the depositions under the commission are not, by the 49 Geo. 3, c. 121, made conclusive evidence. *Cooper* v. *Machin*, 2 Law J. C.P. 66, s. c. 1 Bing. 426, s. c. 8 B. Mo. 536.

In an action by assignees of a bankrupt for a demand for which the bankrupt, if solvent, might sue, the depositions are conclusive evidence of the matters contained in them, unless the bankrupt, within the time prescribed by the statute 6 Geo. 4, c. 16, s. 92, gives notice of his intention to dispute the commission, although the action was commenced, and notice given by the defendant that he would dispute the act of bankruptcy, &c. within the time allowed to the bankrupt to give such notice, if the cause be not brought to trial till after that time is elapsed. *Earith* v. *Schroder*, 1 M. & M. 24. [Abbott]

Where, in an action by a person against whom a commission had issued, against his assignees, for assaulting him, and entering his house, they produced the proceedings before the commissioners, to shew that they had been appointed assignees; on which the plaintiff's counsel examined them, and raised an objection to the petitioning creditor's debt: Held, that he had no right to do so, the plaintiff having given no notice to the assignees that he intended to dispute any of the proceedings under the commission. *M'Beattie* v. *Cooke*, 5 Law J. C.P. 26, s. c. 4 Bing. 34.

If a person, who is in fact assignee of a bankrupt, be sued in trover, and it appear that he claims the goods as property belonging to the bankrupt; in making out this defence, he need not give evidence of the trading, &c. unless there has been notice of disputing the commission, although he be not, in point of form, *sued as assignee*. *Newport* v. *Hollings*, 3 C. & P. 223. [Vaughan]

(*c*) *Of the Debt, Trading, and Act of Bankruptcy.*

An acknowledgment by a bankrupt of the petitioning creditor's debt, in a conversation, which took place between him and a third person, after the act

of bankruptcy, but before the commission issued, is not admissible in evidence to support the petitioning creditor's debt. *Smallcomb* v. *Bruges*, 13 Price, 136, s. c. M'Clel. 45.

To prove the petitioning creditor's debt, the proceedings under the commission were produced: Held, that the defendant's counsel had only a right to look at those depositions which were necessary to support the fact for which they were produced. *Stafford* v. *Clark*, 1 C. & P. 26. [Burrough]

Where no notice of disputing a commission of bankrupt have been given, on the production of the proceedings, the deposition of the petitioning creditor's debt is sufficient proof, not only of the *debt* itself, but of the *character* in which he claims it; and, therefore, where the petitioning creditor under one bankruptcy, was the assignee of another bankrupt, his deposition, found among the proceedings of the first-named bankrupt, was sufficient proof that he was the assignee of the latter-mentioned bankrupt. *Skaife* v. *Howard*, 2 Law J. K.B. 106, s. c. 2 B. & C. 560, s. c. 4 D. & R. 37.

Where, in an action for money had and received, brought by a petitioning creditor and another assignee of a bankrupt against a sheriff, for the amount of money levied by a *fieri facias* on the bankrupt's estate; the proof of the petitioning creditor's debt was merely the single *primâ facie* evidence of the acceptance of a bill of exchange by the bankrupt before the bankruptcy, unfortified by any proof of consideration (there having been a notice given that the plaintiff would be required to prove the consideration), and where the parties were connected by relationship, and did not appear to be connected in business; and where there were other circumstances of suspicion surrounding the transaction: It was holden to be a question for the jury, on the whole matter, to pronounce the debt collusive or *bonâ fide*, notwithstanding no direct evidence was given to impeach the acceptance; consequently, where there are circumstances of suspicion, and the plaintiff has notice that *he will* be required to prove consideration, although, generally, the plaintiff is not under any necessity to prove the consideration, unless it be impeached, yet, under those circumstances, the jury have a right to require something to corroborate, and in the absence of such corroboration, the jury may decide against the document. *Abraham* v. *George*, 11 Price, 423.

Statements made by a bankrupt, respecting his trade, to a creditor, are not evidence to prove his trading. *Brinley* v. *King*, 1 C. & P. 647. [Best]

In an action by the assignees of a bankrupt, they cannot, in order to prove his trading, give in evidence declarations made by him previous to his bankruptcy. *Brinley* v. *King*, 1 R. & M. 228, s. c. 1 C. & P. 646. [Best]

Proof of the mere breach of an engagement to meet a creditor to arrange for giving security for a debt, is not sufficient evidence of the commission of an act of bankruptcy, unaccompanied by evidence of *intent*, on the part of the debtor, to delay his creditors. *Tucker* v. *Jones*, 2 Law J. C.P. 98, s. c. 2 Bing. 2.

Where a commission of bankruptcy described a party as a dealer in a particular trade, but from the evidence of dealings, it appeared that he was in a different trade, the Court granted a new trial on the ground of surprise. *Hale* v. *Small*, 8 Taunt. 730.

But, held, that evidence of a dealing in hops was properly admitted in a cause brought to try the validity of a commission of bankrupt, describing the plaintiff as *dealer in cattle*, seeking his trade of living by buying and selling. *Hale* v. *Small*, 2 B. & B. 25.

Where a notice to dispute has been given, the trade ascribed to the bankrupt in his description in the commission, does not limit the assignees to prove him to be of that particular trade. Proof of any other trading within the meaning of the 6 Geo. 4, c. 16, will be sufficient. *Bernasconi* v. *Glengall*, 6 Law J. K.B. 26, s. c. 1 M. & R. 326.

Disclosures made by a bankrupt to his attorney, are admissible to prove an act of bankruptcy, if the former consents. *Merle* v. *Moore*, 2 C. & P. 275. [Best]

Depositions taken before commissioners of bankrupt, stating that a trader promised to meet one of his creditors at the office of his solicitors, in order to give him security for a debt, but that he did not attend the appointment, but altogether absented himself, are not of themselves sufficient evidence of the commission of an act of bankruptcy under the statute 49 Geo. 3, c. 121, s. 10, as it was not stated that he absented himself with an intent to delay such creditor. *Tucker* v. *Jones*, 2 Bing. 2; s. c. as *Toleman* v. *Jones*, 9 B. Mo. 24.

To prove an act of bankruptcy in a trader who is a member of parliament, by his not paying or securing to a creditor a debt of £100 after the suing out of a writ of summons, &c. it is not absolutely necessary to call the creditor. *Burton* v. *Green*, 3 C. & P. 306. [Tenterden]

An act of bankruptcy cannot be proved by the bankrupt. *Sanderson* v. *Laferest*, 1 C. & P. 46. [Burrough]

### (*d*) *Admissibility of Depositions and Proceedings under the Commission.*

Where a commission of bankrupt was sued out in January 1825, and the party obtained his certificate under it, in the month of November following: Held, that such certificate was admissible in evidence, without having been enrolled or entered of record, according to the provisions of the statute 5 Geo. 4, c. 98, and 6 Geo. 4, c. 16. *Tattle* v. *Grimwood*, 4 Law J. C.P. 174, s. c. 3 Bing. 493.

Material facts, which have transpired before commissioners of bankrupt, are admissible in evidence, though they have not been taken down in writing. *Rowland* v. *Ashby*, 1 C. & P. 649, s. c. 1 R. & M. 231. [Best]

If a person who has numerous dealings with a bankrupt, on being examined before the commissioners, does not bring his books with him, but, while under examination, consents that the accountant to the commission shall make extracts from them; these extracts cannot be used as evidence against him, without also reading his examination. *Yates* v. *Carnew*, 3 C. & P. 98. [Tenterden]

### (*e*) *Competency of Witnesses.*

The assignee of a bankrupt brought an action on the 9th Anne, c. 14, to recover money which the bankrupt had lost at play. The bankrupt, who

had obtained his certificate, was called as a witness to prove the loss: Held, that he was incompetent, but that his competency might be restored by three releases being given,—first, by the bankrupt to the assignee; secondly, by all the creditors to the bankrupt; thirdly, by the assignee (who was not a creditor) to the bankrupt. Held also, that a year after the commission issued, it might be presumed that all the creditors had proved, and that a release, signed by all those who had proved, might therefore be considered as a release by all the creditors. *Carter* v. *Abbott*, 1 B. & C. 444, s. c. 2 D. & R. 575.

In an action to try the validity of a commission of bankruptcy, a creditor cannot be admitted as a witness. *Hallen* v. *Homer*, 1 C. & P. 108. [Park]

A creditor, who has released the assignees, on an undertaking by them to pay him what is justly due to him, is a competent witness. *Sinclair* v. *Stevenson*, 1 C. & P. 582. [Best]

Proceedings under a commission of bankruptcy, are inadmissible in a collateral action, if it would prejudice the assignees. *Laing* v. *Barclay*, 3 Stark. 38. [Abbott]

A bankrupt who has obtained his certificate, may be a witness competent to prove the handwriting of the commissioners to the proceedings had under the commission. *Morgan* v. *Pryor*, 1 Law J. K.B. 224, s. c. 2 B. & C. 14, s. c. 3 D. & R. 215.

In an action by the assignees of a bankrupt, the bankrupt is rendered a competent witness, by his stating on the *voir dire*, that he has obtained his certificate, and released his assignees. *Carlisle* v. *Eady*, 1 C. & P. 234. [Park]

If a defendant, on being sued by the assignees of a bankrupt, does not give notice of his intention of disputing the validity of the bankruptcy, it would appear that the bankrupt, who has obtained his certificate, and released the surplus, may prove that the proceedings produced by the assignees, are those which were made available under the commission. *Morgan* v. *Price*, 3 Stark. 58. [Abbott]

### (W) Practice of the Court on Petitions in Bankruptcy.

A petition and commission were permitted to be amended after the commission had been prosecuted, although the error was in the description of the petitioning creditor, the docket papers being correct. *Ex parte Guthrie*, 1 G. & J. 245.

Unless notice has been given of the party's intention to make the application, no application to take a petition out of its turn can be heard. *Ex parte* ——— *in re Bell*, 1 G. & J. 182.

Where affidavits are filed in answer, it is a waiver of an objection to the affidavits in support of the petition, that they were filed before the petition was presented. *Ex parte Gilpin*, 1 G. & J. 183.

A petition to supersede a commission for want of an act of bankruptcy, not presented until two years after the issuing of the commission, dismissed. *Ex parte Abell*, 1 G. & J. 199.

One petition to stay a certificate being presented, pending that, another was presented, but subsequent to the expiration of three weeks from the notice in the Gazette: Held, that the last petition was irregular, it having been presented out of time, and must consequently be discharged, with costs. *Ex parte Wright*, 1 G. & J. 352.

The solicitor who attests, and also presents, a petition, need not, in his attestation, state himself to be solicitor in the matter of the petition, provided it appear elsewhere that he actually did present the petition. *Ex parte Wilkinson*, 1 G. & J. 353.

The attestation in a petition, "authenticated by me J. L. solicitor to the petitioner," was holden not a compliance with the order made August 12, 1809. *Ex parte Dumbell*, 2 G. & J. 121.

Where a petition was ordered to stand over, the petitioner paying the costs of the day, which costs had not been paid previous to a subsequent application: It was holden no objection, in the absence of an affidavit of a demand having been made. *Ex parte Leech*, 2 G. & J. 78.

A petition in bankruptcy presented by a solicitor must be duly attested, unless it appears on the face of the petition that the petitioner is a solicitor. *Ex parte Cole*, 5 Law J. Chanc. 100, s. c. 2 G. & J. 269.

The title to a petition in bankruptcy, is not vitiated by its being also entitled "In Chancery." *Ex parte Hudson*, 2 G. & J. 228.

Where a petition is ordered to stand over until after a trial, there need not be a new petition for further directions. *Ex parte Window*, 2 G. & J. 280.

If a petition is ordered to stand over, and no application is made for leave to file further affidavits, neither party can vary the case before the Court by new evidence. *Ex parte Rawlinson*, 3 Law J. Chanc. 54.

If an affidavit appears to have been made in the course of a judicial proceeding in the bankruptcy, it is sufficient, though it be not headed "In the matter of the bankruptcy." *Ex parte Simonds*, 1 G. & J. 44.

An affidavit may be read, though not entitled in bankruptcy, if it appears sufficiently that it was made and used for proving a debt under the commission. *Ex parte Simonds*, 3 Law J. Chanc. 99.

Affidavit sworn before the clerk of the solicitor to the commission not allowed to be read. *Ex parte Green*, 1 G. & J. 16.

Where, under an order in bankruptcy, money is directed to be paid, the next order is to pay within four days or stand committed. *Ex parte Davison*, 1 G. & J. 227.

### (X) Of Costs.

The words "costs occasioned by an application," include costs of an interlocutory order, when made in pursuance of part of the application; but costs of the day, unless a special order is made, are not included. *Ex parte Green*, 1 G. & J. 188.

A petition to stay the bankrupt's certificate, on the ground of fraudulent conduct before the bankruptcy, will always be dismissed with costs. *Ex parte Russell*, 1 Law J. Chanc. 32.

A petitioner cannot correct a former order in respect of costs, by a separate petition as to costs only; but he may present a petition for a rehearing, as to whether they are payable out of a particular fund, or to be paid personally. *Ex parte Baines*, 1 G. & J. 259.

If a bankrupt, by misrepresentation, induces his assignees to prosecute an action which he had commenced, and they fail in it in consequence of circumstances being proved by the defendant, which were clearly an answer to it, and were

known to the bankrupt, but were concealed by him from his assignees, the Court will not order the assignees to reimburse or indemnify him in respect of the costs to which he becomes liable at law, by the failure of the action. *Ex parte Seaman*, 1 Law J. Chanc. 117, s. c. 1 G. & J. 260.

An order for taxing the bill of costs of the solicitor to a commission of bankrupt, cannot be made upon motion: it must be sought by petition. *Anon.* 2 Law J. Chanc. 181.

An equitable mortgagee of property belonging to a bankrupt, who has written evidence of the mortgage, will be allowed the costs of his petition for the sale of the premises, though the petition further prays, that he may be at liberty to be a bidder at the sale. *Ex parte Jackson*, 2 Law J. Chanc. 11.

The Court will dismiss a petition to supersede a commission, before the bankrupt has surrendered, with costs. *Ex parte Wilkinson*, 1 G. & J. 387.

The costs of a petition by a bankrupt for his certificate, presented after the petition day, will not be allowed. *Ex parte Birch*, 2 G. & J. 206.

If assignees of a bankrupt, suing for a debt due before the bankruptcy, receive notice of disputing the trading, &c., the Judge will only grant them a certificate for the costs of producing the depositions, and not for the costs of the attorney's attendance, or of witnesses to prove the bankruptcy. *Ralpho* v. *Dawes*, 3 C. & P. 362. [Tenterden]

When a petitioner does not appear, the respondent is entitled to his costs upon producing an office copy of the petitioner's affidavit of service. *Ex parte Garth*, 2 G. & J. 392.

### (Y) Of the Solicitor.

If a commission is superseded, and costs are given against the Solicitor who sued it out, as well as against the other respondents, he cannot bring an action for the costs of the commission, against a person who was an assignee under it. *Ex parte Rawlinson*, 3 Law J. Chanc. 54.

The solicitor suing out a commission must be the person actually and *bonâ fide* suing it out, and no other person ought to have any concern in it.

The solicitor to a commission must have no interest in the fees of the commissioners; nor any commissioner in the fees of the solicitor.

Wherever a petition seeks to supersede a commission on the ground of concert, to which the solicitor is a party, it is not enough for the Court (the petition not being resisted,) to supersede the commission, but the conduct of the solicitor ought to be sifted to the bottom.

Upon a petition charging a solicitor with improper conduct, costs will be given against him, as between solicitor and client. *In re* ——, 2 Law J. Chanc. 177.

On petition, the Court ordered the solicitor of a bankrupt's vendee to attend before the commissioners, without prejudice to any question of confidential communications. *Ex parte Hodgson*, 1 G. & J. 21.

It was agreed between the bankrupt and his creditors, that the commission should be superseded; to facilitate which, the bankrupt paid the solicitor's bill without taxation. On petition, the Court ordered the bill to be taxed. *Ex parte Heyden*, 2 G. & J. 52.

The solicitor to a commission is in no case liable to the messenger, except upon special contract. *Ex parte Barwood*, 2 G. & J. 70.

The solicitor to the assignee of a bankrupt is not competent to give a consent to waive notice of the hearing of an insolvent's petition. *In re M'Carthy*, 1 Cress. 56.

Where the mortgaged estate of a bankrupt is sold under the order in Chancery of 8th March, 1794, at the request of the mortgagee, and the mortgagee is the purchaser at the sale, he is liable, in an action for money paid, to reimburse the solicitor under the commission the expenses of the sale. *Bowles* v. *Perring* 2 B. & B. 457, s. c. 5 B. Mo. 290.

A Master's jurisdiction to tax the bill of costs of the solicitor to a commission, under 5 Geo. 2, c. 30, s. 46, is not conclusive until the Master shall have signed his certificate. *Ex parte Neale*, 2 G. & J. 226.

A petition to tax a bill after payment must state objectionable items. *Ex parte Beresford*, 2 G. & J. 259.

### (Z) Of the Jurisdiction of the Great Seal.

The great seal has jurisdiction over all the officers employed in the conduct of a commission of bankrupt, and over every person acting under and coming in under the commission, as to all questions arising out of, or connected with the conduct of the commission. *Ex parte Rawlinson*, 3 Law J. Chanc. 54.

The Court have no jurisdiction to compel the petitioning creditor under a prior commission, who has received a sum of money from the bankrupt for the abandonment of such commission, to refund the money so received. *Ex parte Marshall*, 2 G. & J. 53.

Courts of equity cannot compel a bankrupt to complete the bill of sale of a ship. *Ex parte Stewart* 1 G. & J. 344.

The Court has no power over the costs, on petitions by the lessor to compel the assignees to elect as to the acceptance of a lease. *Ex parte Bright*, 2 G. & J. 79.

Where title deeds of premises had been deposited by the bankrupt with A, which premises had been previously mortgaged to R & Co.; after the bankruptcy, it was agreed between R & Co. and A and the assignees, that the premises were to be sold by the latter, and the proceeds to be applied in payment of R & Co. and A; on petition by the bankrupt's solicitor, claiming a lien by deposit of the title deeds of the premises, prior to A,—Held, that in bankruptcy there was no jurisdiction to determine the priority of lien between A and the petitioner, and that A might object to the jurisdiction by filing affidavits as to the merits. *Ex parte Allison*, 1 G. & J. 210.

The Court has jurisdiction to review the *quantum* allowed by the commissioners to the assignees in passing their accounts, and the jurisdiction is not confined to the principle upon which the allowance is made. *Ex parte Anthony*, 2 G. & J. 55: overruled on appeal, *ibid.* 177.

The Court has not, by stat. 6 Geo. 4, c. 16, s. 108, jurisdiction against the creditor taking out execution upon a judgment obtained by *nil dicit*, where the creditor does not come in under the commission. *Ex parte Botcherley*, 2 G. & J. 367.

Whether the Chancellor has jurisdiction to en-

force payment from the petitioning creditor of a forfeiture for compounding with the bankrupt—Quære. *Ex parte Dimock*, 2 G. & J. 262; *Ex parte Marshall*, ibid. 265.

Petition does not lie to restrain the bankrupt from disputing his commission at law. *Ex parte Glossop*, 2 G. & J. 268.

But where the bankrupt acquiesces, the Chancellor will, upon petition, restrain him from proceeding at law. *Ex parte Leigh*, 2 G. & J. 332.

Bill does not lie to set aside an execution obtained by *nil dicit*. The remedy is by petition. *Mitchell v. Knott*, 2 G. & J. 293. But see *Ex parte Botcherley*, 2 G. & J. 367.

The Court has not, by 6 Geo. 4, c. 16, s. 108, jurisdiction over the execution creditor who does not prove. *Ex parte Botcherley*, 2 G. & J. 367.

Whether the Chancellor has jurisdiction to supersede a commission as to one of two bankrupts, in order to give validity to a subsequent commission against the two with a third—Quære. *Ex parte Burlton*, 2 G. & J. 344.

The Vice Chancellor has not jurisdiction to direct a petition to be heard before the day for hearing fixed by the Lord Chancellor. *Ex parte Charlton*, 2 G. & J. 390.

The Court of Common Pleas has not authority under 6 Geo. 4, c. 16, s. 96, to compel parties to enrol the proceedings under a commission of bankrupt. The application must be made to the Court of Chancery. *Johnson v. Gillett*, 5 Bing. 5, s. c. 6 Law J. C.P. 192.

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## BARON AND FEME.

(A) Husband, Liabilities of.
(B) Wife.
(c) *Privileges and Incapacities.*
(b) *Property.*
(C) Of a Separation.
(D) Actions and Suits by and against.
(a) *In general.*
(b) *Pleadings.*
(c) *Evidence.*
(E) Criminal Proceedings.

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### (A) Husband, Liabilities of.

To render the husband liable for goods furnished to his wife, his authority must be either express or implied; and it is for the jury to decide, whether the goods were suitable to his estate and degree. *Montague v. Espinasse*, 1 C. & P. 357. [Abbott]

Hence, a gentleman or a special pleader is not answerable for the debt of his wife, contracted for jewels and ornaments whilst she is living with him, if she has already been provided with ornaments fit and proper for her station in life, and he has not any knowledge that such articles have been supplied to her before payment for them has been demanded of him. *Montague v. Benedict*, 3 Law J. K.B. 94, s. c. 3 B. & C. 631, s. c. 5 D. & R. 532, s. c. 1 C. & P. 503.

If a wife leaves her husband's residence, under a suspicion or dread that he will offer her personal violence, and a party furnishes her with necessaries subsequently to her leaving the house, he is entitled to recover the amount as against the husband. *Woolston v. Smith*, 3 Law J. C.P. 201, s. c. 3 Bing. 127; s. c. as *Houliston v. Smith*, 10 B. Mo. 482.

A husband's bringing another woman home to reside with him, or acting so as to make his wife apprehensive of personal violence, or improperly confining her, as in a madhouse, is equivalent to the husband's turning her out of doors; and consequently he is liable for necessaries supplied to her, under such circumstances; and it is no defence to say, that she had previously committed adultery, if the husband did not know it until after the credit had been given, nor that *after* the credit she obtained a decree for alimony, which alimony was to relate back to a period before the credit. *Houliston v. Smyth*, 3 C. & P. 22. [Best]

What will justify a wife in leaving her husband. Where circumstances justify a wife in leaving her husband, a request on her part that she should return to his protection, will not determine his liability for necessaries supplied to her during the separation: (*Alexander*, L. C. B. *dubitante.*) *Emery v. Emery*, 1 Y. & J. 501.

An action lies by an attorney against the husband who has compelled his wife to leave him in consequence of ill treatment, for reasonable costs incurred by proceeding at law and in equity, to enforce an agreement for a settlement, the husband having undertaken to pay if the costs were reasonable. *Williams v. Fowler*, 1 M'Clel. & Y. 269.

The husband is liable for necessaries supplied to his wife during the pendency of a suit between them in the Ecclesiastical Court, until alimony has been assigned her; and his liability is not removed by the circumstance that the alimony, when assigned, is ordered to be reckoned from a time before the supplying of the necessaries in question. *Keegan v. Smith*, 4 Law J. K.B. 189, s. c. 5 B. & C. 375, s. c. 8 D. & R. 118.

Where a wife had received only one tenth of her husband's income as alimony, an application on the behalf of the husband to be relieved from the taxation of costs was refused. *Beevor v. Beevor*, 3 Phil. 261.

A husband is not liable for goods furnished to his wife living apart from him, if she has a sufficient separate maintenance, although no part of it is supplied by the husband. *Clifford v. Layton*, 1 M. & M. 101, s. c. 3 C. & C. 15. [Tenterden]

In an action against a husband, for goods supplied to his wife living separate from him, the plaintiff must give evidence of the circumstances of the separation, to shew that they were such as to authorise her to bind the husband. *Mainwaring v. Leslie*, 1 M. & M. 18, s. c. 2 C. & P. 507. [Abbott]

A husband is liable for necessaries provided for his wife, when he neglects to provide them himself; but, if there be no necessity for the articles delivered, the tradesman is not entitled to recover their value, unless he can shew an express or implied assent of the husband to the contract made by the wife. *Seaton v. Espinasse*, 6 Law J. C.P. 208, s. c. 5 Bing. 58, s. c. 2 M. & P. 67.

Where, in pursuance of articles of separation securing a maintenance to the wife, she quits her husband's house against his wishes, and continues to live apart from him, although he is willing and wishes to receive her back, and provide for her in his own

house: Semble, that he is not liable to be sued by tradesmen for debts contracted by her, even for necessaries. *Hindley* v. *Marquis of Westmeath*, 5 Law J. K.B. 115, s. c. 6 B. & C. 200.

Where husband and wife were living together, and the latter carried on business on her own account, and invoices of goods were made out in her name alone, and she was rated in the parish books, but the husband partook of the profits of the trade, and lived in the same house: Held, that he was liable in an action for goods delivered there, although the invoices were made out by the plaintiffs in the name of the wife. *Petty* v. *Anderson*, 3 Law J. C.P. 223, s. c. 3 Bing. 170, s. c. 10 B. Mo. 577, s. c. 2 C. & P. 38.

Where the restitution of conjugal rights is decreed to the wife, and the husband certifies he has taken his wife home, and treated her with conjugal affection, which the wife denies,—the Court will not dismiss the husband, but order him to certify over. *Gill* v. *Gill*, 2 Add. 384.

## (B) WIFE.

### (a) *Privileges and Incapacities.*

On an application by a feme covert, for leave to appoint a proctor, she being a party in a cause, on the ground that her husband had been absent from this country, at the Cape of Good Hope, for many years, and that she believed he had no intention of returning, and that he refused to execute certain necessary documents: The Court granted the application on the terms of her giving sufficient security for costs. *Sutor* v. *Christie*, 2 Add. 150.

A writ of *ne exeat regno* cannot be sustained against a feme covert, even when sued as administratrix. *Pannell* v. *Taylor*, 1 Turn. 96.

On an application on the part of a feme covert who has been arrested, to be discharged out of custody, founded on the usual affidavit, the Court will not order her to pay the costs, or impose any terms on her in ordering her discharge, although it be opposed on an affidavit, stating that she was carrying on business on her own separate account, and that the action was brought for goods supplied to her in the way of her trade, the object of the application being a matter of right. *Carlisle* v. *Starr*, 9 Price, 161.

If a feme covert, on being arrested as drawer of a bill of exchange, enter into a bail-bond, the Court will, on motion, order it to be cancelled. *Samwell* v. *Jenkins*, 6 B. Mo. 500.

The Court discharged a feme covert on common bail, though separated by a divorce *a mensa et thoro;* there being an appeal still pending against the sentence. *Hookham* v. *Chambers*, 6 B. Mo. 26, s. c. 3 B. & B. 92.

Although the Cause of action arise through the wife, who is properly made a defendant with her husband, yet the Court will discharge her without filing common bail if she be arrested before her husband. *English* v. *Cabellaro*, 1 Law J. K.B. 149, s. c. 3 D. & R. 25.

Whenever it is necessary to make the wife a party to an action, the Court, upon discharging her out of custody, will not grant the costs of the application.

Where baron and feme were arrested for a debt contracted by the wife prior to her marriage, the rule for cancelling the bail-bond given by the wife for the irregularity, was made absolute, but without costs. *Taylor* v. *Whittaker*, 1 Law J. K. B. 16, s. c. 2 D. & R. 225.

A married woman gave an undertaking to pay the amount of an attorney's bill when taxed; she did not pay, and was arrested for it. The Court discharged her out of custody, but would not give her the costs of the application. *Sweet* v. *Ramsbottom*, 1 Law J. K.B. 188.

If the plaintiff knew not, at the time he gave credit, nor at the time of the arrest, that the defendant was a married woman, the Court, on discharging her out of custody, will oblige her to pay the costs. *Fordyce's case*, 2 Law J. K.B. 80.

Where a feme covert has acted in the character of a feme sole, and represented herself as such, she may be arrested, and the courts of law will not discharge her upon motion. *Pannell* v. *Taylor*, 1 Turn. 100.

After a feme covert, who has gone to reside out of the jurisdiction of the Court, has contracted a debt here, without disclosing her marriage, and has in other respects acted with duplicity, the Court will not, on motion, order the bail-bond to be delivered up to be cancelled, and allow her to enter a common appearance; but will leave her to plead her coverture. *Luden* v. *Justice*, 2 Law J. C.P. 10, s. c. 1 Bing. 344.

*Semble*—If a feme covert be taken in execution for a debt contracted by her prior to her marriage, she cannot be discharged, although the husband be in custody on mesne process in the same suit; but it is nevertheless in the discretion of the Court, whether they will grant or refuse such discharge. *Chalk* v. *Deacon*, 6 B. Mo. 128.

Where a married woman has been sued as a feme sole, has suffered judgment by default, and has been charged in execution, the Court will not discharge her on motion, although the plaintiff knew she was a married woman when he gave her credit. *Moses* v. *Richardson*, 6 Law J. K.B. 371.

A married woman, taken in execution together with her husband, for a debt due from her before marriage, is not entitled to be discharged, unless it appears that she has no separate property, even although the husband has been discharged under the insolvent act. *Sparkes* v. *Bell*, 6 Law J. K.B. 206, s. c. 8 B. & C. 1, s. c. 2 M. & R. 124.

Although a sentence of divorce *a mensa et thoro* has been pronounced against a woman, and she is allowed a separate maintenance, yet an action cannot be maintained against her, for goods supplied to her, which are not alleged to be necessaries. *Lewis* v. *Lee*, 3 Law J. K.B. 22, s. c. 3 B. & C. 291, s. c. 5 D. & R. 98.

A divorce *a mensa et thoro* does not authorize a feme covert to give a warrant of attorney. *Fairthorne* v. *Blaquire*, 6 M. & S. 73.

The rule which prohibits bail himself from being a witness for the defendant for whom he has become bound, applies to his wife. *Cornish* v. *Pugh*, 8 D. & R. 65.

### (b) *Property.*

A married woman can have no property distinct from her husband, unless it be secured to her by a conveyance to trustees; therefore where, previous to the marriage of a feme sole trader, she conveyed her "stock in trade, furniture, and other articles belonging to her, in and about her said business,"

to trustees, and it appeared that she had a horse and chaise, (not specified in the settlement,) which she used in carrying on her trade, being lame: It was holden, on an execution against the husband, that whether the horse and gig were for the purpose of her trade, was a question for the jury,—and the jury having found in the affirmative, the Court granted a rule *nisi* to enter a nonsuit, on the ground that it was a question of law depending on the construction of the deed. *Dean* v. *Brown*, 2 C. & P. 62. But afterwards the rule was discharged, s. c. 5 B. & C. 336, s. c. 8 D. & R. 95.

But in equity, a feme covert is, as to her separate estate, viewed as a feme sole. *Headen* v. *Rosher*, 1 M'Clel. & Y. 90.

Although a husband has no right to dispose of his wife's paraphernalia, yet if he does so, she must either abide by the will, or relinquish all benefit therefrom. *Churchill* v. *Small*, 2 Ken. 6. Chanc.

Quære, Whether a husband has a right to compel the wife's executor to pay her funeral expenses out of her separate estate? *Gregory* v. *Lockyer*, 6 Mad. 90.

If a husband, being in the receipt of the rents and profits of an estate charged with an annuity to the wife, retains out of the rents and profits a sum equal to or greater than the amount of the annuity, the claim of the wife is concluded. *Carter* v. *Anderson*, 1 Law J. Chanc. 132.

When the husband has previously possessed himself of part of the wife's fortune without the aid of the Court, her equity, in respect of a fund in court, is increased. *Green* v. *Otte*, 1 Law J. Chanc. 195.

The express consent of a married woman in court, to part with her interest in a fund settled on her marriage for her separate use during her life, with a clause against anticipation, with remainder to the survivor of her and her husband, will not induce the Court to interfere to rescind the settlement. *Ritchie* v. *Broadhurst*, 2 J. & W. 456.

The Court will not receive the consent of a feme covert, that money shall be paid to her husband, until her share has been ascertained. *Jernegan* v. *Baxter*, 6 Mad. 32.

If the Court order the moiety of a legacy given to the wife of a bankrupt, to be set off against a debt due from the bankrupt, they will order the other moiety to be settled on the wife for life, with remainder to her issue. *Ex parte O'Ferrall*, 1 G. & J. 347.

A woman entitled to a fund in court, married immediately after she came of age. A settlement was made after the marriage on her and her husband, and on their issue absolutely. After the death of the husband, and the birth of a child, the settlement was declared void at the instance of the wife, it appearing that she had never consented in court to the transfer of the property settled. *Long* v. *Long*, 2 S. & S. 119.

A married woman having a vested interest in a sum of stock, subject to the life interest of another person, joins with her husband in executing an assignment of the moiety of the fund to a purchaser for a valuable consideration: the husband afterwards dies before the tenant for life: Held, that the wife is entitled by survivorship to the whole fund, and that the purchaser cannot claim any part of it against her. *Purdew* v. *Jackson*, 1 Russ. 1, s. c. 4 Law J. Chanc. 1.

A sum under 200*l.* belonging to a married woman, will be ordered to be paid to her husband, though she appears by counsel to resist the payment, and complains of being deserted by him, *Foden* v. *Finney*, 6 Law J. Chanc. 153.

A bequest of money to be invested in an annuity for the life of a married woman, for her separate use, paid to the husband upon her consent taken in court. *Gullan* v. *Trimbey*, 2 J. & W. 457.

A fund belonging to a married woman, standing in the name of the Accountant General to her account, may be pledged by her husband with her concurrence. *Sansum* v. *Dewar*, 5 Law J. Chanc. 46, s. c. 3 Russ. 91.

A feme covert, in pursuance of a power reserved to her in the marriage settlement, devised different parts of the settled estate, and also lands after purchased by her, with the produce of it, to several persons; and gave all the rest of her property to her residuary legatee and executor: Held, first, that by the residuary clause both real and personal estates passed as by appointment; secondly, that freehold lands, contracted for, or purchased by a feme covert, could not be disposed of by her will, but that leasehold estates might pass; thirdly, that a sum, which she neglected to bequeath, vested in her executor, and not in her surviving husband. *Churchill* v. *Dibben*, 2 Ken. 68.

A man and his wife mortgaged the latter's freehold, and surrendered her copyholds to the mortgagee in fee, reserving a power to them or either of them to redeem; the husband subsequently released his equity of redemption as to both estates to the mortgagee, and soon afterwards died: Held that the wife could redeem the copyholds, but not the freehold estate, *Reeve* v. *Hicks*, 2 S. & S. 403.

Husband and wife cannot sue upon an agreement made between the wife and a tenant of her freehold property, unless the husband was a party to the agreement, or has subsequently adopted it. *Saunderson* v. *Griffiths*, 4 Law J. K.B. 318, s. c. 5 B. & C. 909, s. c. 8 D. & R. 643.

A debt due to the wife before marriage is not vested in the husband until a judgment be recovered thereon. If, therefore, husband and wife bring a joint action in respect of such a debt, and before judgment the wife die, the action will abate. *Checchi* v. *Powell*, 5 Law J. K.B. 253, s. c. 6 B. & C. 253.

Money belonging to the wife paid to the husband, the parties being subjects of Denmark, and the law of that country not requiring a settlement. *Dues* v. *Smith*, 1 Jacob, 544.

The Court will not decree the husband to procure his wife to join in a contract entered into by them, for the sale of the wife's estate. *Martin* v. *Mitchell*, 2 J. & W. 425.

If a married woman has in equity a charge upon an estate, and she and her husband, for valuable consideration, execute a conveyance of the estate to a third person, which conveyance does not pass the premises, in consequence of their having been previously conveyed to a trustee, the instrument may nevertheless operate as an assignment of the wife's charge. *Birch* v. *Calley*, 2 Law J. Chanc. 173.

The wife's equity to a settlement incapacitates the husband, notwithstanding any assignment or release which he can execute, from being a witness in support of the wife's right to personal property. *Gregg* v. *Taylor*, 6 Law J. Chanc. 184.

Where husband and wife assign to a purchaser, for valuable consideration, a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, and both the wife and the tenant for life outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of that share of the fund against such particular assignee for valuable consideration; and the wife, after her husband's death, executes an assignment of the fund, which recites former assignments by the husband, and purports to be made subject to them, she does not thereby recognize or confirm those former assignments. The wife does not acquiesce in those assignments, or waive her right to claim against them, by forbearing to impeach them till the death of the tenant for life. *Honner* v. *Morton*, 3 Russ. 65.

(C) OF SEPARATION.

Husband and wife may legally agree to separate. *Scholey* v. *Goodman*, 1 C. & P. 36. [Burrough]

A deed reciting that unhappy differences existed between a man and his wife, and providing for their separation, in which the husband agrees to pay an annuity to the wife, and not to sue her for restitution of conjugal rights, and she covenants to release her jointure and dower, is good in law.

After making such a deed of separation, the wife sued the husband for restitution of conjugal rights, but the suit was answered by an allegation of adultery, in which the Ecclesiastical Court decreed that they should be divorced *a mensâ et thoro*.

The trustee of the wife sued the husband and surety on a bond conditioned for the performance of the covenants of that deed; and the Court held, on demurrer, that a plea, alleging the decree of divorce, was not an answer to it. *Jee* v. *Thurlow*, 2 Law J. K.B. 81, s. c. 2 B. & C. 547, s. c. 4 D. & R. 11.

Where, in an agreement for a separation between husband and wife, trustees covenant to indemnify the husband against the wife's debts, that is a sufficient consideration for the agreement; and the Court will not refuse to carry such an agreement into effect. *Elworthy* v. *Bird*, 3 Law J. Chanc. 190, s. c. 2 S. & S. 372.

On a deed of separation between husband and wife, whereby the former covenanted to pay, to a trustee, an annuity for the use of the latter: it was holden, that the covenant was binding on the husband, and might be enforced in equity, though it contained no clause of indemnification by the trustee. *Rex* v. *Willoughby*, 10 Price, 2.

But, where a deed of separation between husband and wife, allowing her an annuity, contained no clause of indemnity against her debts, the Court granted an injunction to restrain proceedings at law. *Westmeath* v. *Westmeath*, 1 Jac. 126.

Upon articles of separation between man and wife, the Court held the agreement to be a formal renunciation by the husband, of his marital right to seize her, or force her back to live with him. *The King* v. *Mead*, 2 Ken. 279.

Where a wife lives separate from her husband, and supports her children on the profits of her industry, her employer cannot pay her after notice from the husband not to do so; and if he does, it is in his own wrong, and the husband may sue for the salary. *Glover* v. *the Proprietors of Drury-lane Theatre*, 2 Chit. 117.

Where husband and wife enter a joint appearance, and the husband is attached and committed to the Fleet for want of answer; the Court, upon the coming in of his answer, and its appearing that the wife is not under his control, will, with the consent of the plaintiff, make an order that he may be discharged, and that the wife may answer separately. *Hertford* v. *Croden*, 1 Law J. Chanc. 214: s. P. *Garey* v. *Whittingham*, 1 S. & S. 163.

Husband and wife, by occasionally living together after an agreement to separate, do not put an end to it, and the wife's conduct towards her husband on coming back, is evidence for him in an action by her trustee, for the separate maintenance. *Scholey* v. *Goodman*, 8 B. Mo. 350, s. c. 1 C. & P. 36.

If, on the separation of husband and wife, the former, by deed absolutely transfer to trustees for her benefit, personal property; the husband, in an action against him for debt subsequently contracted by the wife, must shew that the trustees gave effect to the deed by taking possession. *Barrett* v. *Booty*, 8 Taunt. 343.

A deed providing for an immediate, and, in some cases, for a future separation of husband and wife, may be valid in law.

But where a deed imports an immediate separation, and the parties do not intend immediately to separate, and in fact do not separate, but continue to live together, ostensibly as man and wife, for some time subsequent to its execution, it will not be considered as legal or binding.

And, Quære—If a wife, while living apart from her husband, under a valid deed of separation, contract a debt, can the creditor in any, and in what manner, avail himself of that deed? *Hindley* v. *Westmeath*, 5 Law J. K.B. 115, s. c. 6 B. & C. 200.

(D) ACTIONS AND SUITS BY AND AGAINST.

(*a*) *In general.*

A decree against husband and wife, suing as co-plaintiff for matters, in some of which the wife has a separate interest, will not conclude the wife in another suit instituted by her through her next friend.

Neither will she be concluded in such a suit by a decree made against her in a suit in which she and her husband answered jointly. *Hughes* v. *Evans*, 1 Law J. Chanc. 129.

Where a bill is against husband and wife, and the husband has entered a joint appearance, and obtained an order for time, the wife, if she afterwards obtain leave to answer separately, is entitled to all the orders for time, without any regard to the order obtained by the husband. *Jackson* v. ——, 1 Law J. Chanc. 76.

Where two married women are defendants, and they are to answer separately from their husbands, they cannot be included in one order, but there must be two separate orders. *Anon.* 2 Law J. Chanc. 89.

Where husband and wife are defendants, and the husband is abroad, the plaintiff may, where the wife alone was served with the subpœna, obtain an attachment against her, if she neglects to appear. *Bushell* v. *Bushell*, 1 S. & S. 164,

Bill against husband and wife in respect of a demand against wife as executrix—husband a bankrupt and abroad, and attachment had issued against him for want of an answer. Such attachment will not be granted against the wife, until an order has been obtained that the wife should answer separately, and the wife must have notice of the motion for that order. *Bunyan* v. *Mortimer*, 6 Mad. 278.

If a husband and wife be arrested, and the latter is discharged on filing common bail, and afterwards the plaintiff declares against the husband alone, the Court will set aside the proceedings for irregularity. *Cattarus* v. *Player and wife*, 1 Law J. K.B. 246, s. c. 3 D. & R. 247.

On the question, whether a husband and wife, being partners in Spain, could sue as such in our courts: It was holden, that, in order to entitle the plaintiffs to recover, they must shew that a feme covert in Spain could engage in trade, for they are bound to shew that they have put a proper plaintiff on the record, according to the law of Spain. *Pineyro* v. *De Bernales*, 1 C. & P. 266, s. c. 1 R. & M. 102. [Abbott]

A husband may, in an action by him against the owner of a post-chaise, for the negligent driving of a servant, whereby he was injured, recover for the damage sustained by his wife, as well as by himself, though the former be no party to the action. *Alison* v. *Forster*, 1 C. & P. 21. [Burrough]

In an action against husband and wife, if she survive the husband, she is entitled to have the costs taxed under a rule of court. *Tilt* v. *Bartlett*, Ken. 104, s. c. Sayer, 126.

### (*b*) *Pleadings.*

A plea put in by husband and wife, may be entitled their joint and several plea. *Fitch* v. *Chapman*, 2 Law J. Chanc. 172.

In an action on an agreement between husband and wife to live separate, if either of them wish to avail themselves of the defence of adultery, it must be pleaded. *Scholey* v. *Goodman*, 8 B. Mo. 350, s. c. 1 C. & P. 36.

It is not a good plea to a bill filed by a married woman against her husband and other defendants, that a suit has been instituted by her and her husband, and is pending, against those other defendants, which relates to the same transactions, and prays similar relief. *Reeve* v. *Dalby*, 4 Law J. Chanc. 117. s. c. 2 S. & S. 464.

### (*c*) *Evidence.*

Observations made by the wife are admissible in evidence, where she acts as the agent of her husband. *Pratt* v. *Baker*, 1 Law J. K.B. 12.

Although a feme covert, who has joined with her husband in answering a bill, makes admissions, they are not evidence against her. *Hodgson* v. *Merest*, 9 Price, 563.

The answer of a married woman may be read, to shew that she has property settled to her separate use, where the object of the suit is to establish a demand against her separate estate. —— v. *Bailie*, 5 Law J. Chanc. 105.

*Semble*, That in an action by a trustee, under an agreement between husband and wife to live separate, to recover the arrears of an allowance contracted to be made by the husband to her, declarations by the wife, of having committed adultery during the time the allowance claimed accrued due, are not admissible in evidence. *Scholey* v. *Goodman*, 2 Law J. C.P. 11, s. c. 1 Bing. 342.

If the defence to an action for board and lodging of the defendant's wife be adultery, the husband may give in evidence, statements made by her confessing her guilt, previous to his turning her out of doors; and he may also produce letters from different men found by him in her writing-desk at the same period. *Walton* v. *Green*, 1 C. & P. 621. [Abbott]

The separate examination of a married woman as to her fund in court, is not admissible, where the fund in court has not been ascertained by the Master. *Godder* v. *Laurie*, 10 Price, 152.

In an action against executors, the widow of their testator is a competent witness for the plaintiff to prove a promise made by her husband in his lifetime. *Beveridge* v. *Minter*, 1 C. & P. 364. [Abbott]

Where letters between husband and wife, shewing the affectionate terms on which they cohabited, were produced as evidence to contradict the presumption that she was compelled to leave her husband from cruel treatment: It was holden, that the dates which they bore were not evidence to shew the time at which they were written, and consequently other proof must be brought to shew when they were written. *Houliston* v. *Smyth*, 2 C. & P. 26. [Best]

## (E) CRIMINAL PROCEEDINGS.

If a man and his wife jointly commit a felony, the wife, being presumed in law to be under his coercion and control, is entitled to an acquittal; and if the woman be indicted as "the wife of A B," no other proof of that fact will be required for this purpose. *Rex* v. *Knight*, 1 C. & P. 116. [Park]

Husband and wife (paupers) having returned to the parish from whence they were removed: Held, that the husband *only* was liable to be committed to the house of correction, and not the wife, inasmuch as she had merely accompanied her husband in his return. *Baldwin* v. *Blackmore*, 2 Ken. 38, s. c. 1 Burr. 595.

Cohabitation by a man and woman for two years is not sufficient to entitle the latter to an acquittal on a joint indictment for larceny, she being described in the indictment as a single woman, on the ground of coercion; evidence of a marriage *de facto*, though not an actual marriage, being essential. *Rex* v. *Hassall*, 2 C. & P. 434. [Garrow]

Whenever husband and wife are admissible witnesses against each other, they are competent for each other; hence, on an indictment against the wife of W S, and others for a conspiracy in procuring W S to marry—it was holden, that W S was not a competent witness for the prosecutor. *Rex* v. *Serjeant*, 1 R. & M. 352. [Abbott]

## BAPTISM.

The parish register of a person's baptism is not evidence that the person was born in that parish. *Rex* v. *North Petherton*, 4 Law J. K.B. 213, s. c. 5 B. & C. 508, s. c. 8 D. & R. 325.

## BARGAIN AND SALE.

Where the eldest son, tenant in tail male, as soon as he came of age, joined with his father, tenant for life, in suffering a recovery with a view of resettling some of the estates, and took an annuity during his father's life, and part of the estate was limited to the father in fee, the residue resettled, the son taking back an estate for life, with remainder over to his first and other sons in tail general. This transaction was holden to be a mixed bargain and sale, and family arrangement; and the eldest son having died without issue, and the remainder-man, a second son, having done confirmatory acts, and accepted interests under the will, a bill filed by him to set aside the settlement was dismissed. Transactions of this description, between parent and child, are to be viewed with a reasonable degree of jealousy, but not as reversionary bargains. *Tweddale* v. *Tweddale*, 1 Turn. 1.

## BARRISTER,

[See ARBITRATION, COUNSEL, and EVIDENCE.]

## BASTARD.

A child born in wedlock is to be held legitimate, unless there is evidence affording irresistible presumption to the contrary. *Head* v. *Head*, 1 Law J. Chanc. 105, s. c. 1 S. & S. 50.

Where personal access between husband and wife is established, sexual intercourse is to be presumed; and the presumption must stand till rebutted by clear and satisfactory evidence. *Head* v. *Head*, 1 Turn. 138.

Every child born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate; but this presumption may be repelled, by proof of such facts as satisfy the jury that *no* sexual intercourse took place between the husband and wife, at a time when the husband could, by possibility, be the father of the child; and the jury, before they can find against the legitimacy, must be convinced that *no* such sexual intercourse took place, by irresistible evidence, and not by a mere balance of probalities. If such intercourse did take place, the adultery of the wife is immaterial; and if there was an *opportunity* of sexual intercourse between the husband and wife, the law presumes that such intercourse *did* take place, unless the contrary be satisfactorily proved. *Morris* v. *Davis*, 3 C. & P. 215. [Vaughan]

If husband and wife are in such a situation that sexal intercourse *might* have taken place, the law presumes that it did take place, unless such facts are proved as satisfy the jury *beyond all doubt* that no such intercourse did take place: and, therefore, unless such facts are proved, a child born of the wife, is legitimate, if the husband and wife were in such a situation that sexual intercourse might have taken place between them, at a time, when, by the course of nature, the husband could have been the father of the child. *Morris* v. *Davis*, 3 C. & P. 427. [Gaselee]

Doctrine of law as to the legitimacy of the child of a married woman, who was separated from, but sometimes was visited by, her husband, and who was living in a state of adultery with one of her servants; the birth of the child having been concealed, and the child having always, during the life of the husband, been considered as a bastard. *Morris* v. *Davis*, 6 Law J. Chanc. 177.

One who is born before the marriage of his parents, cannot inherit real property in England, even though by the law of the country in which he was born, and in which his parents were married, he should be declared legitimate and capable, there, of inheriting. *Doe d. Birtwhistle* v. *Vardill*, 4 Law J. K.B. 190, s. c. 5 B. & C. 438, s. c. 8 D. & R. 185.

Although the father of an illegitimate child is not bound to provide for it, unless in pursuance of an order of Justices; yet, if he consents to do so, he must continue to provide for the child until he has given a distinct and unequivocal notice that he intends to be responsible no longer. *Cameron* v. *Baker*, 1 C. & P. 268. [Best]

Where a father, after having made various payments in support of a bastard child, declined further assistance, unless the mother obtained an order of filiation: It was holden, that the mother could maintain no action for the arrears of its maintenance. *Furillis* v. *Crowther*, 7 D. & R. 612.

If a person know that his illegitimate daughter, of the age of 16, is boarded and clothed by the plaintiff, and neither expresses dissent, nor takes his daughter away, he is liable to pay the plaintiff for such board and lodging without any express promise to do so. And it lies on the defendant to shew that his daughter was boarded and lodged by the plaintiff against his consent, or that he has refused to be at the expense of maintaining her. *Nicholl* v. *Allen*, 3 C. & P. 36. [Tenterden]

Parish officers cannot require a sum of money, either from the mother or putative father, on the birth of a bastard child, for its future maintenance, or to indemnify the parish against the charges of supporting it; they can only require a *security* for the purpose of such indemnity. Where, therefore, the mother of a bastard paid a sum to the overseers, to meet any charges which might accrue in respect of the child: Held, that she was entitled to recover it back, in an action for money had and received. *Clark* v. *Johnson*, 4 Law J. C.P. 132, s. c. 3 Bing. 424.

One Justice alone is not authorized to compel a woman to submit to examination, respecting the father of her bastard child: nor, on her refusal to be examined, to commit her. *Ex parte Mary Anne Martin*, 5 Law J. M.C. 38, s. c. 6 B. & C. 80, s. c. 9 D. & R. 65.

An action on a bastardy bond under the 54 Geo. 3, c. 170, s. 8, must be brought in the name of the overseers who are in office at the period of the

commencement of the action, although they may not have been the overseers to whom the bond had been given. *Addey* v. *Woolley*, 8 Taunt. 691, s. c. 3 B. Mo. 91.

Where the putative father of a bastard child entered into a bond with two sureties, to the overseers of a parish, to indemnify them against the expenses of providing for the child; and default having been made by the father, judgment was entered upon the bond; and the two sureties were afterwards discharged under the Insolvent Debtors Act: Held, that they were still liable for expenses incurred by the parish after their discharge. *Davies* v. *Arnott*, 3 Law J. C.P. 212, s. c. 3 Bing. 154, s. c. 10 B. Mo. 539.

No appeal against an order of bastardy can be entered at the Sessions, until the requisites of the 49 Geo. 3, c. 68, sec. 5 & 7, have been complied with, as to the notice of appeal, and entering into a recognizance. *Rex* v. *the Justices of Lincoln*, 3 B. & C. 548, s. c. 5 D. & R. 347.

Where the time for appeal against an order of filiation has passed, it cannot be enforced under 18 Eliz. c. 3, but the justice of the peace may proceed under the 49 Geo. 3, c. 68, s. 3, by commitment for three months. *Ex parte Addis*, 2 D. & R. 167, s. c. 1 B. & C. 87.

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## BILL OF EXCEPTIONS.

[See PRACTICE.]

A bill of exceptions does not prevent the case from going to the jury, but a demurrer to the evidence does. *Miller* v. *Warre*, 1 C. & P. 240. [Parke]

If a party, before the sealing of a bill of exceptions tendered by him at the trial, bring a writ of error, he waives the bill of exceptions allowed by the Judge.

*Semble*, That if there has been no waiver, the Court of Error cannot order a party to settle a bill of exceptions, so that it may be sealed and appended to the transcript of the record by amendment.

*Quære*, Within what time a party ought to procure the judge's seal to a bill of exceptions. *Dillon* v. *Doe dem. Parker*, 1 Bing. 17, s. c. 11 Price, 100.

Where an indorsement to a foreign bill of exchange turns out to be forged, and a question arises as to the proof of the identity of the indorser, the proper mode of objecting to the insufficiency of the evidence, is by demurring to the evidence, and not by a bill of exceptions. *Bulkeley* v. *Butler*, 3 D. & R. 625, s. c. 2 B. & C. 434.

Upon an exception taken, in a bill of exceptions, in which the whole evidence was set out, that the evidence for the defendant was sufficient to entitle the defendant to a verdict and to bar the plaintiff's claim: Held, that a court of error might look to the whole evidence on both sides, to see whether the verdict for the plaintiff was sustained by the evidence. *Quære*, Whether an objection can be raised to evidence, to which no exception has been taken by the bill. *Vines* v. *Corporation of Reading*, 1 Y. & J. 4.

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## BILL OF EXCHANGE AND PROMISSORY NOTE.

(A) VALIDITY.
(B) PARTIES.
(C) FORM AND CONSTRUCTION.
(D) CONSIDERATION.
(E) STAMP.
(F) ALTERATION.
(G) PRESENTMENT FOR ACCEPTANCE.
(H) ACCEPTANCE.
(I) ACCEPTOR.
(J) TRANSFER AND INDORSEMENT.
(K) PRESENTMENT FOR PAYMENT.
  (*a*) *Time.*
  (*b*) *Place.*
(L) NOTICE OF DISHONOUR.
  (*a*) *When necessary.*
  (*b*) *By and to whom.*
  (*c*) *Form and Mode.*
  (*d*) *Time.*
  (*e*) *When waived.*
(M) ACTION.
  (*a*) *Where maintainable.*
  (*b*) *By and against whom.*
  (*c*) *Lost Bills and Notes.*
  (*d*) *Arrest.*
  (*e*) *Staying Proceedings.*
  (*f*) *Pleadings.*
  (*g*) *Evidence.*
  (*h*) *Witnesses.*
  (*i*) *Defence.*
  (*k*) *What recoverable.*
  (*l*) *Rule to compute.*
(N) REMEDY IN CASE OF BANKRUPTCY.
[See BANKRUPT.]

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### (A) VALIDITY.

A bill of exchange drawn on a contingency is absolutely void. *Palmer* v. *Pratt*, 2 Bing. 185, s. c. 10 B. Mo. 358.

An order for the payment of a sum of money depending on a contingency, cannot be declared upon as a bill of exchange, although accepted by the drawee. *Ralli* v. *Sarell*, 1 D. & R. N.P.C. 33. [Abbott]

A promissory note made in *Scotland*, may be sued upon in *England*, as it is within the 3 and 4 Anne, c. 9. *Milne* v. *Graham*, 1 Law J. K.B. 91, s. c. 1 B. & C. 192, s. c. 2 D. & R. 293; and see *Bentley* v. *Northhouse*, 1 M. & M. 66, *post*, (*J*).

Bills made in France on French stamps, though void in France, because drawn in the English form, are valid in England. *Winne* v. *Jackson*, 5 Law J. Chanc. 55, s. c. 2 Russ. 351.

### (B) PARTIES.

A promissory note, payable to an infant when he shall come of age, specifying the day, is good within the 3 & 4 Anne, c. 9. *Goss* v. *Nelson*, 1 Ken. 498, s. c. 1 Burr. 226.

If a person perfectly imbecile in mind, is imposed upon, and induced to sign a promissory note, which is drawn in an unusual form, such note is bad, even in the hands of an indorsee. *Sentance* v. *Poole*, 3 C. & P. 1. [Tenterden]

A joint and several promissory note, at a shorter period than six months, signed by more than six

persons, is good, if they be not in partnership for the purpose of banking. *Perring* v. *Dunston*, 1 R. & M. 264. [Best]

(C) FORM AND CONSTRUCTION.

An instrument, as follows, "Received of A B 100*l*., which I promise to pay on demand, with lawful interest—J. Davies," is a promissory note. *Green* v. *Davies*, 3 Law J. K.B. 185, s. c. 4 B. & C. 235, s. c. 6 D. & R. 306, s. c. 1 C. & P. 454, *ibid*, 675.

On an indictment for uttering a forged promissory note for the payment of money, as follows:

£28. 15*s*. Newport Nov. 20, 182 ,

Two months after date pay Mr. B H, or order, the sum of twenty-eight pounds fifteen shillings, value received. J. J.

At Messrs. Y. & Co. bankers, London.

Held, that the instrument was a bill of exchange, and not a promissory note. *Rex* v. *Hunter*, R. & R. C.C.R. 511.

An instrument which is in the form of a note, but which is in addition addressed to a third party who accepts it, is a promissory note.

When an instrument is equivocal between a bill of exchange and a promissory note, the holder may treat it as either. *Eedis* v. *Berry*, 5 Law J. K.B. 179, s. c. 6 B. & C. 433, s. c. 2 C. & P. 559.

A note payable on demand, but with interest until paid, is not to be deemed as payable immediately. *Gascoyne* v. *Smith*, 1 M'Clel. & Y. 338.

If a man draws a bill in Ireland, payable in England, and stating that it is for sterling money, it must be construed to mean, sterling in that part of the United Kingdom where it is payable. *Taylor* v. *Booth*, 1 C. & P. 286. [Best]

(D) CONSIDERATION.

It is not sufficient that the acceptor of a bill of exchange receive some benefit *indirectly* from the contract for which he accepted the bill, but the consideration, however small, should be directly from him for whom the bill was accepted. *Archer* v. *Bamford*, 1 Law J. K.B. 228.

Bills made in France, and on French stamps, cannot be enforced in England, if they were given for a gambling debt. *Winne* v. *Callender*, 1 Russ. 293.

All games, whether of skill or of chance, being within 9 Anne, c. 14, s. 5, a promissory note, given to secure the payment of money won at either is invalid. *Sigel* v. *Jebb*, 3 Stark. 1. [Abbott]

A bill of exchange given for differences on stock bargains, is not void in the hands of an innocent holder. *Greenland* v. *Dyer*, 6 Law J. K.B. 345, s. c. 2 M. & R. 422.

If the importation of certain goods be prohibited, and the plaintiff sell such goods in this country to A, who indorses a bill of exchange to him in payment; the plaintiff cannot recover on that bill against the acceptor, although there was no evidence that the plaintiff was the importer of the prohibited goods. *Billard* v. *Hayden*, 2 C. & P. 472. [Abbott]

Where the defendant, who had applied for his discharge under the Insolvent Debtors Act, gave a promissory note to a creditor in consideration that he would not oppose such discharge, the Court held the consideration corrupt and illegal. *Rogers* v. *Kingston*, 3 Law J. C.P. 77, s. c. 2 Bing. 441, s. c. 10 B. Mo. 97.

A bill given to a creditor to induce him to sign a bankrupt's certificate, is void, in whose hands soever it may be, and whatever the consideration given by the holder; but a bill given to a creditor to keep him from taking steps to oppose the certificate, would be good in the hands of a holder for value without notice. *Birch* v. *Jervis*, 3 C. & P. 379. [Tenterden]

No consideration being proved in an action by an infant against the executor of the maker of a note, expressed, for "value received," the Judge told the jury that the words "value received," imported a legal consideration, and that affection for the payee, or friendship for his father, or a desire to avoid the legacy duty, amounted to a legal consideration. The jury having found for the plaintiff,—it was holden, that they had been misdirected, inasmuch as the considerations pointed out were insufficient, and as the jury might have presumed a good consideration, yet as that may be rebutted, a new trial was granted. *Holliday* v. *Atkinson*, 5 B. & C. 501, s. c. 8 D. & R. 163.

Where a note had been altered, and a party, on being applied to for payment, replied, that "from the death of a relation he could not then attend to the subject, but would give his earliest attention:" It was holden, not to render him liable. *Perring* v. *Hone*, 2 C. & P. 401. [Best]

(E) STAMP.

The time for which a bill is drawn is that expressed on its face; and therefore, if it be post-dated, so as to make it in fact drawn for more than two months, yet it is sufficient to have the stamp for a bill payable two months after date. *Upstone* v. *Marchant*, 1 Law J. K.B. 244, s. c. 2 B. & C. 10, s. c. 3 D. & R. 198.

The Court may inquire as to the time when a stamp, not originally affixed to the instrument, was, in fact, affixed thereto: therefore, where it appeared on the face of a note, that it had been issued without having affixed to it a stamp of the legal amount; and also that, since its issue, a penalty had been paid, and a 1*l*. agreement stamp affixed, though bearing no particular denomination on the face of it,—It was held, that the commissioners had no power to fix another stamp after it had been issued; and that it was therefore not receivable in evidence, either in support of the count on the promissory note, or of the account stated. *Green* v. *Davies*, 3 Law J. K.B. 185, s. c. 4 B. & C. 235, s. c. 6 D. & R. 306, s. c. 1 C. & P. 451, 676.

A promissory note, payable to bearer, is a note within the first class of promissory notes, in the Schedule No. 1, to the statute 55 Geo. 3, c. 184; and consequently a note for 40*l*. requires a stamp of five shillings. *Whitlock* v. *Underwood*, 1 Law J. K.B. 251, s. c. 2 B. & C. 157, s. c. 3 D. & R. 356.

Promissory notes payable to the bearer on demand, are liable to the duty imposed by 55 Geo. 3, c. 184. Schedule, part 1, title "Promissory Note;" although the person who makes them may not have availed himself of the qualification given by the act to re-issue them. *Keates* v. *Wheildon*, 6 Law J. K.B. 226, s. c. 8 B. & C. 7.

A bill drawn at Calais, and dated Paris, does not require a stamp. *Bire* v. *Moreau*, 2 C. & P. 376. [Abbott]

A promissory note given as security for money lent and received, is sufficient to support a sequestration in Scotland, though on an improper stamp. *Ex parte Geddes*, 1 G. & J. 414.

Where an unstamped bill purports to have been drawn at Paris, and it appears the drawer was in England on the day it bears date,—it is for the jury to say, whether it was possible for the drawer to have been absent, so as to have drawn the bill out of England. *Bire* v. *Moreau*, 2 C. & P. 376. [Abbott]

## (F) ALTERATION.

[See *post*, M. *g*.]

If a bill of exchange be altered without the consent of the parties, in any material part, as, by inserting a particular place of payment, such alteration will render the bill wholly invalid. *Cowie* v. *Halsall*, 3 Stark. 36, s. c. 4 B. & A. 197.

Where after the 1 & 2 Geo. 4, the drawer, without the consent of the acceptor, added to a bill payable generally, the name of a banker: Held, that the alteration was material, and therefore the acceptor was discharged. *Macintosh* v. *Haydon*, 1 R. & M. 362. [Abbott]

The addition to a general acceptance, by adding words, making the bill payable at any given place, if made without the consent of the acceptor, will discharge him; although the addition may not be in terms which would make the acceptance special under the 1 & 2 Geo. 4, c. 78. *Sparks* v. *Spurr*, 5 Law J. K.B. 293.

Where the directors of a company drew a *joint* note, which the plaintiff refused to take, upon which the secretary to the company, who had no general authority, consulted two of the directors, and inserted the words *joint and several*: It was holden, that the note was void. *Perring* v. *Hone*, 2 C. & P. 401. [Best]

The circumstances of the erasure of a name, and a considerable arrear of interest appearing due on a note, seem not sufficient to found a notice of illegality in the original creation of the note, so as to put an innocent indorsee in the same situation as the payee against the maker. *Gascoyne* v. *Smith*, 1 M'Cle. & Y. 430.

If the drawer and acceptor of a bill give it to their agent, to pay away, and he, perceiving that it has been dated, by mistake, 1822, instead of 1823, makes the necessary alteration without the authority of his principals, it does not vitiate the bill. *Bratt* v. *Picard*, 1 H. & M. 37. [Abbott]

The date of a bill of exchange having been altered before it was negotiated by the drawer, the acceptor wrote the day of the month when it would become due, which corresponded with the date as altered: Held, that such alteration was immaterial, and could not avail the acceptor in an action brought against him by an indorsee of the bill. *Leyherr* v. *Ashford*, 5 Law J. C.P. 90.

If a bill is addressed to A & B by the name of "A, B & Co" and they accept it by the name of "A & B," and the address of the bill is afterwards altered to "A & B," this is an immaterial alteration, and does not discharge the acceptor. *Forquhar* v. *Southey*, 1 M. & M. 14, s. c. 2 C. & P. 497. [Littledale]

Where a bill was drawn payable to "bearer," It was holden, that, after acceptance, the addition of the words "or order," did not render a new stamp essential. *Atwood* v. *Griffin*, 2 C. & P. 368, s. c. 1 R. & M. 425. [Best]

One having made and signed a promissory note, handed it to a third person, the payee being present; but before it was given to the payee it was altered, by the consent of all parties: Held, that this giving it to the third person was not an issuing of it, and that it did not require a new stamp. *Sherrington* v. *Jermyn*, 3 C. & P. 374. [Tenterden]

In an action on a promissory note apparently altered, if the plaintiff gives no account of the making of the note, it is matter for the jury, whether the alteration was made after the completion of the instrument. *Bishop* v. *Chambre*, 1 M. & M. 116, s. c. 3 C. & P. 55. [Tenterden]

## (G) PRESENTMENT FOR ACCEPTANCE.

The word "acceptance" in a banker's deposit note, does not render it necessary for the holder to leave such note with the banker for acceptance. *Sutton* v. *Toomer*, 6 Law J. K.B. 49, s. c. 7 B. & C. 416, s. c. 1 M. & R. 125.

If a bill drawn by a banker in the country, on a banker in town, in favour of A, *payable after sight*, be indorsed by A to the defendants, who indorse to the plaintiffs seven days after the date of the bill, and the *plaintiffs delay* presenting it for acceptance *for four days*; it will be left to the jury to say whether the plaintiffs have been guilty of *unreasonable delay*; and in considering this, the jury may infer, from the defendant himself having kept the bill so long unaccepted, that it is not the course of business to present such bills for acceptance immediately after the party receives them. *Shute* v. *Robins*, 3 C. & P. 80, s. c. 1 M. & M. 133. [Tenterden]

## (H) ACCEPTANCE.

That an acceptor may qualify his acceptance is clearly established, by cases including almost every species of qualification. If the qualification as to place cannot be introduced by the acceptor, it must be on account of some circumstance which belongs to place, and does not belong to time or mode of payment, or any other species of qualification whatever.

When a bill is drawn generally, considering that it is an address to the person who is to accept it generally, it is the duty of the acceptor who intends to give a special acceptance, to accept in such terms that the nature of his contract may be seen in the terms he has used; that the acceptance, which he insists is not general, may clearly appear to be qualified or special.

It is not true that an acceptor must be antecedently the debtor; all the cases of qualified acceptance shew the contrary. A man may accept to pay out of the produce of a cargo consigned to him, when that cargo shall arrive in England. In the case of a consignee, his acceptance is almost universally qualified.

When the acceptor *uno flatu* writes the words "accepted, payable at such a house," the word "accepted" is not to be taken to express the whole of the acceptor's contract, but the latter words are also to be taken as part of it, and are not to be construed distinctly as a direction or expansion of engagement.

If an acceptor promises to pay at his bankers' in London, and the holder calls upon him in Northumberland, the payment is not the same. He presumes that the demand is to be made at the bankers' in London; the funds are deposited there; and if he is liable to be called upon at both places, his liability is rendered more inconvenient. But if the acceptor is unexpectedly to meet the demand in a distinct place, the cost of the exchange and remittance backwards and forwards must be added. *Rowe* v. *Young*, 2 Bligh, 403-4, 6, 9.

If A and B enters into an agreement, whereby A undertakes to accept certain bills of exchange, on certain conditions, the question, whether under the particular circumstances of the transaction, A was bound to accept a particular bill, is a question of law, and not a matter of fact. *Laing* v. *Barclay*, 3 Stark. 38. [Abbott]

A & Co., merchants in London, undertook to accept bills of B, a merchant in Demerara, to a certain amount, at the usual date, to enable him to load certain vessels, upon having the invoices, bills of lading, and orders for insurances sent to them, and no irregularity appearing. B sent the invoices, bills of lading, and orders to insure the goods, on board two vessels, to a large amount, to A & Co. and drew upon them a bill for 500*l.*, at six months after sight, which A & Co. refused to accept: Held, that inasmuch as the jury had not found that six months was an unusual date, it must be taken to be a usual date; and that B was not bound to specify to which cargo the bill was to be charged; for that, in the absence of any direction by him, A & Co. might charge it to either, at their election. *Laing* v. *Barclay*, 1 Law J. K.B. 135, s. c. 2 D. & R. 530, s. c. 1 B. & C. 398.

A sold goods to B, in E, at whose risk they were shipped for L, to be paid for by three sets of bills on C & Co. D was placed on board as a supercargo and joint trustee for A and B, to see that money was remitted to meet the bills, and then to give the bill of lading to B.

B afterwards, without the knowledge of A, effected an insurance of the cargo through C & Co.

C & Co., when apprising A that they had paid two sets of bills, informed him, that whether they should accept the third set depended upon B's account. The ship was taken, and the insurers paid for a total loss: Held, that no acceptance of the bills had been made by C & Co.; and that they were not bound to pay the proceeds of the policy in discharge of the bills. *Neale* v. *Reid*, 1 Law J. K.B. 198, s. c. 1 B. & C. 657, s. c. 3 D. & R. 158.

The defendants had sent an agent and a sub-agent to Mexico, for the purpose of purchasing interests in the mines; and payments had been made, on behalf of the defendants, to carry on the transactions; and which payments were provided for by bills, drawn by the sub-agent on the defendants, and with their consent; and before they could be presented for acceptance, they had transferred their interests in the mines to a company, who would have provided for the bills; but one of the defendants requested their agent, who then acted for the company, that funds might be placed in the defendants' hands to take up the bills, stating, that it would be unpleasant to have bills drawn upon their firm paid by a third party; on which it was agreed, that the defendants should have the money for the purpose of paying the bills, which were left at the defendants' house for acceptance, but not accepted; and when the agent informed another of the defendants of that circumstance, he said, that they had the money, and that the bill ought to be paid: Held, that this amounted to a parol acceptance, and that the defendants were liable to pay the bills to an indorsee, although he had in ignorance protested these bills for non-acceptance. *Fairlee* v. *Herring*, 4 Law J. C.P. 204, s. c. 3 Bing. 625. See 1 & 2 Geo. 4, c. 78.

(I) ACCEPTOR.

If a bill of exchange be drawn payable to the order of the drawer, at a particular place, without being addressed to any person, and the defendant afterwards accept it: Held, that such bill need not have been directed to, or describe the defendant by name, for that by such acceptance he adopted the place of payment. *Gray* v. *Milner*, 8 Taunt. 735, s. c. 3 B. Mo. 90.

Where B accepts a bill for the honour of the drawer, on the refusal of A, the drawee, it must be presented again to A for payment at maturity, before B can be charged on his acceptance; even in the case of a bill payable after sight. *Williams* v. *Germaine*, 6 Law J. K.B. 90, s. c. 1 M. & R. 394.

An acceptor of a bill is not discharged by the bill not being presented for payment for three or four years after it becomes due; he is only discharged by payment of the bill, or by a distinct and direct agreement by the holder to discharge him. *Farquhar* v. *Southey*, 2 C. & P. 497, s. c. 1 M. & M. 14. [Littledale]

(J) TRANSFER AND INDORSEMENT.

A bill of exchange, accepted, payable to (blank) or order, may be filled up and indorsed by a *bonâ fide* holder, and declared on in that form. *Attwood* v. *Griffin*, 1 R. & M. 425, s. c. 2 C. & P. 368. [Best]

A bill of exchange may pass by indorsement in pencil. *Geary* v. *Physic*, 4 Law J. K.B. 147, s. c. 5 B. & C. 234, s. c. 7 D. & R. 653.

If there be two indorsements on a bill by the same party, and an intermediate one—the presumption is, that the first indorsement was on the bill before it became due. *Fryer* v. *Brown*, 1 R. & M. 145. [Abbott]

If a bill of exchange be not presented by an indorsee for payment until a year after it is due, the law will raise a presumption that it was indorsed after it became due, and the indorsee will be affected by the same liabilities as the drawer. *Lloyd* v. *Davis*, 3 Law J. K.B. 38.

A foreign note is negotiable in England by indorsement, by virtue of the stat. 3 & 4 A. c. 9. *Bentley* v. *Northhouse*, 1 M. & M. 66. [Tenterden]

A bill payable to the order of the drawer, having been dishonoured by the acceptor, and paid by the drawer when due: Held, that the drawer might indorse it over a year and a half afterwards, and that

his indorsee might recover against the acceptor. *Hubbard v. Jackson*, 6 Law J. C.P. 4, s. c. 4 Bing. 390, s. c. 1 M. & P. 11, s. c. 3 C. & P. 134.

In such case, the acceptor cannot inquire into the state of the accounts between the indorsee and drawer, nor will the state of such accounts furnish him with any defence. *Hibonard v. Jackson*, 6 Law J. C.P. 4, s. c. 4 Bing. 390, s. c. 1 M. & P. 11, s. c. 3 C. & P. 134.

J S drew a bill on the defendant (which the latter accepted for the accommodation of the former,) and indorsed it to the plaintiff as his agent, in which character the plaintiff paid it away, on account of the drawer, for wine contracted to be purchased for him. Subsequently, the wine contract being rescinded, the holder of the bill refused to give it up, until he had been paid a sum of 150*l.* which he alleged to be due to him from the drawer. The plaintiff engaged to pay it, received the bill, and sued the defendant as the acceptor: Held, that he was not entitled to recover, although it was insisted that he had a lien on it to the amount he had promised to pay the holder, on its being delivered up to him. *Trueset v. Dewes*, 6 Law J. C.P. 32, s. c. 1 M. & P. 79.

## (K) PRESENTMENT FOR PAYMENT.

### (a) *Time.*

Presentment of a bill of exchange to the acceptor (a merchant) between eight and nine o'clock at night is sufficient. *Diggs v. Newnham*, 3 Law J. C.P. 119, s. c. 1 C. & P. 651, s. c. 10 B. Mo. 249.

Where a bill of exchange was presented for payment out of banking hours, it was holden sufficient; it appearing that there was a person stationed there for the purpose of returning answers, and who said there were *no orders*. *Garnett v. Woodcock*, 6 M. & S. 44.

By the 1 and 2 Geo. 4, c. 78, a bill payable at a banker's, but not payable "there only," is a general acceptance, and the holder is not bound to present it at any particular time or place. Therefore, where the acceptor had effects in his banker's hands at the time when the bill became due, and for three weeks afterwards, when the banker failed: It was holden, that the neglect to present did not discharge the acceptor. *Turner v. Hayden*, 4 B. & C. 1, s. c. 6 D. & R. 8.

### (b) *Place.*

Before the statute 1 & 2 Geo. 4, c. 78, if a bill of exchange were accepted, payable at the house of P & Co. it was a qualified acceptance, restricting the place of payment; and the holder was bound to present the bill at that house for payment, in order to charge the acceptor of the bill. If he brought an action upon the bill against the acceptor, he must in his declaration have averred and on the trial have proved that he made such presentment; and for want of such averment, the declaration was held bad on demurrer. *Rowe v. Young*, 2 Bligh, 391, s. c. 2 B. & R. 165.

But since that statute, where, in an action by the indorsee against the acceptor of a bill of exchange, payable to the order of the drawer in London, the declaration stated, that the defendant accepted it at London, whereby he became liable to pay: Held, that it was unnecessary to aver or prove a presentment for payment to the acceptor in London, or an excuse for not presenting it there. *Selby v. Eden*, 4 Law J. C.P. 198, s. c. 3 Bing. 611.

Where the drawer of a bill has required payment at a particular place—*semble*, that by the acceptance of such a bill, the acceptor takes upon himself the obligation of going to the place in question and paying. But otherwise, where the acceptor expressly qualifies his own acceptance, by saying, that he will pay at such a place, and nowhere else: there, the drawer or holder must go to the place of payment, and make the demand. *Hoyle v. Bird*, 5 Law J. K.B. 217, s. c. 6 B. & C. 531.

If a bill of exchange be accepted, payable at the *house* of S, P & S, and be so declared upon, it is not necessary to aver a presentment to the acceptor, or to S, P & S; a presentment *at the house* being sufficient. *Hawkey v. Borwick*, 1 Y. & J. 376, s. c. 4 Bing. 135.

If a bill is accepted payable at a particular place, and the acceptor dies before it becomes due, it is sufficient, in an action against the drawer, to prove presentment at the specified place, and it is not necessary to shew presentment at the house of the deceased's representative. *Philpott v. Bryant*, 3 C. & P. 244. [Park]

## (L) NOTICE OF DISHONOUR.

### (a) *When necessary.*

Where the payment of a bill of exchange is guaranteed, the guarantor is liable if the principal becomes insolvent, although he has not received notice of the non-payment. *Holbrow v. Wilkins*, 2 D. & R. 59, s. c. 1 B. & C. 10.

A foreign bill of exchange was drawn in favour of a person, to be put to the account of a company of merchants.

The payee, at Birmingham, paid it into his bankers' at Birmingham, there to be sent for acceptance to the drawees, who resided in London. It was sent by them to their corresponding bankers in London, and presented for acceptance, but refused. No notice of the non-acceptance was given to the bankers at Birmingham or to the payees.

The Court held that the payee was entitled to recover on the bill, from the bankers at Birmingham, as much as was really due to him from the drawers, from that company of merchants. *Van Wart v. Woolley*, 3 Law J. K.B. 51, s. c. 3 B. & C. 439, s. c. 5 D & R. 374.

A bill of exchange drawn by a party on himself, is in the nature of a promissory note, and does not require notice of non-acceptance to the drawer. *Roach v. Ostler*, 6 Law J. K.B. 43, s. c. 1 M. & R. 120.

If the law be, that, although a bill is drawn generally, it may be accepted specially, it is the effect of the law to impose a duty upon the holder, of giving notice to the drawer and previous indorsers, if he intends to keep alive their liability. *Rowe v. Young*, 2 Bligh, 407.

### (b) *By and to whom.*

Where the drawer of a bill of exchange had no effects in the hands of the acceptor from the time of drawing the bill, till it became due, but the acceptor had received from the drawer, prior to this bill on which the action was brought, acceptances of the

drawer, upon which he had raised money, some of which acceptances had been returned dishonoured, and others were outstanding: Held, that the drawer was entitled to notice of dishonour of the bill. *Spooner* v. *Gardiner*, 1 R. & M. 84. [Best]

(*c*) *Form and Mode.*

A notice of non-payment of a bill of exchange in the following form: "I give you notice, that a bill for, &c. drawn by you, &c. lies at, &c. dishonoured," is insufficient to sustain an action against the indorsor, who was not the drawer as well as the indorser. *Beauchamp* v. *Cash*, 1 D. & R. N.P.C. 3. [Abbott]

The notice of dishonour of a bill of exchange by the acceptor, must contain definite information what the bill is—by whom, and when drawn—on what day it was due—and that it was presented and dishonoured: or it is insufficient. *Hartley* v. *Case*, 3 Law J. K.B. 262, s. c. 4 B. & C. 339, s. c. 6 D. & R. 505, s. c. 1 C. & P. 556.

Where a bill was dated *Manchester*,—it was holden that a notice of dishonour directed to the drawer *at Manchester* was a sufficient notice of dishonour. *Mann* v. *Moors*, 1 R. & M. 249. [Abbott]

But in an action by indorsee against indorser, it was holden, that a letter containing a notice of dishonour directed to "Mr. Haynes, Bristol," was too general to raise a presumption that he received it; and proving it was put into the post-office, was insufficient. *Walter* v. *Haynes*, 1 R. & M. [Abbott]

Where a letter giving notice of the dishonour of a bill, stated, "I did not know until within *these few* days where you were to be found:" It was holden sufficient, because the words *these few days* were not to be taken to prove that the notice was not given on the next day after the defendant's abode was discovered. *Kerby* v. *England*, 2 C. & P. 300. [Abbott]

In an action on a bill of exchange (against the drawer), in order to prove that notice of the defalcation of the acceptor had been duly given, a clerk was called, who said that a letter containing such notice was written by one of the plaintiffs and copied by him (the witness) into a letter-book, and that all letters so copied were regularly sent to the post-office, but that he himself did not carry the letter in question to the post, it being the duty of another clerk so to do: Held, that this was not evidence to prove the letter sent. *Hawkes* v. *Salter*, 6 Law J. C.P. 180, s. c. 4 Bing. 715, s. c. 1 M. & P. 750.

(*d*) *Time.*

The traveller of the plaintiffs, resident in London, received a promissory note in payment of a debt due to his employers, from A, at Derby, and paid it away to B, without communicating to his employers the names of the party from whom he had received it. B paid it to C, in Bedfordshire, by whom it was transmitted to his bankers, and the note was dishonoured on the 3d of April. On the 5th, the plaintiffs received notice of the dishonour, and not knowing the parties to the bill, wrote to B for information, who being then at Edinburgh, did not receive the letter until the 10th, when notice was sent to the plaintiffs, who received it on the 14th. On that day the plaintiffs wrote to C for the note, and received it on the 16th, and by that day's post gave notice to A, the original indorser: Held, that the plaintiffs were not guilty of *laches*, as they had used due diligence in ascertaining the address of the next party. *Baldwin* v. *Richardson*, 1 B. & C. 245, s. c. 2 D. & R. 285.

*Quære*—Whether a notice to the drawer is premature, if given on the same day the bill has been once presented and dishonoured. *Hartley* v. *Case*, 3 Law J. K.B. 262, s. c. 4 B. & C. 339, s. c. 6 D. & R. 505, s. c. 1 C. & P. 556.

Where there has been fair and reasonable diligence used to obtain the address of the party to be charged with notice, the holder is not bound by a nice calculation of days; but his whole conduct is to be considered, with reference to the question, whether he has used due diligence or not.

Accordingly, where a bill was drawn at Frome, indorsed by the defendant, whose address was not known, and the holder took the chance in August, when the bill became due, of writing to the defendant at Frome where the drawer lived; and on the 16th of October, (inquiries being made in the interim,) the plaintiff's attorney found out the address, saw the plaintiff, and received his instructions on the 17th, and wrote on the 18th: It was held, that this sufficiently proved the allegation of due notice. *Frith* v. *Thrush*, 6 Law J. K.B. 358, s. c. 8 B. & C. 387.

A party receiving notice of dishonour of a bill of exchange, need not give notice to the party above him till the next post after the day on which he himself receives the notice, although he might easily give it that day, and there is no post on the day following. *Geill* v. *Jeremy*, 1 M. & M. 61. [Tenterden]

A bill of exchange accepted payable at a banker's at N. became due, and was presented for payment there, on a Saturday, and dishonoured. The post from N, to the place where the drawer resided, left N at half-past nine in the morning: Held, that notice sent to the drawer by the post of Tuesday morning was in time. *Hawkes* v. *Salter*, 6 Law J. C.P. 180, s. c. 4 Bing. 715, s. c. 1 M. & P. 750.

If a letter, giving notice of the dishonour of a bill, is put into the two-penny post-office, in time to be delivered on the proper day, in the ordinary course of business, but, from some delay in the office, does not reach its destination till afterwards, such delay in the office will not prejudice the party by whom the notice was given.

If there are several indorsers of a bill, and the last indorsee and holder resorts in the first instance to the first of such indorsers, he is not entitled to as many days as there are indorsers to give notice of dishonour in, but must give it within the same time as he would have been obliged to do it in, if he had resorted at first to his own immediate indorser. *Dobree* v. *Eastwood*, 3 C. & P. 250. [Burrough]

(*e*) *When waived.*

In a declaration by the holders against the drawers of a bill of exchange, averring that the bill was presented, and dishonoured by the drawers, neither of these averments was proved: Held, that the omission of notice to the drawers was waived by proof of an order given by them to the acceptor not to pay the bill if presented, but otherwise, as to

the fact of presentment, although the holders were informed of such order before the bill became due. *Hill* v. *Heap*, 1 D. & R. N.P.C. 57. [Abbott]

If notice of a bill of exchange being dishonoured be not given to an indorser of it, and, afterwards, he enters into an agreement to pay the amount of it to his intermediate indorsee, such agreement is evidence of his having had notice, so as to make him liable to be sued by the holder of the bill. *Gunson* v. *Metz*, 1 Law J. K.B. 75, s. c. 2 D. & R. 334, s. c. 1 B. & C. 193.

If, after a bill is dishonoured, the indorser offer to pay the holder so much in the pound, on the amount: *Semble*, that this dispenses with proof of the notice of dishonour. *Margetson* v. *Aitken*, 3 C. & P. 338. [Tenterden]

## (M) ACTION.

### (a) *Where maintainable.*

An English merchant resident at Fort St. George in the East Indies, executed a power of attorney to his correspondent in England, in the common general form. A servant of the East India Company, by the direction of the governor in council, drew three bills of exchange on the Company, payable in London, in favour of that merchant. The correspondent received the bills; they were accepted by the Company, and the correspondent indorsed and delivered them to a firm of merchants, who, having also indorsed them, paid them in account to their bankers; but almost immediately drew the amount thereof out of the hands of the bankers.

The bankers, having put their names on the back of the bills, sent them when due to the Company for payment. The Company, after inspecting the power of attorney, paid the amount of the bills.

The English merchant died, and his administrator *de bonis non* recovered the amount of the bills from the Company, in consequence of the Court deciding that the correspondent had not authority by the power of attorney to indorse bills. The Company gave notice of that judgment to the bankers, who at that time had no proceeds in their hands of their customers.

The East India Company brought an action against the bankers, on the ground, that their names being on the bills was a warranty that the prior indorsements were legal.

In a special verdict, the jury found that the Company paid the bills, not on the faith of the indorsements of the bankers, but on the faith of the power of attorney.

The Court held, that the action could not be maintained, for that no such warranty could be implied from the indorsement; and if it could, the facts of the case showed that the Company did not act upon it. *East India Company* v. *Tritton*, 3 Law J. K.B. 61, s. c. 3 B. & C. 280, s. c. 5 D. & R. 214.

If a bill of exchange, and a warrant of attorney, be taken in place of another bill, and the second bill be paid, no action lies on the first bill, but costs of the warrant of attorney may be recovered under the money counts. *Dillon* v. *Rimmer*, 1 Law J. C.P. O. S. 1 Bing. 100, s. c. 7 B. Mo. 497.

If the indorsee of a bill of exchange has not had notice that a prior action is depending thereon, he may, notwithstanding the pendency of such action, commence an action against the same defendant *Columbier* v. *Slim*, 2 Chit. 637.

A bill, drawn by bankers in the country on their correspondents in London, payable after sight, is indorsed to the traveller of the plaintiffs on their account; he transmits it to them after an interval of a week, and they, two days afterwards, send it for acceptance, which is refused, the drawer having become bankrupt. If the bill had been sent by the traveller to his employers as soon as he received it, they would have been able to get it accepted before the bankruptcy; but sending it when he did, they could not do so: Held, that there was no laches on the part of the plaintiffs, or their servant, so as to deprive them of their remedy against the indorsers. *Shute* v. *Robins*, 1 M. & M. 133, s. c. 3 C. & P. 80. [Tenterden]

The plaintiff, a landlord of premises let to one D, distrained for a quarter's rent, alleged to be due. The defendant, who claimed the goods under a bill of sale from D, in order to induce plaintiff to abandon the distress, gave his bill of exchange. In an action on that bill,—Held, that as the plaintiff had falsely represented to the defendant that a quarter's rent was due, so as to obtain the acceptance, he was not entitled to recover. *Grew* v. *Bevan*, 3 Stark. 134. [Best]

Where, for A & B, who were partners, the defendant, at the request of A, accepted the bill in question, drawn by F, payable to his own order, F indorsed the bill to the firm of A & B, in payment of a debt due from him to A & B. A, before the bill was accepted, promised the defendant that he would furnish him with funds, when the bill became due, unknown to B: Held, in an action at the instance of the assignees of A & B, that they were not entitled to recover. *Johnson* v. *Peck*, 3 Stark. 66. [Holroyd]

The plaintiffs were bankers. A & B had an account with them, and they wishing to overdraw it, the plaintiffs consented on B's giving them his note for 2000*l*. A afterwards gave B his note for 1000*l*., as an indemnity to him for a moiety of his liability to the plaintiffs on his note. The advances amounted to 1300*l*., which being unpaid, B indorsed A's note to the plaintiffs, who sued A on it: Held, that they were entitled to recover. *Heywood* v. *Watson*, 6 Law J. C.P. 72, s. c. 4 Bing. 496, s. c. 1 M. & P. 268.

### (b) *By and against whom.*

Where one of several partners in a bank signed the usual promissory notes, beginning with "I promise to pay to the bearer," for himself and the rest of the firm; the Court held, that an action could be maintained against him alone without joining the other partners. *Hall* v. *Smith*, 1 Law J. K.B. 142, s. c. 1 B. & C. 407, s. c. 2 D. & R. 584.

One of two partners had committed a secret act of bankruptcy, and afterwards accepted a bill of exchange in the name of the firm, but without the privity or consent of his partner, and applied it to his private use. A commission was taken out and properly worked. In an action against the two partners by an innocent holder, the Court held, that the action had been well brought. *Lacy* v. *Woolcott*, 1 Law J. K.B. 143, s. c. 2 D. & R. 458.

One partner, by accepting a bill in the name of

the firm, for his separate debt, does not bind his copartners in the absence of proof of any authority. *Ex parte Goulding*, 2 G. & J. 118.

A dormant partner, not known to the world as a partner, is not liable, on a bill given by one of his partners in a transaction not relating to the partnership. *Lloyd* v. *Ashby*, 2 C. & P. 365. [Abbott]

Where executors gave a promissory note to a creditor of their testator, whereby, "as executors, they severally and jointly promised to pay on demand, with interest: "Held, that they were personally liable to pay, &c. *Childs* v. *Monins*, 5 B. Mo. 282, s. c. 4 B. & B. 260.

An acknowledgment within six years by one of the joint makers of a promissory note, will revive the debt against the other, although he has made no acknowledgment and only signed the note as a surety. *Perham* v. *Raynall*, 2 Law J. C.P. 271, s. c. 2 Bing. 306, s. c. 9 B. Mo. 966.

What circumstances may taint a holder of a bill with a fraud committed in its negotiation, by the party negotiating it to him. *Lee* v. *Harrison*, 5 Law J. Chanc. 30.

Discounting a bill, under circumstances sufficient to excite suspicion in the mind of a party reasonably cautious, precludes him from recovering. *Gill* v. *Cubitts*, 3 B. & C. 466, s. c. 5 D. & R. 324, s. c. 1 C. & P. 163.

The drawer of a bill of exchange, payable to himself or his order, can maintain an action of debt upon it against the acceptor, if the bill state that it was given for *value received in goods*. *Priddy* v. *Henbrey*, 1 Law J. K.B. 211, s. c. 1 B. & C. 674, s. c. 3 D. & R. 165.

The plaintiffs drew a bill of exchange on their debtor, who accepted it. They indorsed and delivered it to the defendant, who agreeing, without any consideration, to put his name on the back of the bill as a security for its payment, indorsed and delivered it back to the plaintiffs. The Court held, that the plaintiffs could not maintain an action against the defendant, either by the custom of merchants or on the agreement. *Britton* v. *Webb*, 2 Law J. K.B. 118, s. c. 2 B. & C. 483, s. c. 3 D. & R. 650.

If A and B become drawers of a bill of exchange, and A afterwards accepts, the holder may sue A and B as drawers, and A as acceptor, in separate actions, he being liable in two distinct characters. *Wise* v. *Prowse*, 9 Price, 393.

If, whilst an insolvent is taking the benefit of the act, he gives to his creditor a bill of exchange, in payment of his demand, who indorses it to a *bonâ fide* holder, he, the *bonâ fide* holder, may sue the insolvent after his discharge, though it may have been a fraudulent preference as to the creditor. *Simpson* v. *Pogson*, 3 D. & R. 567.

A party who knows that a bill of exchange is accepted for a particular purpose, cannot afterwards, when that purpose has failed, sue on the bill, in consequence of an indorsement of it to him. *Lloyd* v. *Davis*, 3 Law J. K.B. 38.

A report circulated by the indorser, after the indorsement, of a bill of exchange, that it was an accommodation acceptance, was holden not to affect his indorsee's right. *Shaw* v. *Broom*, 4 D. & R. 730.

Where a defendant accepted a bill without value, and delivered it to A for the purpose of his giving it to B, who, instead of doing that, ran away with the bill, and, upon being pursued by the plaintiff, a creditor, gave it to him among other securities: It was holden that such creditor could not maintain an action against the defendant. *Smith* v. *De Witts*, 6 D. & R. 120.

A party to a bill of exchange is not liable for money paid to his use by a person who takes up the a bill for his honour, unless formal protest of payment to his honour be made before payment of the bill. *Vaudewall* v. *Tyrrell*, 1 M. & M. 87. [Tenterden.

If several persons, not partners in business, separately indorse, for the accommodation of the drawer, a bill of exchange, which has been previously indorsed by another person, and on the bill being dishonoured, pay the party who has discounted it in equal proportions, they may strike out their own indorsements, and bring a joint action against such previous indorser, to recover the amount of the bill. *Low* v. *Copestake*, 3 C. & P. 300. [Best]

### (c) *Lost Bills and Notes.*

The drawer of a bill of exchange, after it was accepted, put an indorsement in blank on it, and inclosed it in a parcel directed to go into the country; and had the parcel booked.

On the next day, a person whose name was unknown, but whose features were familiar, brought the bill to a bill-broker, and requested him to discount it. The bill-broker took time for two hours to make inquiries respecting the acceptors; and then, after the person had written a name on the back of the bill, he discounted it without making any inquiries as to the person himself, his address, or the manner in which he became possessed of the bill; and did not keep a memorandum of the numbers of the notes, with which the payment was made. The bill was returned to the broker and by him paid.

The Court held, that the bill-broker had not acted with reasonable caution, and could not, therefore, maintain an action against the acceptors. *Gill* v. *Cubitt*, 3 Law J. K.B. 48, s. c. 3 B. & C. 466, s. c. 5 D. & R. 324.

A trader in London took a bill of exchange in part payment for goods, of a person representing himself to be a tradesman from the country, and to have been recommended by a customer, and sent the goods, in consequence of an order from the buyer, to a public-house, which was not a booking-office, without making any inquiries except as to the respectability of the acceptor. The bill turned out to have been stolen, and, in an action by the trader against the acceptor, the defendant had a verdict, on the ground that the plaintiff had taken the bill out of the ordinary course of trade, and under circumstances which ought to have excited his suspicion. *Slater* v. *West*, 3 C. & P. 325. [Tenterden]

Defendant accepted a bill payable at three months for the amount of goods he had purchased; the seller lost the bill, not having indorsed it, and became bankrupt: no demand was ever made on the defendant in respect of the bill: Held, that the acceptance of this bill was no defence to an action for the value of the goods. *Rolt* v. *Watson*, 5 Law J. C.P. 172, s. c. 4 Bing. 273.

After a bill had arrived at maturity it was lost: Held, that an action might be maintained, notwithstanding. *Glover* v. *Thompson*, 1 R. & M. 403. [Abbott]

The holder of a bill of exchange cannot, by the custom of merchants, insist upon payment by the acceptor, without producing or offering to deliver up the bill; and, therefore, it was held that the indorsee of a bill, having lost it, could not, in an action at law, recover the amount from the acceptor, although the loss was after the bill became due, and the indorsee offered an indemnity. *Hansard* v. *Robinson*, 5 Law J. K.B. 242, s. c. 7 B. & C. 90.

(*d*) *Arrest.*

A party who receives a promissory note, or other negotiable instrument, after it has attained maturity, takes it subject to all objections; therefore, where the indorsee of several promissory notes, amounting to 500*l.* held the defendant to bail, the Court, on a rule to shew cause why the defendant should not be discharged out of custody, on entering a common appearance, made the rule absolute, on the ground, that as the indorsee had not received the notes from the payee until nine months after they had become due, and that as he had suffered them to lie dormant six months after that period, he must be considered, under such circumstances, as standing in the same situation as the immediate indorsee (in this case the payee), although the indorsee had sworn that all circumstances attendant thereon, between the indorser and maker, were entirely unknown to him: Held also, that, as the maker of the above notes had given them to the payee, as an acknowledgment of a debt of 500*l.*, due for money lent, on certain terms of repayment, by agreement between them, fixing the time and mode of repayment of the money borrowed at a more distant period and by instalments, the original payer, under these circumstances, could not have held the defendant to bail again, he having, five months after the notes were payable, arrested him for the amount due on them; and that, although the payee *had consented to the defendant's discharge* from that first arrest, it furnished no sufficient answer to this application, because the consent was given in payment by the defendant of 200*l.*, and as the Court would in such a case have discharged the defendant so arrested at the suit of the payee, they discharged him out of custody at the suit of the person to whom he had indorsed the notes. *M'Clure* v. *Pringle*, 13 Price, 8, s. c. M'Clel. 2.

(*e*) *Staying Proceedings.*

In an action against the acceptor of a bill of exchange, the rule, that proceedings shall not be stayed, but upon the payment of costs of other actions brought against other parties upon the same bill, does not extend to actions commenced after an offer to pay. *Hodgson* v. *Gunn*, 1 Law J. K.B. 7, s. c. 3 D. & R. 87.

Where it appeared, that the original payee of certain promissory notes had another demand, and that he held a bill of exchange accepted by the maker of the promissory notes, and that he (the payee) had served the defendant with process, but that he had neither prosecuted his action nor discontinued, an application by the defendant, to stay the proceedings in an action, at the suit of the indorsee, till the two actions so brought by the payee, and alleged to be for the same cause of action, should be discontinued in the meantime, was refused because the Court had no efficient means, except by the trial of the actions, to ascertain the true cause of action in the proceedings sought to be stayed. *M'Clure* v. *Pringle*, 13 Price, 8, s. c. M'Clel. 2.

*Extinguishment.*

Where, in an action against the maker of a note who had merely become a party to the instrument as surety, it appeared that the principal had given a bill of sale as a *further security*, in which the note was recited as an existing security: It was holden, that the deed which recited the note as an existing security, could not have been intended to operate as an extinguishment of it. *Twopenny* v. *Young*, 3 B. & C. 210, s. c. 5 D. & R. 259.

(*f*) *Pleadings.*

In an action on a promissory note, it appeared that it became due on the 20th June, and presentment and notice of dishonour were proved on the 23d, and the bill was filed on the 30th: Held, that the cause of action had accrued before the commencement of the action, although the first day of term was on the 22nd, and therefore the memorandum on the record generally of the term, was regular. *Howe* v. *Cooker*, 3 Stark. 138. [Abbott]

In an action of assumpsit, by the indorsees against the drawer of a bill of exchange, in their own right, it appeared that the bill had been indorsed to them in blank, before the death of one of the firm, who was a partner with the plaintiffs as bankers: Held, that the declaration need not describe the plaintiffs as surviving partners, it being unnecessary for them to prove the partnership; *aliter* if there had been a special indorsement. *Attwood* v. *Rattenbury*, 6 B. Mo. 579.

Where a declaration on a bill of exchange stated, that A B, on the 22nd day of Feb. 1824, made his certain bill, and thereby required defendant, four months after date, to pay at C & Co. Lombard-street: it was holden good, because it must be intended that the bill was dated the day it was made. *Giles* v. *Bourne*, 6 M. & S. 73.

A declaration on a bill of exchange need not set out the date thereof. An averment that it was presented at the acceptor's house is sufficient, without stating that it was shewn to him personally. *Giles* v. *Boune*, 2 Chit. 300.

The day upon which a promise to pay a bill of exchange is alleged, is matter of form only, and no objection can be raised on error, that the day stated is more than six years before the action is brought. *Hawkey* v. *Berwick*, 1 Y. & J. 376.

In an action on a bill of exchange, the declaration alleging that it was made payable in Dublin, for money sterling, without averring that Dublin was in Ireland, and that the money for which the note had been given was Irish currency: Held insufficient. *Sprowle* v. *Legge*, 1 Law J. K.B. 3, s. c. 1 B. & C. 16, s. c. 2 D. & R. 15.

It is not improper to allege, that a promissory note is payable at a particular place, though that direction be made by a memorandum at the foot of the note. *Sprowle* v. *Legge*, 3 Stark. 156. [Abbott]

In an action against the acceptor of a bill of exchange, in which the drawer, in the body of the bill, has required payment at a particular place, it

is not necessary to aver or to prove a presentment at that particular place. *Fayle* v. *Bird*, 5 Law J. K.B. 217, s. c. 6 B. & C. 531.

Where an order for the payment of a sum of money depends on the happening of a contingency, it cannot be declared upon as a bill of exchange, although accepted by the drawee. A conditional acceptance must be set forth specially, averring that the condition has been performed. *Ralli* v. *Sarell*, 1 D. & R. N.P.C. 33. [Abbott]

It is not necessary, in an action against the drawer of a bill of exchange, payable *after date*, to aver acceptance or notice of refusal to accept, but proof of presentment for payment is sufficient. *Philpot* v. *Bryant*, 3 C. & P. 244. [Park]

Where a declaration on a bill of exchange averred, that "afterwards, and when the bill became due, according to the tenor and effect thereof, to wit, on the 31st of March, 1822, it was in due manner according to the usage and custom of merchants, presented for payment: Held sufficient on special demurrer, assigning that the 31st of March was a Sunday. *Bynner* v. *Russell*, 1 Bing. 23, s. c. 7 B. Mo. 267.

Where the plaintiff has not given regular notice of the dishonour of a bill, but has given such a notice as is sufficient in point of law, he may declare generally with the common averment of notice, and need not state the special circumstances. *Firth* v. *Thrush*, 6 Law J. K.B. 358, s. c. 8 B. & C. 387.

In an action by the indorsee against the drawer of a bill of exchange, the plaintiff averred, in his declaration, that the bill was accepted by J. S., payable at Messrs. Sikes & Co.'s; and that when it became due, it was duly presented there for payment; but, that neither Messrs. Sikes, nor J. S. would pay the same, but wholly refused so to do. On special demurrer, assigning for causes, that it did not appear in the declaration, that the words, "not elsewhere," were contained in the acceptance, and that due presentment of the bill to J. S. should have been alleged: Held, that the declaration was sufficient; as the holder of a bill accepted and made payable at a banker's, is only bound to present it there, and not seek the acceptor elsewhere. *De Bergerche* v. *Pillin*, 4 Law J. C.P. 146, s. c. 3 Bing. 476.

Matter of defence arising after action brought, cannot be pleaded in bar of the maintenance of the action generally, but only in bar of its *further* maintenance. *Lee* v. *Levy*, 3 Law J. K.B. 251, s. c. 4 B. & C. 320, s. c. 6 D. & R. 475, s. c. 1 C. & P. 553, 675.

In an action on a promissory note, the declaration stated the promise by the defendant to pay, &c. in general terms: Held sufficient, though the note produced in evidence shewed it was given to pay the debt of a third person. *Coombs* v. *Ingram*, 4 D. & R. 211.

A promissory note cannot be pleaded in bar to an action upon a simple contract. *Roades* v. *Barnes*, 1 Ken. 391, s. c. 1 Burr. 9.

(*g*) *Evidence.*

If a bill of exchange be indorsed to the assignees of a bankrupt, and they sue upon it as assignees, they need not prove the validity of the commission. *Gunson* v. *Metz*, 1 Law J. K.B. 75, s. c. 2 D. & R. 334, s. c. 1 B. & C. 193.

If a declaration on a bill of exchange, indorsee against acceptor, state that it was indorsed to the plaintiffs as the surviving assignees of A B after his bankruptcy, the plaintiffs must prove that the bill was indorsed to them after the bankruptcy, and in their capacity of surviving assignees. *Bernasconi* v. *the Duke of Argyle*, 3 C. & P. 29. [Tenterden]

If, in an action on a bill of exchange, given for goods sold, it be proved that the bill was fetched away by the plaintiff's servant, from the house of a third person, after the commencement of the action, and only a short time before the trial, such evidence will not make it necessary for the plaintiff to prove that he, at the time of action brought, was the holder of the bill, and entitled to sue upon it. *Burdon* v. *Halton*, 3 C. & P. 174. [Burrough]

The signature of a party to a bill of exchange may be proved by a person who has seen him write his surname only. *Lewis* v. *Sapio*, 1 M. & M. 39. [Abbott]

Where the payee of a bill delivered it with his name indorsed thereon,—it was holden, that no proof was required of the handwriting of the indorsement. *Glover* v. *Thompson*, 1 R. & M. 403. [Abbott]

In an action against the indorser of a bill of exchange, a witness was called to prove the handwriting of the defendant, but prevaricated in his testimony, and swore both negatively and affirmatively as to his belief. There being no other evidence of the handwriting, the judge left it to the jury to decide what credit was due to the witness. *Beauchamp* v. *Cash*, 1 D. & R. N.P.C. 3. [Abbott]

Where, in an action against the acceptor of a bill of exchange, the defendant's attorney had given notice to the plaintiff to produce all the papers relating to a bill described as the bill in question, and said to be accepted by the defendant:—it was holden that such notice was *primâ facie* evidence of the defendant's acceptance. *Holt* v. *Squire*, 1 R. & M. 282. [Abbott]

The non-production of a cheque, after notice, is sufficient to entitle the plaintiff to give parol evidence of its contents, even though it appears to have remained in the hands of the banker, since the possession of the banker is that of the customer, the former being his agent. *Partridge* v. *Coates*, 1 R. & M. 156. [Abbott]

A promissory note is not admissible in evidence under the money counts in an action by the indorsee against the maker. *Bentley* v. *Northhouse*, 1 M. & M. [Tenterden]

Several persons in partnership, used a certain style at their bankers, and indorsed bills with it, which was different from the name by which they generally designated themselves, and one of the partners indorsed a bill of exchange in the manner used at their bankers, with the words "per Procn." It was objected, that one partner could not sign for the others by procuration; and that the two styles were evidence, in fact, of two sets of partners, and, consequently, that an averment of such an indorsement set out fully, was not supported by evidence of the real partnership. But the Court held, that it was good. *Williamson* v. *Johnson*, 1 Law J. K.B. 65, s. c. 2 D. & R. 281, s. c. 1 B. & C. 146.

[illegible] the time of its date, or whether it was an [illegible] transaction. *King* v. *Masters*, 3 [illegible] [Tenterden]

[illegible] a bill of exchange, by the indorsee [illegible] the acceptor, a letter written by the indorser [illegible] bill is evidence for the acceptor. *Coster* v. [illegible] [illegible] s. c. as *Coster* v. *Merest*, 7 [illegible] [illegible]

[illegible] by a party who has been the holder [illegible] exchange, are not evidence, unless made [illegible] the bill. *Pocock* v. [illegible] 264, s. c. 2 Bing. 269, s. c. 9, [illegible] P. 230, s. c. 1 R. & M. 127.

[illegible] made by a holder of a bill whilst it [illegible] are not admissible against a subsequent [illegible] against the bill before it became due. [illegible] R. & M. 212. [Abbott]

[illegible] indorsee of a promissory note, [illegible] against the maker, [illegible] dealings between him and the [illegible] amount before the note in[illegible] further or direct evidence of the [illegible] The defendant tendered evidence of [illegible] made by the payee while possessed of [illegible] passed from him to [illegible] but did not call the payee as a witness, [illegible] was present.—The declarations were held [illegible] in evidence, as the plaintiff could not [illegible] with the payee, nor could the note be [illegible] at the time of the indorsement. [illegible] 5 Law J. K.B. 227, s. c. 4 B. & [illegible] & R. 679.

[illegible] the first indorsee against the [illegible] of exchange; the declarations of the [illegible] made before indorsement, shewing that the [illegible] no value for his acceptance, cannot [illegible] in evidence, if the drawer be living at [illegible] the trial, because in such case he might [illegible] a witness. *Hodger* v. *Horton*, 3 C. & P. [illegible]

[illegible] by the indorsee of a bill of exchange [illegible] the declaration of the drawer [illegible] in evidence, to shew that the bill was [illegible] by fraud. The plaintiff, however, must be [illegible] in some way privy to the fraud. *Peck*[illegible] 2 C. & P. 235. [Gifford]

[illegible] has been given of a party's inten[illegible] the consideration of a bill or note, [illegible] plaintiff's counsel is apprised by the cross-[illegible] that the consideration is to be disputed, [illegible] evidence in support of the bill in [illegible] *Sumner* v. *Gardiner*, 1 R. & M. [illegible]

In an action by the indorsee against the acceptor [illegible] bill of exchange, if the defendant shew that [illegible] was originally no consideration for the bill; it [illegible] on the other party to shew that he or some [illegible] indorsee gave value for it. *Thomas* v. *New*[illegible] 2 C. & P. 306. [Tenterden]

In an action by the indorsee against an indorser of a bill of exchange, where the defendant proves usury in the concoction, or in a previous transfer of the bill, the plaintiff must prove himself a *bonâ fide* holder, though he has received no notice to prove consideration. *Wyat* v. *Campbell*, 1 M. & M. 810. [Tenterden]

In an action on a note, if it appear on the inspection of the note that it has been altered, it lies on

the plaintiff to shew that the alteration took place under such circumstances as will entitle him to recover. *Bishop* v *Chambre*, 3 C. & P. 55, s. c. 1 M. & M. 116. [Tenterden]

Where a bill of exchange, altered by making the bill payable at a given place, without consent of the acceptor, is offered in evidence, in an action against the acceptor—whether the onus of proof to shew the original state of the acceptance, lies upon the plaintiff or defendant—*quære*. *Sparks* v. *Spurr*, 5 Law J. K.B. 293.

What is said by a third party at the time of the signing of a promissory note, as to the consideration for which it is given, is not evidence against the payee, if he was not present. *Healey* v. *Jacobs*, 5 Law J. K.B. 180, s. c. 2 C. & P. 616.

In an action of assumpsit, an admission that the defendant owed the plaintiff a certain sum on a dishonoured bill of exchange, was holden admissible, though no notice to produce the bill had been given; but in the absence of the bill, interest is not recoverable. *Fryer* v. *Brown*, 1 R. & M. 145. [Tenterden]

If the drawer of a bill for 200*l.* not having received due notice of its dishonour, say, that he does not mean to insist upon want of notice, but add, that he is only bound to pay 70*l.*; the whole of his statement must be taken together, and the holder, in an action against him, can only recover to the amount of the 70*l.* *Fletcher* v. *Froggatt*, 2 C. & P. 569. [Abbott]

In an action by the drawers against the acceptor of a bill of exchange,—Held, that the Statute of Limitations was not avoided by an admission from the acceptor, with this qualification, that no consideration passed between him and the drawers. *Easterley* v. *Pullen*, 3 Stark. 186. [Abbott]

In an action on a bill of exchange by the payee against the drawer, the declaration stated that the latter drew it at "St. Helena, to wit, at Westminster, in the county of Middlesex," but did not aver a protest for non-acceptance or non-payment. On the bill being produced, it appeared to be dated at "St. Helena," and not stamped. On an objection, that it was inadmissible as an inland bill of exchange, for want of such stamp, and that the plaintiff had given no evidence of a protest on the dishonour:—Held, that as there was evidence of the defendant having subsequently promised to pay the amount of the bill, and a letter written by his attorney, offering terms of payment, the objections were waived, although the attorney swore that he had made the offer without prejudice. *Patterson* v. *Becher*, 6 B. Mo. 319.

A was proved to be owner of a cheque drawn on a banker, payable to bearer. Five days after its date, it was tendered in payment for goods to B, a tradesman, who gave his customer cash in change for it, after deducting the price of his goods. B presented it the next day, and received the amount. It did not appear how the cheque passed out of A's possession: Held, first, that in an action by A against B, for money had and received by him to the use of A, the jury were rightly directed to find for the plaintiff, if they thought the defendant had taken the cheque under circumstances which ought to have excited his suspicion; secondly, that the defendant having taken the cheque five days after it was due, the plaintiff had done enough by proving that he once had property in it, without shewing how he lost it. *Down* v. *Halling*, 3 Law J. K.B. 234, s. c. 4 B & C. 330, s. c. 6 D. & R. 455.

(*h*) *Witnesses.*

The first indorsee of a bill of exchange is a competent witness in an action by the second indorsee against the drawer. *Hewitt* v. *Thompson*, 2 C. & P. 372. [Best]

The former holder of a bill of exchange is not an admissible witness to prove the want of consideration, unless his testimony militates against his own interest. *Pocock* v. *Billing*, 3 Law J. C.P. 264, s. c. 2 Bing. 269, s. c. 9 B. Mo. 499, s. c. 1 C. & P. 230, s. c. 1 R. & M. 127.

If the indorser of a bill of exchange indorse it to secure the debt of a third person, in an action by the indorsee against the indorser, the third person is not a competent witness. *Bottomley* v. *Wilson*, 3 Stark. 148. [Abbott]

After the dissolution of partnership between A and B, A drew a bill in the name of the firm, which C accepted and paid without consideration:—Held, in an action by C, against A and B, A having become bankrupt and obtained his certificate, that he was a competent witness for B to prove that C accepted the bill for A's sole accommodation. *Moody* v. *King*, 2 B. & C. 558, s. c. 4 D. & R. 30.

In an action on a bill of exchange, accepted for the accommodation of the drawer, who has become bankrupt and obtained his certificate, the latter is a competent witness for the acceptor. *Ashton* v. *Longes*, 1 M. & M. 127. [Tenterden]

In an action by the indorsee against the drawer of a bill of exchange, the acceptor is not a competent witness for the defendant; because he is answerable over to the defendant in damages for the costs of the action, upon the undertaking implied in law, between the drawer and the acceptor, that the latter will indemnify the former against the non-payment of the bill.

Nor, for the same reason, is the drawer of an accommodation bill a witness for the defendant in an action against the accommodation acceptor. *Edmunds* v. *Lowe*, 6 Law J. K.B. 360, s. c. 8 B. & C. 407.

In an action on a bill of exchange, if a person, called to prove the consideration, say that the bill was accepted for value received, but refuse to say of what that value consisted, on the ground that it might render him liable to a *qui tam* action, he cannot be compelled to answer; but if he persist in refusing, it will stand upon the evidence that there was no consideration. *Dandridge* v. *Corden*, 3 C. & P. 10. [Tenterden]

(*i*) *Defence.*

A & Co. having accepted a bill for B's accommodation, B paid it into the hands of his bankers without notice, who retained possession of it several years, charging him with interest for it, but never debiting him with the amount of the bill. During this time, they became bankers to A & Co. also, but never gave them notice that they held the bill against them. The balance of B's account was always against him; that of the account of A & Co. in their favour, but very seldom to the amount

of the bill. In an action by the bankers against A & Co.—Held, that, under these circumstances, the defendants were not discharged unless the jury should infer that the plaintiffs had entered into an agreement to discharge the defendants, or had expressly renounced all intention of holding them liable on the bill. *Farquhar* v. *Southey*, 1 M. & M. 14, s. c. 2 C. & P. 497. [Littledale]

If the holder of a bill of exchange merely delay to sue the acceptor on its being dishonoured by him, but is under no binding contract to give time for payment, he does not thereby discharge the drawer or indorsers.

Therefore, where the executrix of a deceased acceptor verbally promised the holder to pay the bill out of her own private income, and the latter agreed to give her time, provided interest were paid, and accordingly forbore to sue:—Held, that the drawer was not thereby discharged; the promise by the executor being void, and the holder being under no binding engagement to give her time. *Philpot* v. *Briant*, 6 Law J. C.P. 182, s. c. 4 Bing. 717, s. c. 1 M. & P. 754.

In an action against the drawer of a bill of exchange, drawn for the accommodation of the acceptor, it is a good defence to prove that time was given to the acceptor with the assent of the drawer. *Hill* v. *Read*, 1 D. & R. N.P. 26.

Where the holder of a bill of exchange took another bill, not due, from the acceptor, without actually undertaking to give him time:—Held, not to be a giving of time so as to exonerate the parties on the first bill. *Pring* v. *Clarkson*, 1 Law J. K.B. 24, s. c. 1 B. & C. 14, s. c. 2 D. & R. 78.

So, where the holders of a promissory note wrote to the defendant, the indorser, saying, "the maker is not ready to pay, but will be in a week, which is time enough for us." *Margesson* v. *Goble*, 2 Chit. 364.

Where, in an action against the acceptor of a bill, the plaintiff took a cognovit, stipulating that no judgment should be entered until three weeks:—it was holden, that that was not a *giving time*, so as to discharge the other parties. *Jay* v. *Warren*, 1 C. & P. 532. [Abbott]

Where two actions were simultaneously commenced by one plaintiff, against the acceptor and indorser of a bill, and before judgment against either, the plaintiff took a warrant of attorney from the acceptor for the payment of debt and costs by instalments, all of which were to be paid before judgment could have been obtained against him:—Held, that the thus giving time to the acceptor afforded no defence to the action against the indorser under a plea of the general issue. *Lee* v. *Levy*, 3 Law J. K.B. 251, s. c. 4 B. & C. 390, s. c. 6 D. & R. 475, s. c. 1 C. & P. 553, 675.

If, after a bill of exchange has been dishonoured and notice of dishonour duly given, the holder take part of the amount of the acceptor, and offer to take a warrant of attorney to secure the payment of the residue by instalments, which offer is not accepted—This is not such a giving of time to the acceptor as will discharge the drawer. But if the holder had disabled himself from suing on the bill, it is otherwise. *Hewitt* v. *Goodrick*, 2 C. & P. 468. [Abbott]

If the drawer of a bill payable to his own order, before it is indorsed, give the acceptor a general release; this is no defence to an action by an indorsee against the acceptor, unless there be proof that the indorsee knew of the release. *Dod* v. *Edwards*, 2 C. & P. 602.

If a defendant has entered into a deed of composition with his creditors, containing the usual clause of release, and the plaintiff has executed the deed as a creditor for a certain sum, that is a good defence to an action by the plaintiff as indorsee of a bill to a larger amount, of which the defendant was indorser, and which then lay, dishonoured, in the plaintiff's hands. But it is no defence as to two similar bills, also of larger amount, which the plaintiff had paid away, and which were then in the hands of third parties. *Margetson* v. *Aitken*, 3 C. & P. 338. [Tenterden]

The holder of a bill of exchange, who was security for a debt due from A, B, C, and D, indorsed and placed the bill into the hands of B, C, and D, who settled their accounts with A, saying, that the bill had been satisfied by them, *but the bill was not produced to A, or seen by him, at the time of the settlement*:—Held, that this was no defence to A, in an action by the holder against A, B, C, and D, the bill not having been satisfied by the persons to whom it had been indorsed, and placed in their possession. *Featherstone* v. *Hunt*, 1 Law J. K.B. 49, s. c. 2 D. & R. 233, 1 B. & C. 113.

A and B having purchased a large quantity of wheat for C and D, which they kept in their hands for sale, and which was to be paid for at a given time, requested C and D to furnish them with acceptances of their friends to meet the payment of it. C and D obtain the acceptances under a promise, that they will sell wheat to meet them before they become due. The price falls, and the bills are returned. C and D then write to A and B to sell wheat at some price to take them up. A and B, having paid their bills to their bankers, continue to sell the wheat, and nothing more is said about them until C and D become insolvent, several months afterwards; and then A and B sue a party to one of them:—Held, that the circumstances were a good defence to the action. *Fowler* v. *Baylis*, 1 Law J. K.B. 82.

A partial failure of the consideration for a promissory note, is no answer to an action upon it. And, therefore, where the consideration expressed in a note, proved less beneficial than was expected, and the jury found for the plaintiff,—the Court refused to disturb the verdict. *Day* v. *Nix*, 2 Law J. C.P. 132, and note to that case; 9 B. Mo. 159.

It is no answer to an action, by the indorsee against the acceptor of an accommodation bill, to say that he did not give an adequate consideration for it. *Costar* v. *Merest*, 1 Law J. C.P. 2, s. c. 7 B. Mo. 87.

Where the consideration for a promissory note was expressed to be for the care and medical attendance of the maker: it was holden, that the consideration might be repudiated by shewing that the medicines were furnished by the plaintiff as an apothecary; and in the absence of shewing him to be within 55 Geo. 3, he could not recover. *Blogg* v. *Pinkers*, 1 R. & M. 125. [Best]

Where an action is brought in this country on a promissory note made in Scotland; if there be any difference between the law of the two countries, as

to the liability of the defendant, the onus of proving the difference lies upon the defendant. *Brown* v. *Gracey*, 1 D. & R. N.P.C. 41, n. [Abbott]

(*k*) *What recoverable.*

Interest is not recoverable on a bill of exchange unless the bill be produced. *Fryer* v. *Brown*, 1 R. & M. 145. [Abbott]

A declaration contained four counts on bills of exchange, on demurrer and joinder to the first two, and general issue to the rest, and *unica taxatio*, &c.: Held, that the plaintiff, having proved only two bills, was not obliged to place these to the counts demurred to, but was entitled to nominal damages on those counts, and to the amount of the bills on the rest of the declaration. *Marshall* v. *Griffin*, 1 R. & M. 41. [Abbott]

In trover for a bill of exchange, the jury may, if they think fit, include the amount of the interest in the damages, and this, although there is no mention of interest in the declaration, and no special damage laid. *Paine* v. *Pritchard*, 2 C. & P. 558. [Abbott]

(*l*) *Rule to compute.*

Where a judgment has been obtained in an action upon a bill of exchange, the Court will not grant a rule to compute principal and interest. *Bishop* v. *Best*, 2 Chit. 233.

An affidavit in support of a rule to compute, in an action on a bill, stating that the action was brought upon *a certain instrument called a bill of exchange*, is insufficient, the description being too general. *Dewsbury* v. *Willis*, 1 M'Clel. 366.

## BLACK ACT.

[See HUNDRED.]

On an indictment for maliciously killing &c. cattle, within 9 Geo. 1, c. 22, s. 1: Held, that the malice must be against the owner of the cattle, and not against a servant or relation of the owner. But see now 4 Geo. 4, c. 54, s. 2. *Rex* v. *Austne*, 1 R. & R. C.C.R. 490.

## BONA NOTABILIA.

[See EXECUTOR AND ADMINISTRATOR, and CANAL.]

## BOND.

(A) VALIDITY OF.
(B) EXECUTION.
(C) STAMP.
(D) CONSTRUCTION.
(E) SURETY.
(F) ACTION ON.
(*a*) *Pleadings and Evidence.*
(*b*) *Assignment of Breaches.*
(*c*) *Staying Proceedings.*
(*d*) *Assessing Damages.*

### (A) VALIDITY OF.

*Quære*—Whether a bond, given by a married man, to secure a provision for a woman with whom he has cohabited, is valid, provided that it is executed in contemplation of the termination, or after the termination, of the adulterous connexion.

*Semble*—Such a bond is valid, so far as it makes a provision for the reputed children of the obligor by the woman with whom he has had the adulterous intercourse. *Knye* v. *Moore*, 2 S. & S. 260, s. c. as *Knye* v. *Moseley*, 3 Law J. Chanc. 136.

A married man, living in the same house with his wife, cohabited for six years with another woman, who knew that he was married, but until that time had conducted herself with propriety and morality. At the expiration of that time he ceased to cohabit with her, and gave her a bond to secure an annuity to her for her life, and the payment of a sum of money as a provision for her children, which she had borne to him during such cohabitation: Held, that an action at law might be maintained upon this bond. *Nye* v. *Moseley*, 4 Law J. K.B. 179, s. c. 6 B. & C. 133, s. c. 9 D. & R. 165.

And held, that she and her children might sustain a bill which alleging that the defendant had made a provision for her and them, by a deed duly executed and delivered, and praying for the production of the same: and that the person to whom the deed was delivered need not be made a party, the bill containing an allegation that the defendant had gotten it back into his possession. ——v. *Moseley*, 1 Law J. Chanc. 18.

In an action on an annuity-bond, given by a man to a woman with whom he cohabits, the question for the consideration of the jury is, whether, at the time when it was given, there was or was not an intention and agreement to continue the connexion in future. For, if there was such intention, and the bond was given in furtherance of such arrangement, the plaintiff cannot recover. *Friend* v. *Harrison*, 2 C. & P. 584. [Best]

A bond for resigning a living in favour of one or two brothers of the patron, is simoniacal and void, on the ground that such an agreement is a benefit to the patron, and contrary to the statute 31 Eliz. c. 6. and (*semble*) the common law. *Fletcher* v. *Sondes*, 1 Bligh, N.S. 144, s. c. 3 Bing. 598.

A bond by a surety conditioned to pay such sum or sums as should be advanced to meet bills of exchange drawn by A B and C D, *or either of them*, under a penalty of 5000*l.*, was valid to the extent of the penalty, according to the statute 44 Geo. 3, c. 98, although a 7*l.* stamp only was attached thereto. *Simpson* v. *Cooke*, 2 Law J. C.P. 74, s. c. 1 Bing. 452.

The defendant employed one White to job for him in the funds: the speculations were unfortunate; and White took a promissory note for the *differences* from the defendant, who was unable to pay the losses. *White*, after the note became due, indorsed it to the plaintiffs. The plaintiffs were not then informed of the illegal consideration for which the note was given, but afterwards they were told so, and then they took a bond from the defendant for the amount: The Court held, that the bond was void in law. *Amory* v. *Merryweather*, 2 Law J. K.B. 111, s. c. 2 B. & C. 573, s. c. 4 D. & R. 86.

If a bond be given in order to accelerate a contract of marriage, which is destroyed by the death of one of the parties, the Court will order the bond to be given back to the donor. *Jemmitt* v. *Wytts*, 1 Ken. 72.

A bond obtained by a father from his son, an infant, for money advanced to the latter, for the purchase of a commission in the army, is invalid. *Carpenter* v. *Heriot*, 2 Ken. 533.

A bond given by an attorney, conditioned for securing a part of the profits from suits, for the benefit of an unqualified person, is illegal.

But where the condition is composed, partly of such illegal provision, and partly of another, for securing to the same unqualified person a share of profits in the business, besides those to be derived from suits, the condition may stand good for the latter; and the bond may be enforced. *Cusse* v. *Corfe*, 6 Law J. K.B. 140.

(B) EXECUTION.

Where a bond has been executed in a foreign harbour, the execution of it cannot be established by a mere formal affidavit, made by persons residing in this country, swearing facts of which they have no personal knowledge, nor any document or other solid information from which their belief could be derived. *The Sydney Cove*, 2 Dods. 6.

*Semble*—Where one of the plaintiffs is an attesting witness to an instrument, the proof of the execution of which is essential to the defendant's case, it is enough for the defendant to prove the handwriting of that plaintiff. *Strange* v. *Dashwood*, 3 Law J. Chanc. 194.

A bond appearing to have been signed and sealed, and which was attested in the usual form, "signed, sealed, and delivered," was holden sufficient to raise the presumption, that everything necessary was done, although the subscribing witness could not say whether it was sealed and delivered. *Ball* v. *Taylor*, 1 C. & P. 417. [Best]

(C) STAMP.

A bond, operative only in a foreign state, does not require a stamp. *Yrisari* v. *Clement*, 2 C. & P. 223. [Best]

A bond given to secure the payment of damages to be recovered upon a new trial, and the costs of the action, in the event of the result of a second action proving similar to that of the first, requires only a 35*s.* stamp. *Lopes* v. *De Tastet*, 8 Taunt. 712.

Where the condition of a bond recited, that J S had had a banking account with the obligees, and the defendant and others had agreed to join him in the bond, for the purposes and on the conditions therein contained, and that it had been agreed that the bond should not prejudice a prior bond given by J S to the obligees;—and the condition was, that the defendant should secure to the obligees any sums, which, for ten years, they should advance or pay on account of accepting, indorsing, discounting, paying, or satisfying any bills of exchange which J S should from time to time draw on them, or make payable at their banking-houses, not exceeding the sum of 5000*l.* in the whole; and J S was previously indebted to the obligees in the sum of 10,000*l.*, of which the defendant had no knowledge at the time of the execution of the bond; but his accounts were settled half-yearly, and at the close, he was indebted to the obligees in the sum of 10,000*l.*, but had paid them more than 5000*l.* after the execution of the bond by the defendant: Held, first, that the bond was properly stamped with a 9*l.* stamp, within the statute 55 Geo. 3, c. 184, as being a bond where the money secured was limited not to exceed a given sum, viz. the sum of 5000*l.*; and, secondly, that the defendant was liable to the extent of that sum, as there was no agreement between the parties that the payments made by J S after the execution of the bond, should be applied to the new account. *Williams* v. *Rawlinson*, 3 Law J. C.P. 164, s. c. 3 Bing. 71, s. c. 10 B. Mo. 362.

A father conveys an estate to his son in fee by a deed, reciting that he (the father) was minded and had resolved to give and assure the same to his son, as well in consideration of natural love and affection, as also in consideration of the provision which the son had that day made (by his bond) of 1500*l.* in augmentation of the portions of his eight sisters. This is not a *sale* within 48 Geo. 3, c. 149, (sched. tit. *Conveyance*,) so as to require an *ad valorem* stamp-duty in respect of the consideration. *Doe d. Manifold* v. *Diamond*, 3 Law J. K.B. 211, s. c. 4 B. & C. 243, s. c. 6 D. & R. 328.

(D) CONSTRUCTION.

A was appointed treasurer of the county of Middlesex. Several persons entered into a bond for his duly accounting for the money received by him. One in 3000*l.*, three in 2000*l.* each; also C, D, and E, in 1000*l.* each, in the following words: "for which we bind ourselves, and each of us for himself, for the whole and entire sum of 1000*l.* each." The seal of C had been torn from the bond: The Court held, that the bond was *several*, and therefore that the seal of one of the obligors being taken away, did not prevent the obligees from suing on it against D. *Collins* v. *Prosser*, 1 Law J. K.B. 212, s. c. 1 B. & C. 682, s. c. 3 D. & R. 112.

Where, in the condition of a bond, it was recited that the plaintiffs were shareholders in a public water company, on which shares 30*l.* per cent. had been paid by instalments, and that the plaintiffs had agreed to pay up the remaining instalments *forthwith*; that certain persons therein named had agreed to purchase these shares at a certain sum, some of which to be secured by the joint bond of one of such persons, and the defendant as his surety; and the condition of the bond was, that he and the defendant should, on a given day, pay the plaintiffs the amount of the shares, together with interest thereon, from the time of the *advance or payment thereof* by the plaintiffs: the latter, being also shareholders and treasurers of a stone pipe company, which was indebted to them in 12,000*l.* prevailed on the water company to purchase the pipes of the former; and to effect payment for them, the plaintiffs, without any calls having been made, entered up in their books as paid, the remaining 70*l.* per cent. due on the water company's shares; and having made this entry, paid the pipe company, deducting and transferring to their own account, a sufficient sum to discharge the debts due from the pipe company to themselves. In an action of debt against the defendant, for the sum claimed in respect of the sale of the shares of the water company, the jury having found a verdict for the plaintiffs: Held, that they had advanced or paid the money for the shares, within the terms of the condition of the bond.

*Everett* v. *Eyre*, 3 Law J. C.P. 238, s. c. 2 Bing. 166, s. c. 9 B. Mo. 326.

A bond to secure the good conduct of a collector, under 43 Geo. 3, c. 99, s. 13, may be declared to extend beyond the current year in which it is taken, although the collector himself must be annually appointed.

But a reappointment for a subsequent year must exactly follow the provisions of the bond, in order to charge the surety; for if it should not appear distinctly that the reappointment was for the same description of duties, or not for the same district as those provided for by the first appointment, the surety will be discharged. *Abington* v. *Jeans*, 4 Law J. K.B. 186.

Whether a bond was to be held as a security for a debt due at the time of its execution from some of the obligors to the obligees; or as a security for future balance. *Walker* v. *Hardman*, 5 Law J. Chanc. 39.

An instrument whereby a party binds himself and his heirs to pay to another a certain annual sum, is not like a bond made with a penalty, which can, on a forfeiture, become a debt in law. *Morrant* v. *Gough*, 6 Law J. K.B. 14, s. c. 7 B. & C. 211, s. c. 1 M. & R. 41.

(E) SURETY.

[And see DEBTOR AND CREDITOR.]

A letter written by a surety in a bond, that he will not be answerable after the date of the letter, is no defence to an action on the bond, for a *deficit* subsequent to the letter—*Semble aliter*, if the letter be specially pleaded. *Hough* v. *Warr*, 1 C. & P. 151. [Abbott]

Under a bond conditioned to pay such sum or sums of money as should be advanced to meet bills of exchange drawn by A B and C D, or either of them, the surety is not liable for the amount of bills drawn by C D after the death of A B. *Simpson* v. *Cook*, 2 Law J. C.P. 74, s. c. 1 Bing. 452.

A and B join in a bond to secure money, borrowed by B for the use of a third person; as between A and B, A is only a surety. Parol evidence may be given to shew, as between the two co-obligors in a bond, that one of them was only a surety for the other. *Bolton* v. *Cook*, 3 Law J. Chanc. 87.

Two persons gave a bond, that if one of them, then about to be married, should die and leave his wife without children, that the heirs, executors, &c. of the husband, out of his effects, should, within three months after his decease, put out 1000*l.* on good security, to be approved of by two trustees. The wife survived, without children: The Court held, that the surety or co-obligor was bound to find out the heir, and that it was not necessary for the trustees, within the three months, to give notice of what security they approved. *Joyce* v. *Blount*, 3 Law J. K.B. 9.

A bond conditioned for the good conduct of another person as clerk, will bind the estate of the obligor after his death, although the executor give notice to the obligee that he will be no longer answerable. *Calvert* v. *Gordon*, 6 Law J. K.B. 187, s. c. 7 B. & C. 809, s. c. 1 M. & R. 497.

The liability of a surety in a bond is not discharged by the delay of the creditor in suing for the debt, or by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum. *Eyre* v. *Everett*, 2 Russ. 381.

A B having, by order of vestry, been appointed to the office of collector of poor and church-rates, in the parish of X, became bound with sureties to the then existing churchwardens and overseers of the poor of the said parish, subject to a condition for making void such bond, on his duly accounting and paying over to such existing churchwardens and overseers, or their successors, all such sums as he should receive as such collector, or as should come to his hands, pursuant to, and in the execution of, his said office: Held, that the office of churchwardens and overseers being annual, the office of collector partook of the same character, and the liability of the sureties under such bond did not extend to monies received by the collector, on account of any year subsequent to that for which the obligee continued in office. *Leadley* v. *Evans*, 2 Law J. C.P. 108, s. c. 2 Bing. 32.

(F) ACTION ON.

(*a*) *Pleadings and Evidence.*

The defendant having pleaded *solvit post diem* to an action on a bond, conditioned for payment to third persons: Held, that it was a good plea within the 4 and 5 Ann. *Giddings* v. *Giddings*, 1 Ken. 335.

If the condition of a bond be to perform several matters, performance must be pleaded in the words of the condition. *Reynald* v. *Reynald*, 1 Ken. 357, s. c. Sayer, 316.

Debt on a bond, held subsisting; and principal, with interest, to be paid the plaintiff; circuity needless. *Scott* v. *Ellors*, 2 Ken. 95.

To an action on a bond conditioned for payment of an annual sum to the parish, in consideration of being allowed the exclusive privilege of collecting the dust, &c., the defendant pleaded that the trustees would not *permit and suffer* him to collect, &c. It appeared that after the contract had been entered into, a part of the parish had been separated by another act of parliament, whereby the defendant was prevented from obtaining the dust, &c. on that part: Held that the plea was no bar, since at any rate it ought to have shewn some positive act of obstruction; and it seems that the defendant ought to have filed a bill in equity for relief. *Townson* v. *Green*, 2 C. & P. 110. [Abbott]

A defendant must plead specially to enable him to give in evidence the illegality of the consideration of a bond. *Harmer* v. *Rowe*, 2 Chit. 334.

Giving time to a principal obligor, cannot be pleaded as a defence by the surety. *Davey* v. *Prendergrass*, 2 Chit. 336.

The defendant having become surety in a bond to the Crown, conditioned that A B should, from time to time, during so long as he should continue to hold the office of clerk in the Ordnance, or any other place in the said office, pay the money received by him to the treasurer. To a *sci. fa.* alleging that he had not paid, &c., the defendant pleaded performance; the plaintiff replied that the principal was at the time, &c. a clerk, to wit, second clerk in the Ordnance Office, and continued in the office of such clerk for the space of four years, and until afterwards, to wit, on the 31st January 1810, the principal became, and was chief or first clerk in the

said office, and so continued till the several defaults, &c.; and that whilst he so continued chief or first clerk, he received money which he did not pay over to the treasurer of the Ordnance. Secondly, that on the 6th January 1818, the principal gave to the treasurer of the Ordnance an account of the monies received by him as such clerk, and of the balance of cash then in his hands on such account, and that he (the principal) ought to have paid and delivered up such balance to the treasurer, but did not. Thirdly, that the principal, after the making the said bond, and whilst he so continued clerk as aforesaid, received money belonging to his Majesty in his said office of Ordnance, a great part of which he, as such clerk, ought to have paid on the 6th of January 1818, to the said treasurer, but did not. Fourthly, that after, &c. to wit, on the said 6th of January, the principal gave in an account of money received and paid by him (the principal), so being a clerk in the said office, and of the balance of cash then in his hands, on such account, which, although it was the duty of the principal, as such clerk as aforesaid, to pay over, &c. he did not, &c. contrary to his duty as a clerk in the office. Rejoinder as to the first breach assigned in the replication—that, at the time &c. the principal was a clerk in the said office, viz. second clerk, and that he continued therein until he became first clerk in manner and form, &c., and that he was and continued first clerk till the 26th of February 1810, when he was dismissed from his said place or office without the knowledge of the defendant, and without notice to him; and that, as to part of the money alleged to have been received by the principal whilst he so continued such first clerk, viz. one hundred pounds, the same was received by him whilst he was and continued such first clerk, and in the capacity of and as such first clerk as aforesaid; but that the residue was received by him, not in the capacity of and as such clerk as aforesaid, but by virtue of and under another and different office, which he then and there held, whilst he continued such clerk as aforesaid; and that the said part thereof (the hundred pounds,) had been duly applied accordingly, &c. Secondly, that, at the time &c. the principal was a clerk in the said office, and so continued till, &c.—the like allegation as in the first rejoinder, stating also the dismissal to have been on the 2d of March, in the same year, and averring that the principal had duly accounted for and paid all such money as he had received in his capacity of and as such clerk as aforesaid, accordingly, &c. The third and fourth rejoinders were similar to the preceding surrejoinder to the first; and issue thereon, and demurrer to the second, third, and fourth rejoinder: It was holden, that these rejoinders could not be sustained, and consequently the demurrer must be allowed. *Rex* v. *Forman*, 11 Price, 350.

An attesting witness must be called to prove the execution of a deed, or his absence must be well accounted for; hence, where, in an action on a bond, it was sworn that the attesting witness kept out of the way to avoid an arrest—the reason was holden sufficient; and the Court granted a new trial, as evidence of his handwriting had been received. *Pytt* v. *Griffith*, 6 B. Mo. 538.

If, in an action on a bond given by the sureties of a collector of taxes, there be breaches assigned, that the collector did not pay over money received, and that he did not duly demand and enforce payment of the taxes, it is not necessary, on the part of the plaintiff, to prove exactly what money he received; for if it be proved that he was to collect a certain sum, and that he paid over a smaller sum, and did not take proper steps *to exonerate himself* from the residue, the plaintiff will be entitled to recover. Omitting a word where the context supplies it, or inserting a wrong word, where the context corrects the mistake, is no variance. Therefore, if, on oyer of a bond, the obligees are described as commissioners acting under an act of Parliament for the regulation of duties *on* assessed taxes, and in the bond the duties are stated to be duties *of* assessed taxes, this is no variance. *Loveland* v. *Knight*, 3 C. & P. 106. [Tenterden]

An action of debt on recognizance of bail, taken before a commissioner in the country, must clearly shew that the commissioner had authority. *Bailey* v. *Pottinger*, 6 Law J. K.B. 112.

### (*b*) *Assignment of Breaches.*

Where a defendant pleaded to a declaration on bond that all sums of money which became due on the bond were paid: Held, that the plaintiff might reply generally, negativing the allegation in the words of the plea, without assigning any special breach. *Turner* v. *M'Namara*, 2 Chit. 697.

In debt on a bond, the condition was, that the defendant, who was appointed agent of a regiment, should well and duly pay all such sum or sums of money, as he should receive from the Paymaster General, for the use of the regiment, and faithfully account and indemnify the plaintiff: Plea, a general performance; and that the plaintiff was not damnified: Replication, that the defendant received from the Paymaster General, for and on account of the regiment, several sums of money, but that the defendant had not paid them. On demurrer it was holden that the breach was sufficiently assigned. *Cornwallis* v. *Savery*, 2 Ken. 492, s. c. 2 Burr. 772.

In assigning the breach of condition of a bond conditioned for the good conduct of a clerk, the plaintiff is not bound to set out the names of the persons from whom it is charged that money has been received and not accounted for, although the clerk was dead at the time of the commencement of the action.

Where, in such an action, the defendant sought to force the plaintiff to set out the names and sums, by professing in his rejoinder, to set out a few names and sums, and averring a due performance of the condition as to those; to which the plaintiffs surrejoined, that they proceeded in respect of the not accounting by the clerk for other and different sums: It was held, on demurrer, that the surrejoinder was good, without giving the names and sums; that it contained no new matter, and therefore properly concluded to the country, and not to the court. *Calvert* v. *Gordon*, 6 Law J. K.B. 187, s. c. 7 B. & C. 809, s. c. 1 M. & R. 497.

### (*c*) *Staying Proceedings.*

A sum of money, secured by a bond, was made payable by instalments, on condition, that if any one instalment was not paid at the time it became due, then that the whole sum should be payable.

The Court on the appearance of *fraud*, in not accepting an instalment when offered, stayed execution, but ordered the judgment to stand as a security. *Stafford's case*, 1 Law J. K.B. 54.

In an action on a bond, the Court, at the instance of the defendant, referred it to the Master to ascertain what was due, and stayed the proceedings in the meantime. *Smith* v. *Alsop*, M'Clel. 309.

(*d*) *Assessing Damages.*

On a writ of inquiry to assess damages on a bond to replace stock, it was holden that the price should be taken on the day before, or actual day of, the execution of the writ of inquiry. *Harrison* v. *Harrison*, 1 C. & P. 412. [Best]

If a bond be conditioned for the same amount as the penalty, with lawful interest, the plaintiff is entitled to recover the amount of damages laid in the declaration, though it exceed the penalty. *Francis* v. *Wilson*, 1 R. & M. 105. [Littledale]

In an action of debt on a bond to secure the repayment of money with interest, the plaintiff can only recover the amount of the penalty, with one shilling for the detention of the debt. *Hellen* v. *Ardley*, 3 C. & P. 12. [Tenterden]

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## BOTTOMRY.

[See INSURANCE.]

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## BRAWLING.

[See CHURCH.]

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## BRIBERY.

[See PARLIAMENT.]

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## BRIDGE.

If no one be bound by tenure or prescription to repair a bridge, it shall be repaired by the inhabitants of the county wherein it is situate.

But arches which have been erected, or serve for the purpose of draining lands on each side of a public road at times of inundation, and are not absolutely essential to the passage along that road, will not be considered as bridges, or as forming part of a bridge, unless it shall appear that they have always been repaired by the county.

*Semble*—that they ought to pass over some branch or channel of a river, in order to come within the legal definition, and to render the county liable. *Rex* v. *Oxfordshire*, 5 Law J. M.C. 227.

To constitute a public bridge it need not be always open; therefore, where a bridge was only open to the public on occasional floods, it was holden that the county were liable to repair, it being a public bridge. *Rex* v. *the Inhabitants of Devon*, 1 R. & M. 144. [Abbott]

The inhabitants of a county, who are liable to repair a bridge, are not, by the common law, bound to widen it. *Rex* v. *the Inhabitants of Devon*, 4 Law J.K.B. 34, s. c. 4 B. & C. 670, s. c. 7 D. & R 147.

Indictment against a county for not repairing a bridge in a public highway. *Plea*—that, by a certain act of parliament for improving, &c. this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges; that the bridge in question was erected by the trustees by virtue of that act, and that the trustees were liable, and ought to repair. *Replication*, that the trustees were not liable to repair: Held, that, the bridge being in the first instance built for public purposes, and not for private convenience, in a public highway, the county was not exonerated from that common law liability to repair it which attached as soon as it was built. The plea was also bad, because it did not allege that the trustees had funds sufficient for the repair of the bridge, and for the other purposes for which the tolls were imposed; and even if that fact had been alleged and proved, the county would be liable, and would be left to their remedy over against the trustees, by indictment, for not repairing the bridge. *Rex* v. *Oxfordshire*, 3 Law J. K.B. 128, s. c. 4 B. & C. 194, s. c. 6 D. & R. 231.

On an indictment stating, that a certain bridge, within the parishes of P and M, was out of repair, and that the inhabitants of P and the township of M were liable, and ought to repair the same *rationes tenuræ*: Held defective, as it did not aver that the bridge was situated within the township of M. *Rex* v. *Machynlleth and Pennegoes*, 2 B. & C. 166, s. c. 3 D. & R. 388.

It is with great reluctance that the Court stays judgment in an indictment for not repairing a bridge; and when they do, it will not be stayed generally, but merely until further order; and if the trial of another indictment is not proceeded on with all dispatch, judgment will be given. *Rex* v. *Southampton*, 2 Chit. 213.

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## BRITISH MUSEUM.

[See COPYRIGHT.]

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## BROKER.

[See PRINCIPAL AND AGENT.]

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## BULL BAITING.

[See CATTLE.]

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## BURGLARY.

[See Stat. 7 & 8 Geo. 4, c. 29, s. 11, 12.—5 Law J. Stat. 30.]

An out-house in the yard of a dwelling-house, enclosed by a wall and gates, is a mansion in which burglary may be committed. *Rex* v. *Walters*, 1 R. & M. 13; [but see s. 13. of 7 & 8 Geo. 4.]

A building separated from the dwelling-house by a public road however narrow, will not be parcel of the dwelling-house, if there is no common fence or

roof to connect them, though it be held by the same tenure, and though some of the offices necessary to the dwelling-house adjoin it, and though there be an awning extending from it to the dwelling-house. [See 7 & 8 Geo. 4, c. 29, s. 13.] But if it is made a sleeping-place for any of the servants of the dwelling-house, it may be deemed a distinct dwelling-house. *Rex* v. *Westwood*, 1 R. & R. C.C.R. 495.

If the owner of a house suffer a person to live in it rent free, it may be stated to be that person's house; such person is tenant at will. *Rex* v. *Collett*, 1 R. & R. C.C.R. 498.

If the owner of a cottage lets one of his workmen with his family live in the cottage free of rent and taxes, and he lives there, principally if not wholly for his own benefit, it may be described as the workman's dwelling-house. *Rex* v. *Jobling*, 1 R. & R. C.C.R. 525.

Where a burglary was committed in a house, in which a servant had the exclusive possession, though he paid no rent: It was holden to be well laid in the indictment, as the property of the servant. *Rex* v. *Camfield*, R. & M. C.C.R. 42.

Where a servant lived in his master's warehouses, and paid a yearly rent: It was holden that an indictment for burglary, laying the premises in the servant, was correct. *Rex* v. *Jarvis*, 1 R. & M. C.C.R. 7.

Where a married woman lived apart from her husband, upon an income arising from property vested in trustees for her separate use: Held, that a house, which she had hired to live in, was properly described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it. *Rex* v. *French*, 1 R. & R. C.C.R. 491.

Held, that the house of a husband, in which he allowed his wife to live separate from him, might be described as the house of the husband, though the wife lived there in adultery with another man, who paid the house-keeping expenses; and though the husband suspected a criminal intercourse between his wife and the other man when he allowed her to live separate. *Rex* v. *Wilford*, 1 R. & R. C.C.R. 517.

If several persons take distinct apartments in a house, and the owner does not reside therein, an indictment for burglary may describe each apartment as the dwelling-house of each individual. *Rex* v. *Bailey*, R. & M. C.C.R. 23.

If there be an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary. *Rex* v. *Lewis*, 2 C. & P. 628. [Vaughan]

Where, in breaking a window in order to steal property in the house, the prisoner's finger went within the house: Held, that there was a sufficient entry to constitute a burglary. *Rex* v. *Davis*, 1 R. & R. C.C.R. 499.

A person, by breaking a glass window, and putting in his hand, in order to open the shutter, which he could not succeed in doing, held guilty of a burglary. *Rex* v. *Perks*, 1 C. & P. 300. [Park]

Upon an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of the larceny only. *Rex* v. *Butterworth*, 1 R. & R. C.C.R. 520.

On an indictment for burglary, by breaking into a house in the night-time, and stealing to the value of 5*l.* or more, the prisoner may be convicted of burglary, or of housebreaking, under the stat. 7 & 8 Geo. 4, c. 29, s. 12, or of stealing in a dwelling-house to the value of 5*l.* *Rex* v. *Compton*, 3 C. & P. 418. [Gaselee]

## BURIAL.

[See CHURCH.]

The right of burial in a chancel may be prescribed for, as belonging to an ancient messuage. *Waring* v. *Griffith*, 2 Ken. 183, s. c. 1 Burr. 440.

It is not unlawful to bury in an iron coffin, but churchwardens may demand a higher pecuniary recompense for its admission. *Gilbert* v. *Buzzard*, 3 Phil. 335.

It is the duty of a minister of the established church to bury the child of a dissenter. *Kemp* v. *Hicks*, 3 Phil. 264.

Semble, that though the freehold of the church be in the rector for the time being, he cannot grant an exclusive right of burial for the family of any particular individual, in any part of the church, without a previous faculty authorizing him to do so.

But, if he can, such an exclusive right cannot be created except by deed. *Bryan* v. *Whistler*, 6 Law J. K.B. 302, s. c. 8 B. & C. 288, s. c. 2 M. & R. 318.

## BYE LAW.

[See CORPORATION.]

## CANAL.

[See POOR RATE, and PRINCIPAL AND AGENT.]

Where it was directed by a canal act, that no boat of less burthen than 20 tons, or which should have a loading of 20 tons on board, should be permitted to pass through any of the locks, but on payment of tonnage equal to a boat of 20 tons: Held, that by this clause no toll was imposed upon empty boats. *The Leeds and Liverpool Canal Company* v. *Hustler*, 2 D. & R. 556, s. c. 1 B. & C. 424.

All the holders of shares in a canal have a common interest in the due execution of the act of parliament which regulates its management; and one shareholder may file a bill on behalf of himself and the other shareholders, to set aside an agreement inconsistent with the act, even though many of the shareholders may think it for their advantage to adhere to the agreement.

An agreement, not warranted by the act, will not be rendered valid by the consent and concurrence of even all the shareholders, if it tends to deprive the public of any advantage which the public otherwise might or would have enjoyed under the provisions of the act. *Gray* v. *Chaplin*, 3 Law J. Chanc. 161, s. c. 2 S. & S. 267.

A canal was made under the 23 Geo. 3, which gave the proprietors power to appropriate the water raised by engines from mines within one thousand yards of the canal, provided the produce of such mines were carried along some part of the canal. A canal had been made under the 8 Geo. 3, which contained no such clause. By the

24 Geo. 3, these canals were incorporated, which statute directed that they should be governed by their respective acts of parliament: Held, that to entitle the owners of the canal under the 23 Geo. 3. to the water, it must appear that the whole produce of the mine, and not some part, was carried along the canal; and shewing that the whole produce from the mine was carried along the canal made under the 8 Geo. 3. is of no avail. The 58 Geo. 3. recites the 8 Geo. 3, 23 Geo. 3, and 24 Geo. 3, and says, that the canals incorporated thereby shall be subject to all the clauses of the 23 Geo. 3. and 24 Geo. 3: Held, that the privilege given by the 23 Geo. 3, as to the water, was not, by the 58 Geo. 3, extended to canals made under the 8 Geo. 3, because it would, by matter *ex post facto*, cast a considerable burden upon the proprietors of mines. *Finch* v. *Birmingham Canal*, 5 Law J. K.B. 17, s. c. 5 B. & C. 820, s. c. 8 D. & R. 680.

Semble, that shares in a canal company (which, by the act creating the company, are declared to be personal property) are *bona notabilia* in the diocess wherein the testator died, and wherein the shares are registered at the office of the Company, although the canal may pass through other diocesses. *The King* v. *the Worcester and Birmingham Canal*, 6 Law J. K.B. 173, s. c. 1 M. & R. 529.

## CAPTURE.

[See PRIZE.]

## CARRIERS.

(A) WHO ARE.
(B) LIABILITY.
(C) NOTICE LIMITING RESPONSIBILITY.
(D) ACTIONS AGAINST.
(*a*) *Form of.*
(*b*) *Pleading and Evidence.*

### (A) WHO ARE.

The driver of a stage van, travelling to and from London to York, is a common carrier within the meaning of the 3 Car. 1, c. 1, and subject to the penalties thereof for travelling on Sunday. *The King* v. *Middleton*, 2 Law J. K.B. 220, s. c. 3 B. & C. 164, s. c. 4 D. & R. 824.

But the owner of a stage-coach is not within that act, or 29 Car. 2, c. 7. *Sandeman* v. *Breach*, 5 Law J. K.B. 298, s. c. 7 B. & C. 6; *post*, B.

### (B) LIABILITY.

[See SHIP and SHIPPING.]

Where A, one of several partners, carriers, was in the habit of keeping wool in his warehouses at T, until it was convenient for the customer to receive it; and after the partnership was dissolved, and notice to the customer, the wool was destroyed in the warehouse by fire: Held, that upon the goods being received into A's warehouse, under a special agreement with the vendor, the liability of the partners, as carriers, ceased; and that he did not retain it as one of the carriers, but as a warehouseman;—having, therefore, settled the loss with the vendor, he was not entitled to contribution, in settling the accounts with his partners; and it seems he would not have been liable for the loss, in the character of a warehouseman. *In re Webb*, 8 Taunt. 443, s. c. 2 B. Mo. 500.

Where a bailee has an order given to him prior to the delivery of goods, which goods are to be dealt with in a particular manner, to which the bailee assents; a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given and assented to, and the law infers an implied promise by him, that he will perform such duty: Hence it was held, that an allegation, "that in consideration plaintiff, at the request of defendant, had caused to be shipped on board of the defendant's vessel a quantity of wheat, to be carried safely to W T, for freight to be therefore paid, defendant undertook to carry safely," was supported by evidence of the defendant's having admitted an undertaking to carry, though it appeared that all the wheat was not put on board until the day after such admission. *Streeter* v. *Horlock*, 1 Bing. 34, s. c. 7 B. Mo. 283.

An undertaking by a carrier to convey notes from L to D, "unless fire or robbery should happen:" Held, where the defendant had placed them in his desk, and during his absence for a short period they disappeared, not to be a loss within the exception. *Latham* v. *Stansbury*, 3 Stark. 143. [Abbott]

Every coach-proprietor warrants to the public, that his stage-coach is equal to the journey it undertakes; therefore it is the duty of such proprietor to examine it previous to the commencement of every journey; and if he does not make that inspection, and an injury is sustained by a passenger, he is guilty of gross negligence, for which an action may be supported. *Bremner* v. *Williams*, 1 C. & P. 414. [Best]

A person travelling by a stage-coach wished to alight before the end of the stage. As he called to the coachman, he began to descend. Whilst getting down the side of the coach, he was hurled by the motion of it to the ground, and severely hurt: The Court held, that it was the duty of the coachman to stop immediately that he was desired by a passenger, and that the plaintiff was entitled to damages in an action for negligence. *Griffin* v. *Ironmonger*, 4 Law J. K.B. 28.

Where, in an action brought by a passenger against the proprietor of a stage-coach for the negligence of his coachman, it appeared that a cottage which stood by the road-side had been removed without the knowledge of the coachman, who passed the spot in a moonlight night, and drove over the rubbish, without the limits of the road: Held, that it should have been left to the jury to say, whether the coachman had thereby been guilty of negligence; and the judge having stated that as the coachman had gone out of the road, the plaintiff was entitled to a verdict, the Court granted a new trial. *Crofts* v. *Waterhouse*, 4 Law J. C.P. 75, s. c. 3 Bing. 319.

It seems to be the duty of a carrier to deliver goods at the residence of the party to whom directed, and having once done so, his obligation is at an end, whether received or not; where, however the goods having been taken back to the warehouse, were, upon application, refused to be delivered, on the ground of a lien for a balance, and not on the ground of having been once tendered,—it was holden, to be a waiver of any termination of the original contract, and the liability to be continuing until

actual delivery. *Storr* v. *Crowley*, 1 M'Clel. & Y. 129.

Trover lies against a carrier for the delivery of goods otherwise than at the place to which they are directed.

Where the defendants had received, as carriers, a box directed to "J. West, Esq. 27, Great Winchester-street, London," and, finding the house shut up, afterwards delivered the box to a person at St. Albans, calling himself West: Held, that this was a mis-delivery, for which the defendants were liable in trover, (although West was the person for whom the box was intended), West being a swindler, and the property in the goods not having passed to him, as he had obtained them from the plaintiff by fraud.

Held, also, that it was properly left to the jury to say, whether the defendants had delivered the box according to the course of their business as carriers. *Stephenson* v. *Hart & Waterhouse*, 6 Law J. C.P. 97, s. c. 4 Bing. 476, s. c. 1 M. & P. 357.

If a parcel be given to a waggoner for him to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel be lost. If a box of clothes, packed by the party's own hand, be sent by a carrier, and lost, the judge will recommend the jury to give the fair value of it in damages, although what particular articles the box contained cannot be proved. *Butler* v. *Basing*, 2 C. & P. 613. [Garrow]

If, before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told by a clerk who is transacting business there, 2*s.* 6*d.* per cwt. and on the faith of this he sends the goods, the carrier cannot charge more, although it be proved that the carrier had previously ordered his clerk to charge all goods according to a printed book of rates, in which 3*s.* 6*d.* per cwt. was set down for goods of the sort in question. *Winkfield* v. *Packington*, 2 C. & P. 599. [Tenterden]

The owner of a stage-coach is not within 3 Car. 1, c. 1, or 29 Car. 2, c. 7; and therefore, an action may be maintained against him for neglecting to take a person who had engaged a place on a Sunday. *Sandeman* v. *Breach*, 5 Law J. K.B. 298, s. c. 7 B. & C. 96.

### (C) NOTICE LIMITING RESPONSIBILITY.

In an action against a coach-proprietor for the loss of a parcel, it was proved for the defendant, that the plaintiff had for three years taken in a weekly newspaper, in which the defendant had regularly inserted a notice, that he would not be responsible for any parcel above the value of 5*l.* unless entered and paid for accordingly: Held, that such evidence was not sufficient to shew that the plaintiff had knowledge of such notice at the time of the delivery of the parcel. *Rowley* v. *Horne*, 3 Law J. C.P. 118, s. c. 3 Bing. 2.

The plaintiffs, living in London, employed an agent to collect the debts due to them in the country. He sent a parcel of bank notes in a parcel, by a coach going to London, which was lost. The plaintiffs knew that the proprietors had given notice, that they would not be accountable for bank notes, but it did not appear that the agent had any knowledge of such notice: The Court held, that the knowledge of the principal was the knowledge of the agent, and that the plaintiffs could not maintain an action for the amount of the bank notes. *Mayhew* v. *Eames*, 3 Law J. K.B. 108, s. c. 3 B. & C. 601, s. c. 5 D. & R. 484, s. c. 1 C. & P. 550.

A carrier is not deprived of the benefit of a 5*l.* notice by its being shewn that he *knew* the value of the parcel to exceed 5*l.* and did not *demand* the stipulated rate of insurance. To fix him with responsibility in such a case, the insurance money should be *offered* to him. *Marsh* v. *Horne*, 4 Law J. K.B. 267, s. c. 5 B. & C. 322, s. c. 8 D. & R. 223.

Nor does the fact of a carrier's agent receiving a parcel after notice that its value is considerable, amount to a waiver of the notice. *Alfred* v. *Horne*, 3 Stark. 137. [Abbott]

Semble, that if the agent of a common carrier be not authorized to fix or receive any additional sum for the insurance of a parcel above the value limited in a notice of non-liability, and that agent receive such a parcel for the purpose of conveyance, the common law liability will attach, and the carrier will be answerable for the full value, in case of the loss thereof.

Quære, whether a notice by a carrier that he will not be accountable for goods of a certain description, however small their value, will, in case of his knowingly receiving such goods for conveyance, afford a valid defence to an action founded upon his common law liability? *Lambert* v. *Eames*, 6 Law J. K.B. 88.

If a carrier, who has endeavoured to limit his responsibility by what is called "a 5*l.* notice," pay a sum above 5*l.* demanded of him for the loss of a parcel, his doing so will be evidence of a special contract to govern future dealings between him and the person whom he so pays, and will consequently be a waiver of the notice. Such a special contract as to the course of dealing will bind persons who afterwards become partners with that carrier; an incoming partner being bound by the existing course of dealing, unless he express his dissent. *Helsby* v. *Mears*, 4 Law J. K.B. 214, s. c. 5 B. & C. 504, s. c. 8 D. & R. 289: s. p. *Maddocks* v. *Mears*, 4 Law J. K.B. 216.

To an action against the keeper of a booking-office, for negligently losing property, it cannot be set up as a defence that he was not answerable for any sum beyond a certain value. *Newborn* v. *Just*, 2 C. & P. 76. [Best]

To render a carrier's usual limitation to his liability unavailable, the plaintiff must shew gross negligence, which is a question for the jury to decide; and where the jury improperly negatived that presumption, the Court refused to disturb the verdict. *Lowe* v. *Booth*, 13 Price, 329.

The plaintiffs sent goods packed in a box by the defendant's waggon. The box was placed, with its lid outwards, at the tail of the waggon, which was left during several hours in the night standing in the road opposite an inn, where the waggoner stopped, without any person to watch it. The box was forced open, and its contents abstracted. A notice was proved limiting the carrier's responsibility to 5*l.*: Held, that the carrier was guilty of gross negligence in leaving the waggon so exposed, and, consequently, liable for the loss. *Langley* v. *Brown*, 6 Law J. C.P. 139, s. c. 1 M. & P. 583.

A parcel containing two hundred sovereigns in-

closed in six pounds of tea, was sent by coach, and paid for as of ordinary value, both the party sending and the owner of the parcel being aware of a notice by the coach proprietors, limiting their responsibility to 5*l.*; the parcel was stolen by one of the porters of the coach, while it was standing in the street at a manufacturing town in the course of its journey. In an action to recover the value from the coach proprietors, the defendants had a verdict, on the ground, that the loss was occasioned by the improper mode in which the parcel had been committed to their care. *Bradley* v. *Waterhouse & Briggs*, 3 C. & P. 31. [Tenterden]

A common travelling trunk of a large size, containing apparel and jewels, having been lost by the defendant, a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely: Held, that he was liable to make compensation to the owner, a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office, limiting his responsibility to five pounds in the absence of such disclosure, which notice the owner of the trunk, having been in the office, had an opportunity of seeing.

Held, that, under the above circumstances, the jury were properly directed to consider generally, whether the carrier had been guilty of gross negligence, without reference to the nature of the article conveyed. *Brooke* v. *Pikwicke*, 5 Law J. C.P. 158, s. c. 4 Bing. 218.

### (D) ACTIONS AGAINST.

#### (*a*) *Form of.*

Where one of several proprietors of a coach drove so negligently as to break the plaintiff's leg: It was holden that he might maintain *case* against all the proprietors, or *trespass* against the one who drove the coach. *Moreton* v. *Harderu*, 4 B. & C. 223, s.c. 6 D. & R. 275.

#### (*b*) *Pleadings and Evidence.*

[See VARIANCE.]

*Carriers*, on having a parcel given to them, signed a receipt of its acceptance, by which they undertook to carry it safely, *fire and robbery excepted*. The parcel was not delivered, but was not lost by fire or robbery. The plaintiffs declared on the *general* common law liability of the defendants to carry; and the Court held that the evidence was of a *special* contract to carry, and therefore directed a nonsuit, for a variance between the evidence and declaration. *Latham* v. *Rutley*, 1 Law J. K.B. 225, s. c. 2 B. & C. 20, s. c. 3 D. & R. 211.

The declaration, in an action against mail-coach proprietors, stated it to be the defendant's duty to carry the plaintiff *safely*: Held, that it must be construed to mean, that they would use *due care*. *Harris* v. *Costar*, 1 C. & P. 636. [Best]

In error, upon a declaration in an action on the case against several defendants as common carriers for negligence in the conveyance of the defendant in error, as a passenger, whereby &c.: Held, that the action being founded upon a breach of duty imposed by the custom of the realm, and the declaration being framed as upon a misfeasance, and judgment given against some of the parties only, was not erroneous, and the judgment was affirmed. *Bretherton* v. *Wood*, 6 B. Mo. 114, s. c. 3 B. & B. 54, s. c. 9 Price, 408.

In an action against a carrier, the declaration alleged, that the defendant undertook to carry "the plaintiff, her children, and servants, *together*." To support this allegation, it was proved, that he whole inside of the coach was taken for the plaintiff and her three daughters, and two outside places for her servants: It was holden, first, that there was no variance; secondly, that an offer to carry three in one part of a double-bodied coach, and one in another, was a failure of the contract; and thirdly, that the defendant's having put eight *other* outside passengers on the coach, was contrary to the 50 Geo. 3, c. 48, s. 2, which enacts, "that all stage-coaches called long coaches, or double-bodied coaches, shall be permitted to carry eight outside passengers, and no more;" consequently, the plaintiff was entitled to recover the extra expenses she had been put to. *Long* v. *Horne*, 1 C. & P. 610. [Abbott]

Evidence that, at the door of a booking office, there is a board on which is painted, "Conveyances to all parts of the world," and a list of names of places, is not sufficient proof that the owner of the office is a common carrier, so as to charge him for the loss of a box which was booked there. *Upston* v. *Slark*, 2 C. & P. 598. [Tenterden]

To prove the non-delivery of goods in an action against a carrier, the consignee's shopman stated that he had not received them, and that he thought they could not be delivered without his knowledge: Held, sufficient proof of the non-delivery. *Griffiths* v. *Lee*, 1 C. & P. 110. [Hullock]

An unstamped paper given by a wharfinger, on the receipt of goods, stating the particular manner in which they were to be shipped, and the manner in which they were to be received, is admissible in evidence. *Chadwick* v. *Sills*, 1 R. & M. 15. [Holroyd]

The plaintiffs, in London, desired their agents at W to send a parcel of goods to London. The goods were lost. At the trial it was proved, that the parcel was delivered, by the servant of the plaintiffs' agent, at W, from which the defendant's coach set out, and that the common carriage and booking were paid; it appeared, however, that the plaintiffs had received printed notices in London, that the defendant would not be answerable for more than 5*l.*, unless, &c. either in London, or to their agents in the country: Held, that it was sufficient to prove that the plaintiffs had received the notice in London, especially if the terms of the notice extended to the delivery of goods to the agent in the country. *Alfred* v. *Horne*, 3 Stark. 136. [Abbott]

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## CASE.

Case, by a reversioner, for cutting and carrying away branches of growing trees, with a count in trover for the wood carried away. Proof, that the occupier held under a written agreement: Held, that this agreement must be produced, in order to prove the reversion in the plaintiff, as laid in the first count: but that, the count in trover was sup-

ported by evidence of branches carried away, though their value was not shewn at the trial; for it was there indifferent whether the plaintiff was in possession of the trees, or had only the reversion. *Cotterill* v. *Hobby*, 3 Law J. K.B. 276, s. c. 4 B. & C. 465, s. c. 6 D. & R. 551.

## CATTLE.

The word *cattle*, in the 9 Geo. 1, c. 22, extends to asses. *Rex* v. *Whitney*, 1 R. & M. C. & R. 3.

The 4 Geo. 4, c. 54, does not apply to injuring sheep by setting a dog at them. *Rex* v. *Hughes*, 2 C. & P. 420. [Park]

Bull-baiting is not punishable under the stat. 3 Geo. 4, c. 71, for preventing cruelty to cattle, a bulls are not included in that statute. *Ex parte Hill*, 3 C. & P. [Tenterden]

## CERTIORARI.

(A) When it lies.
(B) Restraints on by Statute.
(C) When and how obtained.
(D) When quashed.
(E) Costs.

### (A) When it lies.

An action of ejectment, brought in an inferior court, may be removed by *certiorari*. *Doe d. Sadler* v. *Dring*, 1 Law J. K.B. 109, s. c. 1 B. & C. 253, s. c. 2 D. & R. 407.

The defendant is entitled to a *certiorari*, to remove an action of ejectment from an inferior jurisdiction, on the ground that he cannot obtain a fair and impartial trial, although the lease be executed within the local jurisdiction. *Patterson* v. *Eades*, 3 B. & C. 550, s. c. 5 D. & R. 445.

A *certiorari* will not lie to remove proceedings out of an inferior court, in order that the bail below may render the defendant, who happens to be in the custody of the marshal. *Patterson* v. *Reay*, 1 Law J. K.B. 32, s. c. 2 D. & R. 177.

A *certiorari* does not lie to remove a plaint in replevin from the county court in Wales. *Edwards* v. *Bowen*, 5 B. & C. 206, s. c. 7 D. & R. 709.

But the plaintiff, after removing the cause from the county court, into the Court of Great Sessions, obtained a *certiorari* to remove it into the Court of King's Bench, which was granted, in the absence of special circumstances. *Edwards* v. *Bowen*, 2 S. & S. 514.

Where it was expected that a special verdict would be found, the Court refused a *certiorari* to remove a *quare impedit* from the Court of Great Sessions at Chester, the proper mode being by writ of error, after such verdict has been found. *Rickerington* v. *the Bishop of Chester*, 6 D. & R. 489.

This Court will not grant a *certiorari* to remove an indictment for murder from Yorkshire, so as to enable the prisoner (who has pleaded to the indictment) to have a trial at bar, on the ground that he cannot have a fair and impartial trial in that county. *Rex* v. *Mead*, 3 D. & R. 301.

The Court granted a rule *nisi*, for a *certiorari*, to remove an indictment from Wales into the next English county, upon a suggestion that they could not have impartial justice upon a trial there, there being a strong prejudice in the freeholders. *Rex* v. *Parry*, 2 Ken. 370.

This Court will not direct a *certiorari* to the quarter sessions in Wales, without special cause. *Rex* v. *Gwyn*, 2 Ken. 441.

A *certiorari* lies to the justices of the town of Berwick. *Rex* v. *Cowle*, 2 Ken. 519, s. c. 2 Burr. 834.

Where the sessions reserve no case, the Court will not grant a *certiorari* to quash an order of sessions, on the ground, that the judgment would have been the other way, if the vote of an interested magistrate were withdrawn. *The King* v. *the Justices of Monmouthshire*, 6 Law J. M.C. 87, s. c. 8 B. & C. 137.

A *certiorari* does not lie to remove an order of justices, which had not been obeyed by Quakers, against whom it had issued for refusing to pay their tithes, on account of their religious scruples. *Rex* v. *Wakefield*, 2 Ken. 164, s. c. 1 Burr. 485.

Convictions under penal statutes are removable by writ of *certiorari*, unless it be expressly taken away by the enactment under which the proceedings are instituted. *Rex* v. *the Justices of the Hundred of Cashiobury*, 3 D. & R. 35.

### (B) Restraints on by Statute.

An appeal to the sessions, and not a *certiorari to* the superior courts, lies to remove the appointment of surveyors, under the Highway Act, 13 Geo. 3, c. 78. *Rex* v. *St. Albans*, 3 B. & C. 698, s. c. 5 D. & R. 538.

In general, appeal lies to the sessions against acts done by magistrates, in pursuance of the Highway Act, (13 Geo. 3, c. 78,) and therefore *certiorari* does not lie.

But where the special sessions allowed a surveyor's accounts, which had not been previously submitted to one magistrate, (according to section 48:) It was held, that they were not acting in pursuance of the act; that they were acting without jurisdiction; and a *certiorari* was therefore granted, and their order quashed. *The King* v. *the Justices of Somersetshire*, 5 Law J. M.C. 35, s. c. 5 B. & C. 816, s. c. 8 D. & R. 733: s. p. *Rex* v. *Justices of Somersetshire*, 6 D. & R. 469.

Where an indictment contained counts on a statute which took away a *certiorari*, and counts at common law: The Court held, that the *certiorari* was not taken away. *Rex* v. *Saunders*, 5 D. & R. 610.

The 50 Geo. 3, c. 73. recites the 31 Geo 2, c. 29, and 13 Geo. 3, c. 62. makes amendments therein, and the 31 Geo. 2, c. 29, ss. 36 and 37 respectively take away the writ of *certiorari*, and give an appeal to the sessions: Held, that the 50 Geo. 3, c. 73, s. 5. incorporated those sections, and that on a conviction under the latter statute the *certiorari* was taken away, and an appeal given to the sessions. *Rex* v. *the Mayor of Liverpool*, 3 D. & R. 275.

A case granted by the sessions for the opinion of this court, upon the affirmance of a conviction under the Metropolitan Paving Act, 57 Geo. 3, c. 29, which prohibits the removal into the superior courts of "any rate, proceeding, conviction, order, matter or thing," is within the statute, and cannot be removed by *certiorari*. *Rex* v. *Justices of Middlesex*, 8 D. & R. 117.

Where an act of parliament provides that the determination of the justices at Quarter Sessions "shall be final and conclusive to all parties concerned, and shall not be removed or removable by *certiorari*," the Court of King's Bench will have no jurisdiction over an order of sessions removed by *certiorari*, though such order has been made, subject to the opinion of that Court upon a special case reserved. *Rex* v. *Wykeham*, 6 Law J. M.C. 71.

The statute 52 Geo. 3, c. 93, Sch. (L), R. 13 and 15, which gives the commissioners appointed under it summary power to convict for offences committed within the districts for which they act, prescribes a form of conviction, and takes away the removal by *certiorari*, does not require that the commissioners shall state, on the face of the conviction, that the offence was committed within their jurisdiction.

But, in case they shall omit to do so, the party may, by affidavit, shew that there was no jurisdiction; and, on such fact, so made out, the Court will have power to grant a *certiorari*. *Rex* v. *the Justices of Gloucester*, 6 Law J. M.C. 21, s. c. as *Rex* v. *Long*, 1 M. & R. 139.

The sessions having confirmed an order, made by two justices, for diverting and turning a road in pursuance of 13 Geo. 3, c. 78, but which order was not according to the directions of the act: Held, on the removal of the same by *certiorari*, that as the 80th section in the 13 Geo. 3. divested the parties of the right of removing an order by *certiorari*, that the Court could not enter on the question of its sufficiency or insufficiency. *Rex* v. *Casson*, 3 D. & R. 36.

(C) WHEN, AND HOW OBTAINED.

The King is not bound by the 13 Geo. 2, c. 18, which limits the time for removing an order of justices of the peace. *Rex* v. *Berkeley*, 1 Ken. 80, s. c. Sayer, 123.

After judgment has been pronounced at the Quarter Sessions, the Court will not grant a *certiorari* to remove the indictment, in order to have it quashed. *Rex* v. *Pennygoes*, 2 D. & R. 209, 1 B. & C. 142.

After judgment, it seems a *certiorari* does not lie to remove a cause from an inferior court; especially if it be judgment by default. *Walker* v. *Gann*, 7 D. & R. 769.

A *certiorari*, to remove a cause from the Great Sessions for the county of Carmarthen, obtained after cause entered for trial, briefs delivered, and witnesses in attendance, was superseded, and defendant ordered to pay the costs of the day and *certiorari*. *Stacy* v. *Evans*, 13 Price, 449.

It seems the Court will not award a *certiorari* for removing an indictment upon the motion of the Attorney General, without an affidavit from the defendant, according to 5 W. and M. c. 11. *Rex* v. *Burgess*, 1 Ken. 135.

Affidavits to obtain a rule *nisi* for a *certiorari*, should not be entitled. *Ex parte Norough*, 1 Law J. K.B. 112, s. c. 1 B. & C. 267.

A rule for a *certiorari* to remove an inquisition into the Court of King's Bench, may be absolute in the first instance. *Percival* v. *Rochdale*, 2 Law J. K.B. 40.

If a *certiorari* be obtained too late, a *procedendo* is absolute *instanter*, though it appears that the inferior court has exceeded its jurisdiction, by taking cognizance of a suit for 16*l*. when its power was limited to 5*l*. *Walker* v. *Gann*, 7 D. & R. 769.

(D) WHEN QUASHED.

A writ of *certiorari*, for removing proceedings from an inferior into a superior court, will be quashed on motion for irregularity, in not returning the record itself, but merely setting out a copy thereof. *Palmer* v. *Forsyth*, 3 Law J. K.B. 260, s. c. 4 B. & C. 401, s. c. 6 D. & R. 497.

In the absence of special circumstances, a writ of *certiorari* to the Great Sessions in Wales, was quashed. *Pearce* v. *Thomas*, 1 Jac. 54.

(E) COSTS.

Without notice or any special reason, *certiorari* was delivered to the judges of the Court of Great Sessions, in Wales, on the day before a trial; but this Court quashed the *certiorari*, and directed a *procedendo* to issue, and also ordered the party to pay the costs of the proceedings below, and the costs of the application. *Jones* v. *Davies*, 1 Law J. K.B. 54, s. c. 1 B. & C. 143.

Pursuant to the 5 W. & M. c. 11, bail entered into the usual recognizance on the removal of an indictment by *certiorari*. After conviction, and before judgment, their principal died: Held, that they were bound to pay the taxed costs of the prosecution. *Rex* v. *Turner*, 4 D. & R. 816.

## CHAMPERTY.

An agreement, giving a third person an interest in the prosecution of a suit, is not champerty, unless that third person is to share in the profits of the suit. *Hartley* v. *Russell*, 3 Law J. Chanc. 146, s. c. 2 S. & S. 244.

## CHARGE.

In the naked case of a charge upon lands, the law is clear and settled; but, upon wills and instruments of marriage contract, all the cases cited authorize a distinction. In such cases the intention of the person making the will, and of the parties to the contract, is to be collected from the different parts of the instruments. *Lansdowne* v. *Lansdowne*, 2 Bligh, 88.

## CHARITY.

(A) JURISDICTION OVER.
(B) DEVISE OR BEQUEST TO.
(C) GRANT.
(D) ADMINISTRATION OF.
  (*a*) *Trustees.*
  (*b*) *Objects.*
  (*c*) *Property and Revenue.*
  (*d*) *Leases and Alienations of Charity Estates.*
(E) PLEADING AND PRACTICE.

(A) JURISDICTION OVER.

A, having purchased an ancient chapel, with a parcel of ground adjoining, devises it by will, dated in 1590, together with certain messuages,

&c. in trust, to complete the building of certain alms-houses, which he had commenced on the ground near the chapel, and to apply the rents of the messuages, &c. to the support of four poor people, with directions for keeping up the chapel, and appointing a minister, chiefly for the benefit of the alms-houses, but partly also for any other persons who might think fit to attend the service. In 1769, the chapel having fallen into decay, is conveyed, together with the piece of ground, the alms-houses and the messuages, &c. by the leave of the surviving trustee, to the corporation of Ludlow, who, in 1771, pull down the chapel, convert the materials to other purposes, and grant leases of the piece of ground near the chapel, upon which houses are built: Held, (reversing the decision of the inferior court,) that this is not a case within the jurisdiction of the Court under the enactments of the 52 Geo. 3, c. 10.

The operation of the act is confined to the simple cases of a clear breach of trust.

A person cannot present or join in a petition, although he may have an interest in the question, unless he was (or represents) a party in the matter in the court below. *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 17.

Under the 52 Geo. 3, c. 101, the Court has no jurisdiction to direct an account of the assets of a person who has received the rents of a charity estate. *In the matter of St. Wenn's Charity*, 2 S. & S. 66.

Where charity estates are directed by the founder to be leased for twenty-one years, the Court has no authority to order them to be leased for ninety-nine years. *Attorney General* v. *Mayor of Rochester*, 2 Sim. 34.

The corporation of Dublin having before the year 1777, supplied water to the inhabitants of the city, from works which they had constructed, but the rents which they received being inadequate to the maintenance of the water-works, by the Irish act 15th and 16th Geo. 3, the owners or occupiers of houses were compelled to provide branch pipes from the mains of the company to the houses; and the corporation were empowered to charge the owners or occupiers with certain fixed annual rates or rents, in order to construct new mains, and extend their works—to borrow money for those purposes, and to mortgage the rates for the re-payment of the money so borrowed.

Under the authority of this act, the corporation, from time to time, borrowed, on the credit of the water-rents, various sums of money, which, in 1819, amounted to 67,800*l*. In that year the corporation obtained a new act of parliament (49th Geo. 3), by which they were empowered to borrow, at stated annual periods, a further sum, amounting to 32,200*l*., and to charge the debt upon the rates granted by that and the former acts. The act further required, that the interest of the money borrowed under that act should be retained out of the rates thereby granted, as well as a further sum of 2000*l*. to be appropriated as a sinking fund to pay off the whole debt for money borrowed under that and the former acts. The act further directed that distinct accounts should be kept of the rates received under the act, and that the surplus, after providing for the interest of the whole debt, should be applied in laying down iron or metal main and service pipes, in the general improvement and extension of the water-works, and to increase the sinking fund; and it was declared, that the rates being granted only for such purposes, should not be subject to deductions, except for collection, nor be deemed rates for the supply of water, as for sale.

The act then provided that the corporation should furnish annually, to be laid before parliament, an account of the sums received by them, under that and the former acts, and of the manner in which the same had been expended and applied. Finally, a further provision was made by the act for the appropriation to the sinking fund of any further surplus out of the rates.

In 1823, an information and bill was filed on behalf of the inhabitants of Dublin paying water-rates, against the corporation, which, stating various acts of mismanagement and misappropriation of the funds arising from the rates; submitting that the corporation were trustees under the act of the rates thereby given, for uses which were charitable in their nature, and charging that the conduct of the corporation amounted to a breach of trust, prayed (among other things) a declaration and execution of the trust, and that accounts might be taken of the rates received by the corporation, and the application thereof; of the sums annually applied to the sinking fund; of the money borrowed and due on the credit of the rates, and which had been applied in payment of the principal and interest of the debt. To this information and bill, the defendants put in an answer, by which, after admitting many of the principal facts, and setting forth various accounts, they submitted that they were not trustees, that the purposes specified in the acts were not charitable uses; that the act required the accounts to be furnished annually to the lord-lieutenant to be laid before parliament; which having been done, it was a bar to the jurisdiction of the Court, of which matter they prayed the same benefit as if they had pleaded to the bill.

Held, (reversing the judgment in the court below,) that the Court had jurisdiction to entertain the information and bill. *Attorney General* v. *Corporation of Dublin*, 1 Bligh, N.S. 312.

### (B) Devise or Bequest to.

Where a testator bequeathed one-fourth of his property to the widows and orphans of the parish of L: It was holden a good charitable bequest. *Attorney General* v. *Comber*, 2 S. & S. 93.

Where a condition is to assign a part of a bequest of leasehold property to a charity, the legatee will take, discharged of the condition. *Poor* v. *Mail*, 6 Mad. 32.

The statute of Mortmain extends to all devises for a public purpose, whether general or local; therefore, it applies to a devise to the British Museum. *British Museum* v. *White*, 2 S. & S. 594.

Where a general intention to give a sum that can be ascertained to charitable purposes is manifested, but the testator has left blanks for the names of the specific charities, the Court will carry the general intention in favour of charity into execution, by referring it to the Master to settle a scheme. The appropriation of the fund to specific charities does not, in such a case, belong to the Crown.

*Pirchel* v. *Paris*, 4 Law J. Chanc. 77, s. c. 2 S. & S. 384.

Where a testator bequeathed to a charity a certain amount of stock, to be purchased by his executors in the 3 per cents.—the Court ordered it to be transferred to the corporators. *Emery* v. *Hill*, 1 Russ. 112.

Before the 23 Henry 8, the Crown was entitled to any payment out of the rents of lands directed to be made for a superstitious use. *Attorney General* v. *Vivian*, 1 Russ. 226.

Under a devise to the dean and canons of Christchurch, in trust to constitute and support a grammar school at P, to appoint a master and usher, and pay them certain salaries, and the dean and canons to direct the management of the school: It was holden, 1st. That the school was to be a free grammar school for teaching the learned languages. 2d. That the proper objects were the children of the resident inhabitants of P. 3d. That they must be the children of Protestants, and must be educated according to the principles of the church of England. 4th. That the master might take boarders and day-scholars. 5th. That the number of free scholars was to be limited; and in fixing the number, the Court was guided by the amount of salary originally provided. 6th. That the free scholars were to be nominated by the trustees. 7th. That the trustees were to visit the school at their discretion, and to be allowed their reasonable expenses. Lastly, An augmentation of the salaries of the master and usher, made by the trustees upon an increase of the income of the charity was not allowed, because the school, through error, had not been devoted to the proper objects. *Attorney General* v. *Christchurch*, 1 Jac. 744.

### (C) GRANT.

Grant of land void under 9 Geo. 2, c. 36, where there is a resulting trust for the grantor during his life.

Where the principal charity fails, the accessary fails with it.

A several charity is good, though connected with a charity that fails, in some cases, of administration, not of the essence of the charity. Where a residue is given to a valid purpose, it will fail with the prior void purpose, if not capable of being ascertained, except by the actual execution of that purpose. *Limbrey* v. *Gurr*, 6 Mad. 151.

### (D) ADMINISTRATION OF.

#### (a) *Trustees.*

A court of equity will not visit slight irregularities, committed by trustees of charitable institutions, with severe censures, when they have not acted from corrupt motives. *Attorney General* v. *Jaliffe*, 1 Law J. Chanc. 43.

#### (b) *Objects.*

Where the trusts of a deed and will were, to found a school, for the education of gentlemen's sons, in a particular house, built by the founder; and it was provided that, if the school was not established, the funds should be applied, at the discretion of the trustees, to some other purpose conducing to the good of the county of Westmorland, and the parish of Lowther especially; the charity, as to the school having altogether failed, by the school-house having been built on a part of the founder's family estate, on which he was tenant for life only, the Court referred it to the Master to settle a scheme for the benefit of the county of W and the parish of L especially. *Attorney General* v. *Earl of Lonsdale*, 5 Law J. Chanc. 99, s. c. 1 Sim. 105.

Where there is a general indefinite charitable purpose, not fixing itself upon any particular object, the disposition is in the King by the sign manual; but when the gift is to trustees, with general or some objects pointed out, the Court will take upon itself the execution of the trust. *Ommanney* v. *Butcher*, 1 Turn. 270.

Where a school, upon the true construction of the instruments establishing it, ought to be a grammar school for instruction in the classics, the trustees will not be permitted to convert it into a school for teaching merely English, writing, and arithmetic, though it had ceased, from before the time of living memory, to be a place for classical education, and though it appeared, from old regulations, that elementary instruction in English had always been one of the objects of the institution.

Where the original statutes of such a school shew that the intention of the founder was, that the master should be employed personally in teaching the children, he must not leave the detailed management of the school to an usher; nor is it any excuse for his doing so, that, as minister of a chapel annexed to the school, he devotes his time to ecclesiastical duties. *Attorney General* v. *the Earl of Mansfield*, 2 Russ. 50.

#### (c) *Property and Revenue.*

In the reign of Hen. VIII. lands are conveyed to the corporation of Exeter for the aid and relief of the poverty of poor citizens and inhabitants of Exeter, who oftentimes are heavily burdened, as well by fee farms of the city as by other impositions and talliages: Held, that to apply the rents to the defraying of public expenses, which it would otherwise be necessary to provide for by a general rate, is not a due application of the charity:

That the rents ought to be applied to the aid of poor citizens and inhabitants not receiving parish relief. *Attorney General* v. *Mayor of Exeter, &c.* 6 Law J. Chanc. 50.

Funds supplied from the gifts of the Crown, of the legislature, or of a private person, for any legal, or public purpose, are charitable funds to be administered in a court of equity.

Portions of a moor, belonging to the lord of the manor, and to certain persons having a right of common on it, are, with their consent, vested by acts of parliament in trustees for the purpose of improving the adjacent town: the property thus given constitutes a charitable fund, for the administration of which the trustees are liable to account in a court of equity. *The Attorney General* v. *Heelis*, 2 Law J. Chanc. 189, s. c. 2 S. & S. 67.

Where the income of estates given to a corporation for specific charitable purposes has, for a long series of years, been misapplied, an indefinite account will not be directed against the corporation.

Semble—That the account will not be carried back beyond the filing of the bill. *Attorney General* v. *Winchester*, 3 Law J. Chanc. 64.

If a charitable bequest gives a certain sum in trust for the relief of certain parishes, on condition that St. N be one; and through a scheme, merely a small part of the funds be appropriated to St. N, and the bulk to another parish:—the Court will decree an equal division. *Attorney General* v. *Bulkr*, 1 Jac. 407.

Charity-money for the use of the church ought not to be mixed up with the parochial rates, so as to form a general fund, out of which all expenses are defrayed. *Attorney General* v. *Vivian*, 1 Russ. 226.

Where a corporation admitted by their answer the receipts of rents and profits of a charity estate, they were decreed to account for the period of two hundred years. *Attorney General* v. *City of Exeter*, 1 Jac. 443.

The Court decreed an account of charity property against a corporation, from the time at which the accounts rendered by their answer commenced. *Attorney General* v. *Corporation of Stafford*, 1 Russ. 547.

A fund given to a corporation in England for a charitable purpose, ordered to be paid to the corporation without the settlement of a scheme. *The Society for the Propogation of the Gospel in Foreign Parts* v. *Attorney General*, 3 Russ. 142.

Where a legacy is bequeathed to persons having no corporate character, for permanent charitable purposes, the Court will not allow the fund to be paid over to those persons, without a reference to the Master, even where they are intrusted by the testator with the management of the fund. *Wellbeloved* v. *Jones*, 1 Law J. Chanc. 11, s. c. 1 S. & S. 40.

### (E) PLEADING AND PRACTICE.

To all suits respecting charitable funds, the Attorney General is a necessary party, except where a legacy is given to the officer of an established institution, as part of its general fund. *Wellbeloved* v. *Jones*, 1 Law J. Chanc. 11, s. c. 1 S. & S. 40.

The Attorney General, having signed and allowed a petition under the act 52 Geo. 2, c. 10, is at liberty to appeal for the respondents to argue their case. *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 17.

Upon an information to set aside a lease for 99 years of charity lands, the defendants, the lessees, set up a title adverse to the lease: upon the merits it was held, that there was no ground for the defence; but the Court was of opinion, that if the merits had been otherwise, the defendants were estopped, and could not dispute the title while they retained the possession, though the lessees ought not to have been permitted to enter into evidence, upon the principle that the plea of *nil habuit in tenementis* could not have been pleaded at law. *Attorney General* v. *Lord Hotham*, 1 Turn. 209.

If a charity information be filed by the Attorney General, without naming a relator under the 59 Geo. 3, c. 91, s. 1, it is competent for this Court to order the defendant to pay the former his costs. *Attorney General* v. *Ashburnham*, 1 S. & S. 394.

Where, upon an information to establish and administer a charity, it appeared, from the report, that sums belonging to the charity were in the hands of the defendants, but no account had been directed against them by the decree, no order could be made that they should pay the money into court.

Relators, on an information upon which abuses in a charity are proved and corrected, are entitled to have allowed to them, not merely costs as between party and party, but their costs, charges, and expenses. *Attorney General* v. *Winchester*, 3 Law J. Chanc. 64.

In a charity information, it is irregular for persons, being inhabitants of a parish interested in the charity, but not being parties to the information, to present a petition in the cause; nor is the irregularity cured by the circumstance of a defendant to the information being a petitioner along with them. *Attorney General* v. *Lechmere*, 3 Law J. Chanc. 125.

It is not essential that the relator in a charity suit should have any interest in the due administration of the charity.

Where a record is both an information and a bill, and the whole of the relief specifically prayed is in respect of an alleged interest of the relator in the trust property, the Court, if it see that there is any occasion for regulation in the management of the charity, will not dismiss the information, even though the claim of interest on the part of the relators be so groundless that their bill is dismissed with costs. *Attorney General* v. *Vivian*, 1 Russ. 226.

A chapel had been granted to the trustees of the school for the maintenance of the school, and the inhabitants of the hamlet had been long accustomed to attend the performance of divine service there: it was held, with reference to the details of its history, and the particular language of the instruments, that the chapel was not in the nature of a chapel of ease for the accommodation of the hamlet, but belonged to the school; and that the trustees of the school had no right to apply the revenues of the charity in enlarging the chapel for the accommodation of the inhabitants of the hamlet. *Attorney General* v. *the Earl of Mansfield*, 2 Russ. 50.

#### (d) *Leases and Alienations of Charity Estates.*

*Quere*—Whether a purchaser of charity lands, who has, after notice, expended money in building, is entitled in equity to a compensation. *Attorney General* v. *Lloyd*, 6 Mad. 92.

A mere husbandry lease of charity lands for 99 years, at an uniform rent, cannot be supported. *Attorney General* v. *Lord Hotham*, 1 Turn. 209.

Lands of a specified annual value being given to charitable purposes, and a certain sum of the yearly rental being directed to be paid to one class of objects, and the residue to another, an arrangement was entered into two centuries ago, by which a certain part of the lands was demised for a thousand years, to the persons entitled to the certain annual payment, in lieu of that payment; and the lands so demised became afterwards of much greater proportionate value than the remaining lands of the charity: the Court would not interfere with such an arrangement, nor order the lease to be set aside. *Attorney General* v. *Hall*, 4 Law J. Chanc. 58, s. c. 2 S. & S. 441.

Trustees of a charity grant an improper lease of the charity lands, in which they covenant with the lessee for his actual enjoyment of the demised premises during the term. The Court, in setting aside the lease, will order the indenture of demise to be cancelled *in toto*, and will not leave the personal

covenants of the trustees in force for the benefit of the lessee. *Attorney General* v. *Morgan*, 2 Russ. 306.

A corporation which was bound to pay out of the revenues of charity lands a certain annual sum to a college, in the 4th of James the First conveyed to the college lands then of that annual value, in satisfaction of the annual sum.

The lands so conveyed, by accidental circumstances became of much greater value in proportion than the lands which were reserved by the corporation for the other purposes of the charity; yet the Court will not, at this day, undo an arrangement which was fair at the time, and had the approbation of the executor of the founder. *Attorney General* v. *Pembroke Hall*, 4 Law J. Chanc. 58, s. c. 2 S. & S. 441.

Trustees of a charity cannot be allowed the costs of an unsuccessful attempt to obtain an act of parliament to enable them to administer the property of the charity on an improved plan, though their failure was from accidental circumstances, and though their motives were fair and proper.

The trustees of a charity were made, as individuals, defendants to a suit for the administration of the charity; afterwards the information was amended, and they were made defendants in their corporate capacity, but the suit was not dismissed against them as individuals. At the hearing, the record was considered as constituting two different causes; and the cause against the trustees as individuals was dismissed with costs; though, in the cause against them in their corporate capacity, a decree was made, remedying abuses which had grown up in the charity, and regulating its future administration. *Attorney General* v. *Earl of Mansfield*, 2 Russ. 50.

## CHARTERPARTY.

[See SHIP and SHIPPING.]

## CHILDREN.

[See PARENT AND CHILD.]

## CHOSE IN ACTION.

The same rules obtain in equity as at law, with respect to actions by husband and wife, for the chose in action of the wife. *Adams* v. *Lavender*, 1 M'Clel. & Y. 41.

Assumpsit cannot be maintained for a chose in action, in the name of a trustee, under the Scotch Bankrupt Act, 54 Geo. 3, c. 137. *Jeffery* v. *M'Taggart*, 6 M. & S. 126.

## CHURCH.

There never was a time when an impropriation could be made without providing in some way for the service of the church. After the 15 Rich. 2, an endowment of a vicar was required. Before that statute there ought to have been either a vicar endowed, or the service of the church performed by a curate. *Norbury* v. *Meade*, 3 Bligh, 247.

The union of churches does not give the respective parishes a right to participate in lands previously devised to them. *Attorney General* v. *Vivian*, 1 Russ. 226.

A mandamus does not lie to compel churchwardens to deliver up the keys of the church. *Anon.*, 2 Chit. 255.

Though a curate has no right to alter the situation of a pew, yet its restoration will not be ordered if the churchwardens do not disapprove, and the alteration has not disfigured the church. *Parham* v. *Templar*, 3 Phil. 55.

The ordinary may grant a pew to a particular person while he resides within the parish; or there may be a prescription by which a faculty is presumed: but as to personal property in a pew, the law recognizes no such right. *Hawkins* v. *Compeigne*, 2 Phil. 11.

It is the duty of ordinaries to prevent and discourage the system of granting pews exclusively to particular families. *Fuller* v. *Lane*, 2 Add. 419.

Ordinaries, at the present day, are bound not to issue faculties, appropriating pews to individuals, but under special circumstances. Sentence of the Court below, refusing a confirmatory faculty for so appropriating a pew, &c. affirmed, generally—but *quære* as to the propriety of an order, part of that sentence, dispossessing the applicant for the faculty of the pew in question, in favour of the opponent; that opponent, though setting up, failing to sustain any prescriptive right to the pew; the possessory right to the pew seeming, of the two, to be rather in the applicant for, than in the opponent of, the faculty; and such order not, regularly, connecting itself with the proceedings, pleadings, and prayers in the cause. *Woollocombe* v. *Ouldridge*, 3 Add. 1.

A pew in the *body* of a church may be prescribed for as appurtenant to a house out of the parish. *Lousley* v. *Hayward*, 1 Y. & J. 583.

A non-parishioner can have no right to a pew in the body of a parish church, except by prescription. And prohibition will lie to restrain proceedings in the Ecclesiastical Court, if they seek to enforce a claim by any title except that of prescription; or if it be sought by that title, and the prescription be denied by the defendant. Where prohibition is applied for, it is not necessary that the proceedings in the Ecclesiastical Court should be actually at issue: It is sufficient, if they are clearly in progress towards the trial of a question which can be properly tried only in a court of law. *Byerley* v. *Windus*, 5 B. & C. 1, s. c. 7 D. & R. 564, s. c. 4 Law J. K.B. 102.

An answer relating to pews, containing a superfluous history, will be referred for reformation. *Turner* v. *Giraud*, 3 Phil. 334.

A chapel-warden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews, without the consent of the perpetual curate. *Jones* v. *Ellis*, 2 Y. & J. 265.

The lessee of an impropriator of great tithes will be canonically punishable if he breaks open the church-door, with an intent to erect pews in the church. *Jarratt* v. *Steele*, 3 Phil. 167.

No usage can legalize the erection of a monument without a faculty. *Seager* v. *Bowle*, 1 Add. 554.

Responsive allegations to articles, in a cause of office, promoted by the official of a peculiar against

the defendant, calling upon him, 1st, To answer to "having illegally set up a monument in a certain church in his peculiar without a faculty;" 2dly, To "shew cause why he should not be decreed to remove the same:" Pleading, 1st, That, "the said monument was erected by leave of the minister and churchwardens;" 2dly, That, "the said monument, instead of injuring or disfiguring, is an ornament to the said church;" admitted to proof. *Seager* v. *Bowle*, 1 Add. 541.

*Quære*—Whether the ordinary is precluded from granting a faculty confirmatory of alterations made in a parish church, when the strict legal form of publishing a notice of the vestry has not been complied with. *Thomas* v. *Morris*, 1 Add. 470.

In the year 1736, a meeting-house was built by contributions of materials, money, and labour, and collections at the church-door, of persons professing the principles of those who seceded at that time from the church of Scotland. The meeting-house, and the ground on which it was built, were vested in certain persons as trustees, for the use of the society and managers of the house of public worship for the associated congregation of Perth.

A schism took place in 1796 among the members of this religious community, and several of the members, including the representatives of some of the trustees, to whom the legal right of property had devolved, separated themselves from the rest of the community, and absolved themselves from the authority of the associate synod, which was the constituted authority for the government of the community. This separation took place on grounds of alleged difference of opinion on a question as to the power of civil magistrates in religious concerns, which the Court of Sessions pronounced to be unintelligible: Held, that in a case where it was difficult to ascertain who were the legal owners as representatives of the contributors, the use of the meeting-house belonged to those who adhered to the religious principles of those by whom it was erected; and those who had separated themselves from the associate synod, and declined their jurisdiction, were held to have forfeited their right to the property, although it had been judicially declared that there was no intelligible difference of opinion between them and the adherents of the synod. *Craigdallie* v. *Aikman*, 2 Bligh, 529.

Telling a man in a church or church-yard, that what he suggested is "*a damned lie*," is brawling within the 5 and 6 Edw. 4. c. 4. *Austen* v. *Duggen*, 3 Phil. 120.

If a parishioner, without an express authority, read a "notice of vestry" during divine service, it is brawling. *Dawe* v. *Williams*, 2 Add. 130.

To bring brawling within 5 and 6 Edw. 6, it must be committed in a consecrated place. *Williams* v. *Goodyer*, 2 Add. 463.

It seems unsettled whether that statute applies to brawling in a vestry, partly in and partly out of a churchyard. *Ibid.*

If two be implicated for brawling in a church, ascertaining which is most culpaple is immaterial, as it is incumbent on each of them to abstain; and each failing to abstain incurs a penalty. *Palmer* v. *Roffey*, 2 Add. 141.

Where the offence of brawling was clearly proved, and no mitigation offered, the parties were condemned *ab ingressu*, for one month, and full costs. *England* v. *Hurcomb*, 2 Add. 306.

If a churchwarden be pronounced to have committed brawling "by words" only, he will be suspended and condemned in the sum of 50*l.* *nomine expensarum*, instead of full costs. *Palmer* v. *Tijou*, 2 Add. 196.

Upon the offence of brawling being proved against a churchwarden for "smiting and laying violent hands upon certain persons in the said church, and creating a riot and disturbance in the same," he was suspended and condemned in full costs. *Palmer* v. *Roffey*, 2 Add. 141.

Though it seems a suit for brawling ought not, perhaps, to be brought in the Court of Arches by "letters of request," yet, if brought, it may be entertained. *Dawe* v. *Williams*, 2 Add. 130.

Where the offence of brawling is prosecuted before the bishop's commissary, the suit may be committed to the Arches Court by letters of request.

*Semble*—The offence of brawling was not created by stat. 5 and 6 Edw. 6, c. 4, but was previously punishable by the Ecclesiastical Courts.

If a spiritual court has no jurisdiction over a suit, the pleading an issuable plea does not preclude the award of a prohibition. *Ex parte Williams*, 4 B. & C. 313, s. c. 6 D. & R. 373, s. c. 3 Law J. K.B. 221.

## CHURCH RATE.

[See RATE.]

## CHURCHWARDENS AND OVERSEERS.

[See MANDAMUS, POOR.]

(A) APPOINTMENT.
(B) RIGHTS AND DUTIES.
(C) LIABILITIES.
(D) ACCOUNTS.

### (A) APPOINTMENT.

By a local act, 47 Geo. 3, it was enacted, that the then overseers of the parish of Woolwich should continue to be overseers for the remainder of the year, and until *two other overseers* should be appointed in the manner and at the time by law directed to succeed them. Two justices having appointed four overseers: Held, that under the 43 Eliz. c. 2, justices might still appoint four overseers, as the private act did not repeal the latter statute. *Rex* v. *Pinney*, 2 B. & C. 322, s. c. 3 D. & R. 578.

A person who has a counting-house in a town, but resides with his family at a little distance in the country, is a householder in the town, so as to be bound to serve the office of overseer in it; and, if he refuse to do it, he is liable to an indictment.

But a householder in two parishes is not bound to perform the duties of an overseer in both parishes at the same time. Having accepted the office in one parish, he has a good legal excuse for not taking it in another parish. *The King* v. *Poynder the elder*, 1 Law J. K.B. 65, s. c. 1 B. & C. 178, s. c. 2 D. & R. 258.

A person duly elected as churchwarden, may be compelled by the Ecclesiastical Court to take the oath of the office. *Cooper* v. *Allnut*, 3 Phil. 165.

### (B) Rights and Duties.

In a parish having one church, two sets of churchwardens had always been appointed for the two divisions, and each set had always made and collected from a separate rate. The out-going churchwardens of one division refused to pay over a sum of money to their successors: the Court held that the in-coming churchwardens for that division could maintain an action to recover it, without joining the churchwardens of the other division. *Astle* v. *Baldwin*, 2 Law J. K.B. 8, s. c. 2 B. & C. 271, s. c. 3 D. & R. 592.

A churchwarden who, as such, has expended money in the repairs of a church, cannot maintain an action of assumpsit for contribution against one of several parishioners who attended at a vestry meeting and signed an order for the repairs, although such parishioner gave directions as to the mode in which certain parts of the repairs should be effected. The plaintiff should have reimbursed himself by laying a rate on all the parishioners before he went out of office. *Lanchester* v. *Frewer*, 3 Law J. C.P. 40, s. c. 2 Bing. 361, s. c. 9 B. Mo. 688.

To make a body corporate, within the meaning of the 59 Geo. 3, c. 12, there must be two overseers, distinct from and besides a churchwarden or churchwardens. *Woodcock* v. *Gibson*, 4 B. & C. 462, s. c. 6 D. & R. 524.

A churchwarden cannot act as a magistrate in making an order for the removal of a person from his own parish. *The King* v. *the Inhabitants of Great Yarmouth*, 5 Law J. M.C. 73, s. c. 6 B. & C. 646.

In an action on a bond duly executed under the 54 Geo. 3, c. 170, s. 8, which had been given to the overseers of a parish to indemnify them against the expenses of an illegitimate child: Held, that it must be brought in the names of the overseers who are in office at the period of commencing the action, although they may not have been the overseers to whom the bond had been given. *Addey* v. *Woolley*, 8 Taunt. 691, s. c. 3 B. Mo. 21.

Where the spire of a church had been destroyed by lightning, a monition was issued, directing the churchwardens to repair and reinstate it. *Maynard* v. *Brand*, 3 Phil. 501.

For the purpose of leasing charity lands, under the 59 Geo. 3, churchwardens only cannot be deemed a corporate body. *Phillips* v. *Pearce*, 5 B. & C. 433, s. c. 8 D. & R. 43.

### (C) Liabilities.

A deputy overseer is not liable to pay a surgeon who attends a pauper, unless he expressly authorize the latter to do so.—*Quære*, whether the overseer is liable. *Watling* v. *Walters*, 1 C. & P. 132. [Park]

If A and B are overseers, and A borrow money for parochial purposes, B is not liable, unless he has expressly promised to repay. *Massey* v. *Knowles*, 3 Stark. 65. [Bayley]

Goods were ordered by one of two chapelwardens for the use of the chapel, and there was no evidence that the other assented to the order. On a plea in abatement for a non-joinder of the other chapelwarden, the Court held, that it was not necessary to sue them jointly. *Shaw* v. *Hislop*, 2 Law J. K.B. 168, s. c. 4 D. & R. 241.

Persons being churchwardens, overseers, and trustees of the poor, directed, in consequence of a resolution of the vestry, a prosecution to be instituted against certain persons accused of having concurred in the misapplication of parochial monies: one of them, having been compelled to pay the bill of costs of the attorney employed in the prosecution, is entitled to contribution from the others. *Wrightson* v. *Masterman*, 5 Law J. Chanc. 14.

In actions on penal statutes, the declaration must state that the act was done against the form of the statute: therefore, where in debt for penalties against an overseer, on 55 Geo. 3, c. 137, the declaration did not allege the act in question to have been committed against the form of &c., the Court arrested the judgment. *Wells* v. *Iggulden*, 3 B. & C. 186, s. c. 5 D. & R. 13.

A guardian of the poor, appointed under 22 Geo. 3, c. 83, is within the 55 Geo. 3, c. 137, s. 6, notwithstanding the former act, s. 42, imposes a penalty for the supply of the provisions for the poor by such guardians. *West* v. *Andrews*, 1 B. & C. 77.

To bring an overseer within the meaning of the 55 Geo. 3, c. 137, it must appear that he supplied the provisions with a view to profit; therefore, where he indirectly supplied a small quantity of provisions in the name of another, without profit,—it was holden, that he had committed no offence within the meaning of the act. *Skinner* v. *Buckes*, 3 B. & C. 6, s. c. 4 D. & R. 628.

By a local act of parliament, it was enacted "that the churchwardens and overseers of a parish should nominate twenty vestrymen to be, with, themselves, the governors and directors of the poor." By another local act, an addition was made to the governors, of all persons seised of land within the parish of the annual value of 80*l.*; and by a third act, it was enacted, "that the rector, churchwardens and overseers, and thirty-two vestrymen, naming them (and their successors, to be appointed as before), should be the governors:" The Court held, that this last act virtually repealed the two former acts, as to the governors; and that a person who was qualified by estate to act as a governor, and had attended parish meetings, was not liable to the penalties of 55 Geo. 3, c. 137, for supplying the poor with provisions. *Stanley* v. *Dodd*, 1 Law J. K.B. 177, s. c. 2 D. & R. 809.

Under the 55 Geo. 3, c. 137, s. 6, an acting guardian of the poor is liable to the penalties of the statute, for supplying the poor of the parish with provisions, notwithstanding there be no proof of his appointment; hence, although a parish officer is liable under the 22 Geo. 3, c. 83, s. 42, still he may be sued on the general act, 55 Geo. 3, c. 137, without regard to the former statute. In an action of debt for the penalties under the latter statute, the declaration stated, that "the defendant was a person having the providing for, management and direction of the parish as to provisions;" and it appeared that W was one of several united parishes, whose poor were jointly maintained by all the parishes in one common workhouse: Held, that the offence was well laid. And *semble*, that, in order to bring the case within the act of parliament, it is not necessary for the declaration to allege that the provisions were supplied "for the use of the workhouse." *West* v. *Andrews*, 1 B. & C. 77, s. c. 2 D. & R. 184.

In an action of trover against a succeeding overseer to recover the value of some manure, it appeared that the preceding churchwardens and overseers of a township had leased lands vested in the poor to the plaintiff, for a term of years, covenanting that it should be lawful for the plaintiff to take all manure, &c. from the poor-house, and to use it upon the demised premises, and the plaintiff covenanted to provide straw for the use of the poor: Held, that the action would not lie, though the overseer had used the manure on his own land, and the manure had accrued from the straw supplied by the plaintiff to the poor-house. *Sowden* v. *Emeley*, 3 Stark. 28. [Bayley]

(D) Accounts.

Churchwardens of a parish may keep separate accounts, provided the parish have two divisions. *Astle* v. *Thomas*, 1 C. & P. 103. [Park]

Where the late churchwardens and overseers of the poor of B, delivered to the succeeding overseers and churchwardens a piece of paper, verified before a justice, purporting to be an account of the receipts and disbursements for the year 1822, containing the gross sum of money levied and disbursed during the year, without any other document or voucher: Held to be insufficient, as the delivering a mere balance sheet of the monies received and expended, is not such an account as the 17 Geo. 2, c. 38, requires; and therefore the Court directed a mandamus to issue, commanding the justices to hear and determine a complaint, for not properly accounting pursuant to the above enactment. *Rex* v. *the Justices of Worcester*, 3 D. & R. 299.

An overseer committed for the non-delivery of his accounts, and paying over the balance, may be discharged on becoming bankrupt, and obtaining his certificate, although the bankruptcy happens before the expiration of the year for which he acted. *Rex* v. *Tucker*, 2 Chit. 286.

Where the late overseer of a parish has been committed under 50 Geo. 3, c. 49, s. 1, for not delivering up the parish books, the commitment should state what the books are. *Grover* v. *Forrester*, 2 Chit. 286.

The Court will not grant a mandamus to churchwardens to allow an inspection of their accounts, under 17 Geo. 2, c. 38, s. 1, unless the applicant states some public ground for desiring such inspection.

Sect. 14 of the act, which imposes a penalty upon churchwardens wrongfully refusing an inspection, is no answer to the application. *The King* v. *Clear*, 7 D. & R. 393, s. c. 4 B. & C. 899.

Overseers' accounts, allowed by justices, were delivered to their successors on the day on which the Easter Quarter Sessions were held, at some distance, and too late to enter an appeal at those, being the *next* Sessions: Held, that an appeal to the next *practicable* Sessions, viz. the Midsummer Sessions, was in time; and that it might be respited there to the Michaelmas Sessions. *Rex* v. *Thackwell*, 3 Law J. K.B. 139, s. c. 4 B. & C. 62, s. c. 6 D. & R. 61.

A notice of appeal against overseers' accounts, need not state that the party appealing is a party aggrieved; but it must state the grounds of objection which he is about to take to the accounts. *The King* v. *the Justices of Somerset*, 6 Law J. M.C. 116.

Where a notice of appeal against overseers' accounts, stated that the appellant intended to object to the following items or charges, and setting them out: Held insufficient, inasmuch as it ought specifically to have stated the *particular grounds* of objection as directed by the 41 Geo. 3, c. 23, s. 4. The insufficiency of the notice is not waived by the attorney on both sides signing an admission before the Sessions, respecting the items in the accounts objected to, because it ought, under section 5 of the 41 Geo. 3, c. 23, to have been signified by the respondents, or their attornies in open court. *Rex* v. *Sheard*, 2 B. & C. 856, s. c. 4 D. & R. 480: s. p. *Rex* v. *Mayall*, 3 D. & R. 383.

A magistrate, who is an inhabitant, and pays rates, has no right to vote on the determination of an appeal against an order for the allowance of the overseers' accounts. *Rex* v. *Gudridge*, 5 B. & C. 459, s. c. 8 D. & R. 217.

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## CLERGY.

The statute 57 Geo. 3, c. 99, applies to cases in which the curate has a time fixed for him to continue performing the duty, and not to clergymen who are removable at the mere will of their superiors. *Goodtitle dem. Lincoln College* v. *Lee*, 1 Law J. K.B. 165.

An indictment against a clergyman on the 21 Hen. 8, c. 13, for taking to farm lands not his glebe, was quashed on the grounds that an indictment was not named by the words of the act; and, 2d, it did not state that such person *occupied for*, &c. *Rex* v. *Bright*, 2 Ken. 274.

To a criminal proceeding against a clergyman for a violation of the 48th canon, by officiating out of his diocess, and for obstructing a licensed curate in the performance of divine service—a responsive allegation suggesting facts sufficiently probable, as to amount to a complete legal defence, or at least to render it a case for mitigated costs, was admitted to proof. *Gates* v. *Chambers*, 2 Add. 177.

A person who has endeavoured to prevent a clergyman complying with the requisites of the statutes 13 Eliz. c. 12, and 13 & 14 Car. 2, c. 4, is not at liberty to take advantage of the non-compliance. *Doe d. Watson* v. *Fletcher*, 6 Law J. K.B. 282, s. c. 8 B. & C. 25, s. c. 2 M. & R. 206.

A clergyman suspended under a proceeding by articles, for drunkenness, profaneness, &c. *Quære* as to the right of the Dean of the Arches, *per se* to depose, or deprive, in any case under the 122d canon.

The Court ordered, that, before a sentence of suspension against a minister was relaxed, a certificate of intermediate good behaviour should be produced. *Saunder* v. *Davies*, 1 Add. 291, 299.

A bishop has not, under the statute 57 Geo. 3, c. 99, the power of fixing the amount of the salary to be paid to a curate by a *resident* incumbent. *Rex* v. *the Bishop of Peterborough*, 2 Law J. K.B. 199, s. c. 3 B. & C. 47, s. c. 4 D. & R. 720.

*Semble*, An assistant curate of a resident incumbent is not entitled to the benefit of a summary process by monition, for the recovery of his stipend. *Weatherell* v. *Paris*, 2 Add. 193, n.

The perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to

maintain trespass for breaking and entering the chapel and destroying the pews. *Jones, clerk,* v. *Ellis,* 2 Y. & J. 265.

Where a custom directed *the parishioners* to elect a perpetual curate, it was holden, that an election by some of the parishioners only, the rest being excluded, was void.

Parishioners cannot legally elect a curate by *ballot. Faulkner* v. *Elgar,* 4 B. & C. 449, s. c. 6 D. & R. 517.

Where a spiritual person, by virtue of his office of chaplain of a college, held a curacy with a dwelling-house attached, and although he had ceased to hold the office of chaplain, yet retained possession of the premises: Held, not to be a curate within the meaning of the 57 Geo. 3, c. 99, s. 67, and that he might be evicted by notice to quit, and was not entitled to the three months' notice, required to be given by that act. *Goodtitle* v. *Lee,* 2 D. & R. 718.

## CLERGY, BENEFIT OF.

[See Stat. 7 and 8 Geo. 4, c. 28, s. 6, whereby benefit of clergy is abolished.]

Petit larceny is not within the meaning of the 3 Geo. 4, c. 38, s. 2, which enacts, that, "if any servant shall steal any money, &c. from his master, and shall be convicted thereof, and be entitled to benefit of clergy, he, instead of being subject to such punishment as may now by law be inflicted upon persons so convicted and entitled to benefit of clergy, may be transported for fourteen years." *Rex* v. *Ellis,* 5 B. & C. 395, s. c. 8 D. & R. 173.

Benefit of clergy, in a clergyable felony, may be obtained after sentence of death has been passed. *Rex* v. *Armstrong,* 1 R. & M. C.C.R. 21.

## CLERK OF THE PEACE.

Where an assignor assigned by deed to trustees all his income, emoluments, and profits, during his life, and which, on his continuing to hold the office of the Clerk of the Peace for Westminster, should become due to him as such clerk in respect of his office, (after deducting the salary or allowance of his deputy for the time being,) upon trust, to pay interest, which should become due to A and B on certain debts due from the assignor to them, and from time to time to render and pay the surplus and residue of the income, emoluments, and profits, to the assignor, after satisfying the trusts, such assignment held not good, effectual, nor valid in law; and under such an assignment, the trustees are not entitled to receive such income and emoluments. *Palmer* v. *Bate,* 6 B. Mo. 28, s. c. 2 B. & B. 673.

An agreement by A, an attorney, town-clerk and clerk of the peace of the borough of L, in the county of L, to pay to B a certain sum of money, and to use his endeavours to procure for him one-fourth of the prosecutions arising in the town-clerk's office,—was held to extend to all prosecutions "*arising* in the town-clerk's office," (viz. where the examinations were conducted there,) whether the criminals were tried at the borough sessions, the assizes, or county sessions. Held also, that a note written before the agreement was signed, could not be given in evidence, to shew that the parties intended it only to apply to the prosecutions tried at the borough sessions. Held also, that the defendant, as clerk of the peace of the borough, and not merely as town-clerk, could not, within stat. 22 Geo. 2, c. 46, s. 14, legally enter into such an agreement. *Hughes* v. *Statham,* 3 Law J. K.B. 179, s. c. 4 B. & C. 187, s. c. 6 D. & R. 219.

The duplicate of fines, issues, amerciaments, and forfeited recognizances, required to be delivered into the Exchequer by the clerk of the peace, under the statute 3 Geo. 4, c. 46, s. 14, must be delivered in on oath. *Ex parte Hodgson,* 2 Y. & J. 142.

## COGNOVIT.

No stamp is necessary to a cognovit which merely gives time to the defendant. *Jay* v. *Warren,* 1 C. & P. 532. [Abbott]

Where the language of a cognovit is clear, and free from all ambiguity, the Court will not permit its effect to be altered upon affidavit, that at the time of executing the cognovit other terms were agreed upon, even though those terms depended on a subsequent contingency. *Anon.* 4 Law J. K.B. 57, s. c. 7 D. & R. 375.

The rule, made in the 15 Car. 2, requiring, in cases of warrants of attorney executed by a defendant in custody, that an attorney on behalf of the latter should be present, does not apply to a cognovit. *Bayley* v. *Taylor,* 8 D. & R. 56.

The defendant, in Hilary term, gave the plaintiff a cognovit, with a defeazance, that judgment should not be entered up or execution issued until a certain day in vacation. The defendant died before the day named, and judgment was afterwards entered up by the plaintiff as of Hilary term, and execution issued thereon: Held, regular, notwithstanding the death of the defendant, before judgment actually signed. *Calvert* v. *Tomlin,* 6 Law J. C.P. 191, s. c. 5 Bing. 1. s. c. 2 M. & P. 1.

## COIN.

An indictment on 15 Geo. 2, c. 28, s. 2, for feloniously uttering counterfeit coin, after two convictions and judgments for misdemeanors on the same statute, must set out the former convictions and judgments, with *prout patet per recordam.* Judgment for misdemeanor cannot be given, on an indictment for felony, in the absence of such averment. *Rex* v. *Turner,* 1 R. & M. C.C.R. 47.

The 8 and 9 W. 3, c. 26, applies to a collar of iron for graining the edges of counterfeit money, though it is to be used in a coining press. *Rex* v. *Moore,* 2 C. & P. 235. [Burrough]

Two may be convicted on an indictment for uttering a counterfeit shilling, if it appear that one went into a shop and offered a bad shilling, and the other remained outside, having other pieces of bad money.

To support an indictment for uttering a counterfeit shilling, it is not necessary to prove the exact piece which was offered, if it appear that the prisoner uttered one and had another in his pocket, both being counterfeit, it will suffice. *Rex* v. *Skerrit,* 2 C. & P. 427. [Garrow]

In an indictment for putting off counterfeit money at a lower rate than its denomination imported, it was alleged that the prisoner put off a counterfeit sovereign and three counterfeit shillings, "for the sum of five shillings." The proof was, that the prisoner said he would let the witness have a bad sovereign at 4s., and three bad shillings at 1s.; and the witness paid for them with two good half-crowns: Held, that this proof supported the allegation. *Rex* v. *Henry Hedges*, 3 C. & P. 410. [B. Vaughan]

## CLUB.

The proprietor of a club-house, and not the members, must sue subscribers for non-payment of the subscription-money; and a rule in the club, that all persons shall pay the yearly sum for being a member, until he has given notice of his intention to discontinue, is binding. *Raggett* v. *Bishop*, 2 C. & P. 343. [Abbott]

If the rules of a club be contained in a book kept by the master of the club, and accessible to the members, every member of the club must be taken to be acquainted with them. *Raggett* v. *Musgrave*, 2 C. & P. 556. [Abbott]

## COMMITMENT.

It is not necessary that an authority to commit, should appear in a warrant of commitment. *Rex* v. *Goodhall*, 1 Ken. 122, s. c. Sayer, 129.

A warrant of commitment, under the statute 5 Geo. 3, c. 14, for fishing in a private fishery without the consent of the owner, must state, that the offence was committed in an inclosed ground. Where, therefore, a warrant of commitment stated, that a party was convicted for fishing with a rod and line in a pond or pool of water, the right of fishery therein being the private property of W C: Held, that such warrant was void, and could not be cured by a conviction, stating that the party convicted attempted to take and destroy the fish in the said pond or pool, without the consent of W C, he being the owner of the fishery within the said pond or pool, not being in any park or paddock, &c. but in *other inclosed ground*, being private property. *Wickes* v. *Clutterbuck*, 3 Law J. C.P. 67, s. c. 4 Bing. 433, s. c. 10 B. Mo. 483.

Although a warrant of commitment be manifestly defective on the face of it, the Court will not, if there has been a conviction, notice the defect until the conviction is returned into court. *Rex* v. *Taylor*, 7 D. & R. 622.

By the Smuggling Act, 6 Geo. 4, all persons convicted thereof shall be sent on board one of his Majesty's ships of war, to be examined by a surgeon, and if found unfit, shall be conveyed before two justices, who, upon proof that he has been so convicted, shall *call upon such person to pay the penalty of* 100*l.*: Held, that a warrant of commitment by the magistrates need not shew, first, that he has been examined by a surgeon; nor, secondly, that he has been called on to pay the penalty, because the justices having adjudged him to pay, and he not having paid, is the same as calling on him to pay. *Ex parte Edwards*, 8 D. & R. 115.

A warrant of commitment, under the 39 and 40 Geo. 3, c. 94, s. 3, of a person apprehended under circumstances that denote a derangement of mind, is sufficient, if it pursue the terms of the act of parliament; and it need not set forth the circumstances, or the evidence from which the committing magistrate concludes that such person is within the meaning and object of the act. *Ex parte Gourley*, 6 Law J. M.C. 89, s. c. 1 M. & R. 619.

## COMMON.

(A) Rights of the Commoners.
(B) Approvement and Inclosure.
(C) Pleadings and Evidence.

### (A) Rights of the Commoners.

Where a common was enclosed by a railed fence which contained gaps, through which the commoners' cattle might enter and return: It was held, that building a wall in lieu of the fence, and leaving only a single door, was an encroachment. *Kitchen* v. *Knight*, M'Clel. 373.

If A, a commoner, gives to B, leave and licence to build a cottage on the common, no action lies for the encroachment, though no sufficient common be left, and the licence be only by parol. *Harvey* v. *Reynolds*, 1 C. & P. 141. [Park]

A plea of justification to an action of trespass, that the trespass was committed in order to abate a surcharge, which precluded the defendant from enjoying his right of common as he was entitled to do: Holden, an insufficient answer to the action, inasmuch as he was bound to seek his remedy at law. *Cooper* v. *Marshall*, 2 Ken. 1. s. c. 1 Burr. 259, 2 Wils. 51.

Where there have been two manors in one lord, it seems, that one who claims under him as lord of one of the manors, cannot prescribe for a right of common over the other.

But there is no legal objection to a tenant of land in one of the manors having, in respect of such land, a right of common *levant et couchant*, over land in the adjoining manor. *Sefton* v. *Court*, 4 Law J. K.B. 319, s. c. 5 B. & C. 917, s. c. 8 D. & R. 741.

### (B) Approvement and Inclosure.

There was a common on which the inhabitants of the parishes of A and B had, from time immemorial, intercommoned, and those of B had always repaired part of a road across it. Under an act of parliament to inclose the lands in A, a part F of the common was set off for the inhabitants of B, which, under an act to inclose the lands in B, was allotted amongst them. The church-rates, poor-rates, land-tax, for the part F, after the inclosure, were paid by the inhabitants of B. A question arose, whether the part F was not within the parish of A; because, by reputation, the whole of the common had been considered as being in A, and its inhabitants had, in their perambulations, taken it in as belonging to them, and it was also described in old terriers as being in A. The jury found that the part F was in the parish B, and the Court refused to grant a new trial; observing, that perambulations were no evidence, unless the adjoining parish had notice of them. *Warren* v. *Shuttleworth*, 1 Law J. K.B. 214.

A lord of the manor had been accustomed to take stones and gravel out of some commonable hills, without stint, from time immemorial. That place, and some adjoining lands in the same manor, were inclosed. The commissioners were directed by the act to award to him a piece of land, equal in value to his interest therein as such lord; but there was a reservation of all rents, services, courts, &c., and other rights whatsoever to him, as lord of the manor, appertaining. The commissioners awarded a piece of land to the lord, and directed that the hills should be still kept as common of pasture for the commoners: The Court held, that the lord could still get stone without stint. *Place* v. *Jackson*, 2 Law J. K.B. 156, s. c. 4 D. & R. 318.

Whether the lord may, in general, make grants of the waste upon which the copyholders have a right of common of turbary, provided he leave sufficient for the commoners—*quære*.

A special custom that he may, leaving sufficient for the commoners, will be good; and *semble*, that a special custom that he may without limit, would be bad.

A commoner may destroy fences erected upon the common by the lord or his grantee; and therefore, the fact of a commoner destroying the whole of the fences which have been erected, when he might have entered without throwing down any part thereof, is not evidence that he entered for other purposes than to use his common of pasture. *Arlett* v. *Ellis*, 5 Law J. K.B. 391, s. c. 7 B. & C. 346.

(C) Pleadings and Evidence.

The plaintiff claimed a right of common *for all commonable cattle*, and proved that he turned on all the commonable cattle he had, but that he never kept any sheep; other commoners, who had sheep, had however turned them on: this is evidence in support of the right laid, and should be left to the jury. *Manifold* v. *Pennington*, 3 Law J. K.B. 182, s. c. 4 B. & C. 161, s. c. 6 D. & R. 291.

Where a declaration for disturbance of common, stated a right of common for all *cattle levant and couchant*, it was holden to be supported, by shewing a lease to plaintiff's testator for years, determinable on lives, of a farm, &c., together *with reasonable common of pasture*; and that this right was not destroyed by a subsequent conveyance to the plaintiff in fee of the farm, and common of pasture thereto belonging and appertaining; for this operated as a new grant of the common. *Doidge* v. *Carpenter*, 6 M. & S. 17.

If, in answer to a plea of right of common, a person relies upon a previous inclosure of the *locus in quo*, with the approbation of the owner in fee of the soil, *he* must state, in *his* pleading, that sufficient common *was* left for the commoners, notwithstanding the inclosure; and it is not incumbent on the commoners to state, in their pleading, that sufficient common was *not* left. *Rogers* v. *Wynne*, 4 Law J. K.B. 75, s. c. 7 D. & R. 521.

To an action for a trespass in a close, the defendant justified the entering, that it was parcel of a common. The plaintiff replied, that it was called Burgey Cleave-gardens, which had been inclosed for thirty years. The defendant rejoined, denying it. The jury found, that the part of Burgey Cleave-gardens, in which the trespass had been committed, had not been inclosed thirty years, and found a verdict for the defendant: The Court held, that the verdict was correct. *Richards* v. *Peake*, 2 Law J. K.B. 189, s. c. 2 B. & C. 918, s. c. 4 D. & R. 572.

Freehold tenants of a lordship, having rights of common for their cattle *levant and couchant*, and common of turbary and estovers, the lord approved parts of the common, and granted them to other persons; the tenants prostrated the fences; upon which actions of trespass were brought against them, and they filed a bill, in the nature of a bill of peace, against the lord and his grantees, to be quieted in the enjoyment of their commonable rights. A general demurrer was overruled, the Court considering it no objection to the bill, that each defendant had a right to make a separate defence, provided that right was a general one; and that the Court could not, before answer, judge of the nature of the right. *Powell* v. *the Earl of Powis*, 1 Y. & J. 159.

Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c., and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded, that the plaintiff's close was parcel of the manor of C, and that a certain messuage, and four acres of land was parcel and a customary tenement of that manor; and that there is, and from time whereof, &c., there hath been, a custom within the manor, that the customary tenant of that tenement shall have common of pasture upon the plaintiff's close; that J S, being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c., and put his cattle in; and, because the hedges and fences had been improperly erected, defendant threw them down. The plaintiff, in his replication, took issue upon the custom, and new assigned that the defendant entered for other purposes than those mentioned in the plea: Held, first, that upon the issue joined upon the replication, the plaintiff was at liberty to prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to him of the *locus in quo* under such custom, and that it was not necessary that that custom should be specially replied.

Held, secondly, that the fact of the defendant's having entered the plaintiff's close, and thrown down the whole of the fences which he had erected, when he might have entered on the close without throwing down any part of the fences, was held not to be evidence that he entered for other purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plaintiff on the new assignment. *Arlett* v. *Ellis*, 5 Law J. K.B. 391, s. c. 7 B. & C. 346.

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## COMPANY.

[See Corporation.]

(A) In general.
(B) Rights, Powers, and Duties.
(C) Liabilities of Shareholders, and other Persons.
(D) Suits and Actions.

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### (A) In general.

A proviso for the dissolution of a company in a particular manner, does not exclude the jurisdiction of the Court to decree a dissolution in case of misconduct.

A contract, which the company might claim, may be rejected by them; and then, all the members except one may form another company, for the purpose of taking the benefit of the contract, which they themselves, on behalf of the other company, had rejected.

Acting as a corporate body, not being such, is an offence at common law.

*Quære*—Whether acting as a corporate body is prohibited *per se*, by the 6 Geo. 1, c. 18, s. 18.

*Semble*—That to form a company, without any intention of remaining in it, and with the view of raising the shares to a premium, and then withdrawing from the speculation, is an offence indictable at common law. *Kinder* v. *Taylor*, 3 Law J. Chanc. 69.

Where a scheme was projected for raising money by small subscriptions, to be laid out at interest, and to enure for the benefit of the subscribers, by survivorship; the subscribers to be governed by rules and regulations, to be made by the directors, and at the end of the year, transferrable shares were to be issued: It was holden not to be within the Bubble Act, 6 Geo. 1, c. 18. *Nockels* v. *Crosby*, 3 B. & C. 814, s. c. 5 D. & R. 751. [See 6 Geo. 4, c. 91, by which 6 Geo. 1. is in fact repealed.]

### (B) Rights, Powers, and Duties.

Where an act of parliament creates a public company; giving them certain powers, and imposing on them certain public duties; it impliedly gives them the means of performing those duties; though the obtaining of those means may conflict with the rights of private individuals. In such a case, the company must make compensation to the individuals.

Accordingly, a public company, in the exercise of their powers, had carried on works, which, in the course of time, occasioned a public nuisance. On being called upon by mandamus to remove the nuisance, they urged that they could not do so without obtaining land adjoining to the place in question, in order to make sewers beneath; and that they had no power to obtain the land: But the Court held, that they must, by whatever means, remove the nuisance; and they intimated an opinion that the company might lawfully obtain the use of the land to make sewers beneath, on making adequate compensation; though the land might belong to private individuals; and though the company had no longer any express power by their act, to obtain the use of the adjoining lands. *Rex v. the Bristol Dock Company*, 5 Law J. M.C. 51, s. c. 6 B. & C. 181.

Where it was provided, by the deed of settlement of a joint-stock company, that the directors should meet weekly at the office of the company at such day and hour as they should from time to time agree upon: Held, that, although there was no other meeting during the week, one which was not the result of agreement or appointment at a previous meeting, was not valid under the deed. *Moore* v. *Hammond*, 5 Law J. K.B. 267, s. c. 6 B. & C. 456.

### (C) Liabilities of Shareholders and other Persons.

Persons who merely sanction the invention of a scheme by forming a committee at the request of the patentee, who acts himself as secretary, are not liable to an action at his suit for his services as secretary. *Parkin* v. *Fry*, 2 C. & P. 311. [Abbott]

In general, the mere circumstance of a person applying for shares in a company not incorporated, and paying a deposit on those shares, does not make him a subscriber to the company, so as to render him answerable for calls made upon him after the company has been incorporated. *The Thames Tunnel Company* v. *Sheldon*, 5 Law J. K.B. 157, s. c. 6 B. & C. 341.

The plaintiff's name was entered in a book with those of several other subscribers to a projected joint stock company; the plaintiff received certain scrip receipts, but sold them before the deed for the formation of the company was executed, and he was not a party to that deed: Held, nevertheless, that he was a partner in the concern. *Perring* v. *Hone*, 5 Law J. C.P. 33, s. c. 4 Bing. 28.

Where, in an action for goods supplied for the purpose of working a mine, it appeared, that the defendant had paid money for certain shares, and received a certificate that she was a proprietor of those shares; and that she had acknowledged that she was a shareholder; but no assignment of any interest in the mine had been made to her: Held, that the action could not be maintained. *Vice* v. *Lady Anson*, 6 Law J. K.B. 24, s. c. 7 B. & C. 409, s. c. 1 M. & R. 113.

Where the prospectus of a company required the members to execute a deed, it was holden, that a person who acted generally as a director, though there was no evidence to connect him with the particular order in question, was liable to be sued as a partner, whether the deed was executed or not. *Maudslay* v. *Le Blanc*, 2 C. & P. 409, n. [Bayley]

Any member of a company not regularly instituted, is liable to pay the demands upon it. *Keasley* v. *Codd*, 2 C. & P. 408, n. [Abbott]

A person who has formed one of a company continues liable until he has ceased to be connected with such association by the assent of the other members. *Perring* v. *Hone*, 2 C. & P. 401. [Best]

On the formation of a company for the purpose of making a railway, it was agreed that 15,000 shares of 50*l.* each should be raised, and that application should be made to parliament—the company after fourteen months dissolved, no eligible line of road being found: Held, that the 6 Geo. 1, c. 18, did not apply to this company, and therefore that a shareholder might recover back his money: Held also, that a party who had sold shares, without having made a transfer as directed by the constitution of the company, was liable to be sued by the vendee for money paid, on the ground that the consideration had failed. *Kempson* v. *Saunders*, 2 C. & P. 366. [Best]

A, B, and C, directors of a projected joint stock company, contract in their own names with D, a shareholder, for the purchase of a mine; and after the formation of the company, enter into further agreements with D, respecting the purchase, with a clause exempting them from personal liability upon certain parts of the contract: Held, that A, B, and C may

be sued by D, upon those parts of the contract to which the exemption does not apply. *Attwood* v. *Small*, 6 Law J. K.B. 111, s. c. 7 B. & C. 390, s. c. 1 M. & R. 246.

The defendants, as directors of a mining company, having purchased mines, covenanted to pay the purchase-money, by instalments, within twelve months, out of the monies to be raised by the company; with a proviso, that, in case there should not have been received by the bankers or the directors of the company deposits from the shareholders sufficient to pay the balance due on account of the purchase-money at the times mentioned, the directors should be allowed a further time of six months to pay it in: Held, that the directors were by this covenant rendered personally responsible for the balance, at the end of the six months further time. *Hancock* v. *Hodgson*, 5 Law J. C.P. 170, s. c. 4 Bing. 269.

If persons conspire to fabricate shares in addition to the limited number of which a joint stock company, according to its rules, consists, in order to sell them as good shares, they may be indicted for it, notwithstanding any imperfection in the original formation of the company.

Whether scrip receipts given by the bankers of such a company, in return for sums paid as deposits, can be properly described as "shares," in the indictment—*quære*. *Rex* v. *Mott*, 2 C. & P. 521. [Abbott]

Where a person, who is agent to a partnership company, and also a member of the company, draws a bill in his character of agent, and indorses it over to the company, without describing himself as agent, he yet cannot be sued at law by the company for the amount of the bill.

And *semble*, that where a person, being the member of a partnership company, receives money on their account, he cannot be sued at law for the same; although he received it in a character distinct from that of his being such a member. *Teague* v. *Hubbard*, 6 Law J. K.B. 326, s. c. 8 B. & C. 345.

### (D) SUITS AND ACTIONS.

A bill for the specific performance of an agreement for a lease, entered into by the trustees of a numerous company, cannot be sustained unless all the members join. *Douglas* v. *Horsefall*, 2 S. & S. 184.

Therefore, a bill by three members of a trading company, against one of the committee appointed for its management, is unavailable, since it ought to have been by all the partners as well as the other members of the committee. *Baldwin* v. *Lawrence*, 2 S. & S. 18.

A bill having been filed by a shareholder in a joint stock company, against the other shareholders, praying a dissolution of the company; fourteen of the directors, appearing by the company's solicitor, filed fourteen separate answers, the same in substance, and nearly the same in words; and with the same long schedules annexed to each. The Vice-Chancellor directed a reference to the Master to inquire into the necessity or expediency of filing these separate answers: but the Lord Chancellor held, that the Court had no authority to direct such a reference, consistently with its practice, and discharged the order.

Observations of the Lord Chancellor on the constitution of joint stock companies, with respect to legal proceedings by or against them. *Van Sandau* v. *Moore*, 4 Law J. Chanc. 177, s. c. 1 Russ. 441, s. c. 2 S. & S. 509.

Several persons associated themselves together for the purpose of forming a company, to be called The Equitable Loan Bank, to lend money, on the deposit of goods, at a much less rate of profit than the pawnbrokers took. Before an act of parliament was obtained, a prospectus was circulated, setting forth the names of the directors, &c., and transferable shares were sent into the market. The Court held, that an action could not be maintained by a broker for money paid for the use of another person, in buying shares for him, at his request, as the contract was altogether void, being in furtherance of an illegal transaction. *Josephs* v. *Pebrer*, 3 Law J. K.B 102, s. c. 3 B. & C. 639, s. c. 5 D. & R. 542, s. c. 1 C. & P. 341, 507.

Where a joint stock company is represented as about to be formed, not with a fair intention to establish a *bonâ fide* company, but in order to enable the directors to make a profit for themselves,—any subscriber may sustain a bill against them, for the recovery of the sums which he has paid. *Green* v. *Bennett*, 5 Law J. Chanc. 6, s. c. 1 Sim. 45.

Two or more individual holders of shares in a joint stock company, not conducted according to the prospectus, have an equity to file a bill against the directors to recover the instalments paid by them. *Blair* v. *Agar*, 5 Law J. Chanc. 1, s. c. 1 Sim. 37.

Some shareholders in a company may sue, on behalf of themselves and the other shareholders, for the purpose of compelling directors and agents of the company to refund monies fraudulently withdrawn by them from the stock of the company, and applied to their own use; and no objection lies to such a bill either for want of equity or for want of parties. *Hitchins* v. *Congreve*, 6 Law J. Chanc. 167.

Certain persons, as directors of an intended joint stock company, agreed to purchase mines. Articles of agreement were entered into, by which the purchasers agreed to pay to the vendors the purchase-money by instalments; and it was provided, that if the directors should not have received the deposits or instalments from the shareholders in time to pay the purchase-money, they should be allowed six months further time. A bill was filed by some of the directors to restrain the vendors from suing for the purchase-money; alleging that the plaintiffs only intended to become liable as directors, and to the extent of funds received by them; and not to incur any personal responsibility; and that they had no funds as directors. A demurrer was allowed.

*Quære*—Whether in a suit by directors of a joint stock company all the shareholders must not be made parties. It would appear that they must. *Hodgson* v. *Hancock*, 1 Y. & J. 317.

An attorney, who has continued a shareholder in a joint stock company up to the date of its dissolution, cannot maintain an action for work and labour in the defending of actions, commenced subsequently to that dissolution, against other shareholders, in respect of partnership transactions, although he has been specially employed by those shareholders for that purpose. *Milburn* v. *Codd*, 6 Law J. K.B. 52, s. c. 7 B. & C. 419, s. c. 1 M. & R. 238.

The plaintiff, a shareholder in a joint stock company, drew two bills on the directors for goods sup-

plied for the use of the company, which bills were accepted by the secretary per procuration of the directors;—on proof that the secretary had directions to accept bills drawn by the plaintiff's brother—Held, that the plaintiff could not recover as against the directors, on the ground, that the secretary had no authority to accept the bills drawn by the plaintiff; and that as he was a shareholder, he must be considered as a partner in the concern, and as such could not sue his co-partners. *Neale* v. *Turton*, 5 Law J. C.P. 133, s. c. 4 Bing. 149.

## COLONY.

Where a colonel of a regiment, on full pay, was appointed civil superintendent of a colony, and commander of the armed forces,—it was holden, that such appointment gave him the command of all the King's troops there, and that he did not lose that right by the disbandment of his own regiment. *Bradley* v. *Arthur*, 4 B. & C. 292, s. c. 6 D. & R. 413.

## COMPENSATION.

Quit rents, being incidents of tenure, are proper subjects of compensation.

Rent charges, which are not incidents of tenure, when small, the Court has permitted to be subjects of compensation,—*sed quære*. *Esdale* v. *Stephenson*, 1 S. & S. 122.

Surveyors, appointed by consent to make a partition of certain lands between several tenants in common, allot by mistake to one tenant in common, as part of her share, lands belonging to her by a different title: Held, that she may sustain a bill against another of the tenants in common, for a pecuniary compensation in respect of this mistake. *Dacre* v. *Gorges*, 4 Law J. Chanc. 50, s. c. 2 S. & S. 454.

A court of equity may grant compensation, that power being auxiliary to its authority to enforce contracts. *Newham* v. *May*, M'Clel. 511.

The term *compensation* is not very accurately applied to any restitution that falls short of a fair and full indemnification. *Dundee*, 1 *Hag*. 121.

## COMPOUNDING AND COMPROMISE.

It is not illegal to give securities to prevent opposition to a private bill in parliament. *Vauxhall Bridge Company* v. *Spencer*, 1 Jac. 64.

Though, generally speaking, the policy of the law will not permit the compromise of indictments; yet assaults are considered to be so much in the nature of private injuries, rather than of public offences, that it is allowed to compromise indictments for assaults.—*Semble*, That the doctrine, that it is illegal to compromise indictments, is not confined to indictments for felonies. *Elworthy* v. *Bird*, 3 Law J. Chanc. 190, s. c. 2 S. & S. 372.

A court of equity will not enforce an agreement against a party, who was induced to enter into it, in order to save his sons from a threatened prosecution for felony. *Dewar* v. *Elliott*, 2 Law J. Chanc. 178.

*Semble*—that it cannot be made one of the terms of the compromising of a suit, that the solicitor's bill should be paid without taxation. *Bains* v. *Paver*, 1 Jac. 305.

A *bonâ fide* compromise by a person fully acquainted with the nature and extent of his liability, is legal, and a sufficient consideration for an agreement. *Atwood* v. —— 1 Russ. 353.

A transaction, in which an alleged claim is described, not as a matter of doubt, but as an undisputed demand, cannot be treated as a family compromise. *Harvey* v. *Cooke*, 6 Law J. Chanc. 84.

## CONSANGUINITY.

Uncles, nephews and nieces take equally under a decree of distribution. *Mourgue* v. *Buissieres*, 1 Ken. 296.

The grand-child of the first cousin of a testator is within the degree of a second cousin. *Silcox* v. *Bell*, 1 Law J. Chanc. 137.

## CONSPIRACY.

If A and B are jointly concerned in a conspiracy, A, on an indictment against them for such an offence may give in evidence, letters which passed from B to him, shewing that he has been B's dupe, and that he has not participated in the fraud. *Rex* v. *Whitehead*, 1 C. & P. 67. [Best]

The defendants, being indicted for conspiring falsely to indict Josiah Taylor, with intent to extort money, were found guilty of conspiring to indict with that intent; but not *falsely* conspiring, &c. as laid: Held, this was a verdict on which the judgment of the Court might be grounded. *Rex* v. *Hollingberry*, 3 Law J. K.B. 226, s. c. 4 B. & C. 329, s. c. 6 D. & R. 346.

A, B, C, and D, were indicted for a conspiracy, A and B were tried, C and D did not appear; A was acquitted, B was found guilty of conspiring with C. On motion to arrest the judgment against B, or to suspend it until C should be tried,—it was holden conclusive as to B, without reference to what the verdict might be as to C. *Rex* v. *Cooke*, 5 B. & C. 538, s. c. 7 D. & R. 673.

To sustain an indictment for conspiring by false oath, &c. the ecclesiastical court will, on prayer, order its officer to attend with the papers in the cause. *Westmeath* v. *Westmeath*, 2 Add. 380.

## CONSTABLE.

(A) Appointment.
(B) Power, Duty, and Liability.
(C) Allowance to.
(D) Actions against.

### (A) Appointment.

No person not an inhabitant is liable to serve the office of constable. *Rex* v. *Adlard*, 4 B. & C. 772, s. c. 7 D. & R. 340.

(B) POWER, DUTY, AND LIABILITY.

Several felonies had been committed in a neighbourhood. Part of the stolen goods were found concealed in a hay-rick, and some were suspected to be in a certain dwelling-house. A warrant to search that house having been granted, a constable and his assistants being placed near it, and about half a mile from the hay-rick, watched it.

In the night, between the hours of twelve and three, a person was seen coming out of the house. They apprehended him and took him to a dungeon. *Three days* afterwards the constable handcuffed him, and took him before a magistrate, who remanded him to another time for examination, when he was discharged.

To an action for false imprisonment, and handcuffing him, the constable and his assistants pleaded, that they imprisoned him for those three days in order to give time to the prosecutor to obtain the necessary evidence, as the same was a reasonable time for taking him before a magistrate. No excuse was given for putting on the handcuffs.

The Court held, that a constable could not keep a person for three days before he took him to a magistrate: and that handcuffs could not be put on, unless the person had attempted to escape, or there was reasonable ground to think that he would endeavour to escape. *Wright* v. *Court*, 4 Law J. K.B. 17, s. c. 4 B. & C. 596, s. c. 6 D. & R. 623.

Warrants addressed to *peace officers in their official character*, under 6 Geo. 4, c. 18, are to be received in the same light as those formally *directed to them by name*. *Gimbert* v. *Coyney*, 1 M. & Y. 469.

When a warrant is specially directed to A, and the constable of a particular place, the latter may, out of his own jurisdiction, act under it, for it is done in aid of A. *Weatherall* v. *Watson*, 1 Law J. K.B. 2.

If a party stands in the way, in order to hinder a constable from doing his duty, he renders himself liable to be taken into custody, though the constable is not justified in committing a battery. *Levy* v. *Edwards*, 1 C. & P. 40. [Burrough]

If a reasonable charge of felony be made against a person who is given in charge to a constable, the constable is bound to take him, and will be justified in so doing, although the charge may turn out to be unfounded. *Cowles* v. *Dunbar*, 2 C. & P. 565. [Abbott]

*Semble*—That where a distress of goods is made by a constable under a magistrate's warrant, but the amount of the distress is afterwards paid, the constable is not bound to restore the goods until a demand made by the owner; nor is he answerable for any injury which may happen to the goods subsequently to the payment of the money. *Hutchins* v. *Morris*, 5 Law J. M.C. 144, s. c. 6 B. & C. 646.

By common law, a constable, without a warrant, and where no felony has been charged or committed, has authority to apprehend and detain a party who, he has reasonable ground to suspect, has committed, *or intends to commit* a felony. *Beckwith* v. *Philby*, 5 Law J. M.C. 132, s. c. 6 B. & C. 635.

A constable, acting under a magistrate's warrant, is protected by it only so long as he confines himself to the orders given by that warrant. If, for instance, when acting under a search warrant, he take goods not mentioned in the warrant, he will be liable to an action.

But, *semble*, that if the goods not mentioned in the warrant were necessary to be seized, in order to assist in proof of the identity of the others, he would be justified in seizing them. *Crozier* v. *Cundey*, 5 Law J. M.C. 50, s. c. 6 B. & C. 232.

The presentment of a constable for any offence, whether at the Assizes or Quarter Sessions, must be made upon oath, before the grand jury. *Rex* v. *the Justices of Somersetshire*, 6 Law J. M.C. 23, s. c. 7 B. & C. 514, s. c. 1 M. & R. 272.

(C) ALLOWANCE TO.

The statute 41 Geo. 3, c. 78, s. 2, which empowers two justices to make an allowance to high-constables for extraordinary expenses incurred by them in cases of tumult, riot, or felony, extends to payments which they may have made in such cases to special and other constables. *Rex* v. *the Justices of Leicester*, 5 Law J. M.C. 95, s. c. 7 B. & C. 6.

(D) ACTIONS AGAINST.

A constable delivering a copy of his warrant to the party grieved, pursuant to the 24 Geo. 2, c. 44, is not thereby discharged, unless the party has a right of action against the magistrate under whom the constable acted. *Sly* v. *Stevenson*, 2 C. & P. 464. [Best]

Where constables were acquitted, on the ground that the venue was laid in an improper county, and the other defendant pleaded that the constables were acting *in his aid* and not he *in theirs*,—it was holden that he was not entitled to any protection. *Bond* v. *Rust*, 2 C. & P. 342. [Abbott]

## CONSUL.

Where a party acts between one individual and another, though he acts as consul, yet he may receive fees, but not where he acts for his government. *De Lema* v. *Haldimand*, 1 C. & P. 183, s. c. 1 R. & M. 45. [Abbott]

## CONTEMPT.

In cases of contempt, the parties are to be personally examined. *Farquharson* v. *Balfour*, 1 Turn. 197.

A party in a prison for a contempt is not within the jurisdiction of the ecclesiastical judge, although he may have been the judge who pronounced him in contempt. *Barles* v. *Barles*, 1 Add. 301.

Costs must be tendered by a defendant to clear his contempt, and if they are refused, he must obtain an order for discharging the contempt. *Green* v. *Thompson*, 1 S. & S. 121.

In the absence of a breach of good faith, the Court will not interfere to relieve parties from process of contempt, upon the terms of their paying the costs. *Heatan* v. *Tipton*, 1 Russ. 323.

Courts of equity always act indirectly by process of contempt, except where the decision is upon a title to land, in which excepted case they decree possession, and direct the sheriff to execute the decree. *E. I. C.* v. *Kynaston*, 3 Bligh, 165.

## CONTRACT.

(A) CONSTRUCTION.
(a) *In general.*
(b) *Condition precedent.*
(c) *Penalty, or Liquidated Damages.*
(B) WHEN VALID, OR ILLEGAL.
(C) STAMP.
(D) COPY OF.
(E) PERFORMANCE.
(F) WHEN ENFORCED OR RELIEVED AGAINST IN EQUITY.
(G) ACTION ON.
(a) *Pleadings.*
(b) *Evidence.*

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### (A) CONSTRUCTION.

#### (a) *In general.*

In ambiguous contracts, the domicile of the parties, the place of execution, the purpose, and the various provisions and expressions of the instrument, are material to be considered in the construction. *Lansdowne* v. *Lansdowne*, 2 Bligh, 66.

If a word has acquired a particular meaning in a certain trade, that meaning will be applied to it in construing a written contract respecting that trade; but, that the word has acquired that particular meaning must be distinctly proved. *Taylor* v. *Briggs*, 2 C. & P. 525. [Abbott]

The Court will not, in construing an agreement of sale, intend that a party meant to incur the risk of a loss, without a chance of gain, unless there are express words to that effect. *Hoffman* v. *Heyman*, 1 Law J. K.B. 3, s.c. 2 D. & R. 74, s.c. 1 B. & C. 7.

In the case of a reciprocal contract, a party cannot be admitted to say that he has no consideration for a sacrifice which he binds himself to make. When a tenant is making such a bargain, he provides in the other conditions of the lease a consideration for what he gives up to the landlord. *Roxburgh* v. *Roberton*, 2 Bligh, 166.

The plaintiffs undertook to insure goods for the defendants "with such names as should be to their satisfaction." In an action for the premiums paid—Held, that it was not necessary for the plaintiffs to prove that the names of the underwriters had been submitted to, or approved by, the defendants. 6 Law J. C.P. 155, s. c. 4 Bing. 665, s. c. 1 M. & P. 656.

Where letters are produced to prove an agreement, the answer to the written proposal must unequivocally and expressly accept the terms proposed, without the introduction of new matter. *Holland* v. *Eyre*, 2 S. & S. 194.

Where the conclusion of a letter containing the terms of a contract was—"It is desirable that I have your answer per return, as I can have a vessel to charter at the price stated, who will not wait any longer for my answer; and failing him, I fear I should not be able to get another:" Held, that these words amounted to a request, and not to any part of a contract. *Johnson* v. *King*, 2 Bing. 270.

The defendant sent the plaintiff a written proposal for the purchase of the lease of his house, requiring (amongst other things) that possession should be given "on the 25th of July," and a definitive answer within six weeks. The plaintiff in answer said that he accepted the proposal, and would give possession "on the 1st of August next." Before the expiration of the six weeks mentioned in the defendant's offer, he withdrew it, and the plaintiff then wrote to him again, stating that he was willing to give him possession according to the terms of his proposal: Held, that, as the plaintiff had not accepted the defendant's offer in terms before the latter had retracted it, the agreement was not completed, and the defendant was at liberty to renounce it. *Routledge* v. *Grant*, 6 Law J. C.P. 166, s.c. 4 Bing. 653, s.c. 1 M. & P. 717.

A performer who is called on to resume, in consequence of the illness of another, a part in which by previous performances she has acquired celebrity, is entitled to reasonable notice previous to the time of performance, such notice to be proportioned to the reputation at stake. *Graddon* v. *Price*, 2 C. & P. 610. [Best]

If there be a written agreement between landlord and tenant, that for certain premises the tenant shall pay 170*l.* a-year, and afterwards an arrangement is made by parol that 30*l.* a-year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable under it; and therefore an allegation is correct which states it to be 170*l.* *Hilton* v. *Goodhind*, 2 C. & P. 591. [Best]

A proposed to B to give him a certain sum for a *thirty-one years' lease* of a house, with possession on the *25th July*, and a definitive answer was to be given within six weeks. B about three weeks after the proposal wrote that he accepted it, and would give possession on the *1st of August*. A in a few days wrote, withdrawing his proposal. Some time after this, and just before the end of the six weeks, B wrote that it was by mistake he had offered possession on the 1st of August, and stating that he was ready to give it according to the proposal:—Held, at Nisi Prius, that the letter of B, offering possession in August, was not an acceptance of A's proposal, and that A had a right afterwards to retract his offer, and having done so, the second letter of B amending the offer of possession, was too late. *Routledge* v. *Grant*, 3 C. & P. 267. [Best]

If one undertake to furnish a new history of a country, this is not performed by his furnishing a book, which is a translation of an entire previously-existing history, with his own continuations and some additions. *Paton* v. *Duncan*, 3 C. & P. 336. [Tenterden]

Time, from the nature of the property sold, may be of the essence of the contract. *Withy* v. *Cottle*, 1 Law J. Chanc. 117, s.c. 1 Turn. 79.

In bargains for the purchase of stock, time is of the essence of the contract. *Doloret* v. *Rothschild*, 2 Law J. Chanc. 125, s.c. 1 S. & S. 590.

In a contract for the purchase of timber, time is of the essence of the contract; and if, by difficulties improperly raised by the vendor, the timber is prevented from being felled and carried away at the time limited by the agreement, the Court will not afterwards enforce the performance of the contract. *Arkwright* v. *Stoveld*, 3 Law J. Chanc. 49.

A party agreed in writing to purchase the mail coach concern between Derby and Leicester, pro-

vided the Postmaster consented. The party afterwards took possession of it with the risk of obtaining that consent: The Court held, that the proviso had been waived. *Mansfield* v. *Cheslyn*, 2 Law J. K.B. 85.

If G and B claim a chattel, and G says, if B will make an affidavit, that the property is his, he will relinquish all his right thereto, and B makes an affidavit to that effect—*Semble*, that it is not conclusive against G's right of property. *Gornet* v. *Ball*, 3 Stark. 160. [Abbott]

Where a father signs an agreement to the following effect—that "I agree, on behalf of my daughter, M A P, that she shall perform, during the remainder of this season, for a certain sum; and I also consent, that she shall enter into articles with M, if he requires her performance for the three following seasons:" Held, that an action lies against the father, for non-performance of the first part of the agreement, but not for the second, it being merely a consent. *Morris* v. *Paton* 1 C. & P. 189. [Abbott]

A debt arising upon a contract made in England must be considered as an English contract, though the services are to be performed in Scotland. Therefore, where the Admiralty Court in Scotland gave interest on a contract which did not carry interest in England,—it was holden not to be recoverable. *Arnott* v. *Redfern*, 2 C. & P. 88. [Best]

A court of equity will reform an instrument by making it conformable to the intention of the parties, even though the person seeking this relief should be the solicitor by whom the instrument was drawn. *Ball* v. *Storie*, 1 Law J. Chanc. 214, s. c. 1 S. & S. 210.

### (*b*) *Condition precedent.*

Under an agreement "for the delivery of goods *on arrival*, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for the delivery by the day named is a condition precedent. *Alewyn* v. *Pryor*, 1 R. & M. 406. [Abbott]

The giving a receipt, by the commander of a vessel to the shipper, for goods brought to him for shipment, does not affect the right of the consignee to sue the shipowner for injury to the goods, accruing between the giving such receipt and the shipment. Where goods were to be paid for within three months after their arrival at a foreign port, the arrival is not a condition precedent, if the order for them contains directions for them to be dispatched after insurance is effected: for the insurance is for the protection of the consignee. *Fragano* v. *Long*, 3 Law J. K.B. 177, s. c. 4 B. & C. 219, s. c. 6 D. & R. 283.

By an agreement on the completion of work, a certificate of approval was to be produced, signed by a third person—it appeared on the trial of an action on such agreement, that the bill of charges had been referred to such third person, who signed the following memorandum:—"On examining the annexed bill, and considering the circumstances, I am of opinion that a reduction should be made of 12*l.* 11*s.* 6*d.* A B." A B being called as a witness, stated that he disapproved of the work, and would not have signed any certificate of approval. The jury found for the plaintiff, and the Court would not disturb the verdict. *De Ville* v. *Arnold*, 10 Price, 21.

Where a canal company are bound by act of parliament to keep the banks of the canal in good and sufficient repair, in an action to recover damages against the owner of adjoining land for digging pits, whereby a portion of the bank fell in, it is necessary for the company to shew the performance of the condition precedent, that the bank was in that efficient state of repair required by the act, when the alleged cause of action accrued. *Staffordshire Canal Company* v. *Hallen*, 5 Law J. K.B. 154, s. c. 6 B. & C. 317.

The terms of a contract being as follows: "1st April 1826, sold W P one bale of sponge, at 10*s.* a pound, and bought of them yellow ochre at 5*l.* a ton, to be delivered on or before the 24th inst." Held, that the delivery of the ochre by the 24th to the extent of the price of the sponge, was a condition precedent to the delivery of the sponge. *Parker* v. *Rawlings*, 5 Law J. C.P. 174, s. c. 4 Bing. 280.

### (*c*) *Penalty or Liquidated Damages.*

The Court, in determining whether a nominal sum made payable on the breach of the conditions of the contract, be in the nature of a penalty or of liquidated damages, will be governed by the intention of the parties; but if that be doubtful, by reason and equity, generally, as it appears, inclining to consider such sum as a penalty. *Davis* v. *Penton*, 5 Law J. K.B. 112, s. c. 6 B. & C. 216.

Where an agreement stated, that if either party did not fulfil all and every part of its stipulations, he who failed was to pay the other 500*l.*, thereby settled and fixed as liquidated damages: Held, that this was not a mere penalty; but the defendant, having committed a breach of the contract, was liable to pay the whole of the 500*l.* *Reilly* v. *Jones*, 1 Law J. C.P. 105, s. c. 1 Bing. 302, s. c. 8 B. Mo. 244.

A agreed with B to sell to him the stock and the good-will of his business, and to demise to him his house in which the business was carried on, for which B was to pay 800*l.*, and to take furniture and fixtures at a valuation. They were afterwards valued at 174*l.*; 400*l.* was paid to A at the time of executing the agreement, and B agreed to accept and pay two bills of exchange, one for 400*l*, payable twelve months after date, and the other for 174*l.*, payable two months after date; and A agreed not to carry on the business within five miles of the house, and for the true performance of this agreement each of them did thereby bind and oblige himself to the other of them in the penal sum of 500*l.*, to be recoverable for breach of the said agreement in a court of law, as and by way of liquidated damages: Held, that this sum was a penalty, and not liquidated damages. *Davis* v. *Penton*, 5 Law J. K.B. 112, s. c. 6 B. & C. 216.

An agreement not under seal, for the lease of a public house, contained a clause that the party neglecting to comply with his part of the agreement should pay the sum of 100*l.*, mutually agreed upon to be the damages ascertained and fixed on breach thereof: Held, that the party making a default was not liable beyond the damages actually sustained. *Randal* v. *Everest*, 1 M. & M. 41, s. c. 2 C. & P. 577. [Abbott]

In an agreement for the sale of a public house, it was stipulated, that the seller should not be concerned in carrying on the business of a publican, within

a mile from the house he had parted with, "under the penal sum of 500*l*. the same to be recoverable as and for *liquidated damages*." Notwithstanding this, he opened a public-house, about three quarters of a mile off. No evidence of actual damage was given by the plaintiff, but for the defendant some witnesses stated that the plaintiff had spoken of the injury as not considerable. It was held at Nisi Prius, that the whole sum was recoverable as stipulated damages, but left to the jury to state what was the actual damage. The jury found for the whole sum, and the Court of Common Pleas refused to grant a new trial. *Crisdee* v. *Bolton*, 3 C. & P. 240. [Best]

(B) WHEN VALID OR ILLEGAL.

[See LORD'S DAY—FRAUDS, STATUTE OF.]

A secret in trade may be sold by a trader, who may restrain himself generally from the use of it. *Bryson* v. *Whitehead*, 1 Law J. Chanc. 42, s. c. 1 S. & S. 74.

An agreement, between the owner of one East Indiaman and the captain of another, that the latter should exchange his command with the captain of another ship, of which the defendant was also owner, is not illegal; and such an exchange of commands is a sufficient consideration to maintain an action of assumpsit for the breach of the agreement, and the jury may take into consideration, by way of damages, the profits of a voyage which has not been actually performed. *Richardson* v. *Mellish*, 3 Law J. C.P. 265, s. c. 2 Bing. 229, s. c. 9 B. Mo. 435, s. c. 1 C. & P. 244.

An agreement between two coachmasters not to oppose each other, or charge higher prices, is legal. *Hearn* v. *Griffin*, 2 Chit. 407.

If A employs B to run an illegal race, B cannot sue A for the stipulated reward. *Coates* v. *Hatton*, 3 Stark. 61. [Bayley]

A contract entered into by a lunatic, for articles suitable to his degree, is not void, in the absence of fraud, notwithstanding an inquisition of lunacy finding the party to be of unsound mind at the time the necessaries were supplied. *Baxter* v. *Portsmouth*, 5 B. & C. 170, s. c. 7 D. & R. 614.

In an action on a contract, it is no defence that the defendant is of unsound mind, unless the plaintiff knew of, or in any way took advantage of his incapacity, in order to impose on him. *Browne* v. *Joddrell*, 1 M. & M. 105, s. c. 3 C. & P. 30. [Tenterden]

A valid contract may be effected by perfect notes, signed by the broker, and delivered to the parties, although his book be not signed: but where the broker delivers a different note of the contract to each of the contracting parties, the contract is invalid. *Grant* v. *Fletcher*, 5 B. & C. 436, s. c. 8 D. & R. 59.

A broker having a general authority to purchase spices for one person, having purchased some for that person on a Saturday, went to another person on the Sunday and offered them to him for sale, saying that he would deliver the contract on the Monday. The person to whom they were offered said, that he must have the contract on that day (the Sunday). A bought note was accordingly delivered to him on the Sunday. The broker could not say when he made out a sold note for the vendee; whether it was within a week or more from the Sunday; but stated that he informed him of the sale on the Monday or Tuesday. The entry in the broker's book was not signed: Held, first, that the contract was not sufficient under the Statute of Frauds; and secondly, that, supposing it were so, yet that it would be void on account of its having been made on a Sunday. *Smith* v. *Sparrow*, 2 C. & P. 544. [Best]

The 7 Geo. 2, c. 8, the Stock-jobbing act, does not extend to Colombian bonds. *Henderson* v. *Biss*, 3 Stark. 158. [Abbott]

An action will not lie upon a contract for the sale of corn by the *hobbett*, as such contract is in contravention of the provisions of the 22 Car. 2, c. 8, s. 2. *Tyson* v. *Thomas*, 1 M'Clel. & Y. 119.

An agreement made in consideration that a creditor shall withdraw his opposition to an insolvent, is illegal, unless the same be made with the consent of the rest of the creditors. *Murray* v. *Reeves*, 6 Law J. K.B. 348, s. c. 8 B. & C. 421.

Under the 34 Geo. 3, c. 68, s. 14, an executory agreement to transfer a share of a ship is void, unless it contains a recital of the certificate of registry. *Biddell* v. *Leeder*, 1 B. & C. 327, s. c. 2 D. & R. 429.

*Semble*, that a contract to discontinue an indictment is illegal, and cannot be enforced. *Etworthy* v. *Bird*, 3 Law J. C.P. 260, s. c. 2 Bing. 258, s. c. 13 Price, 222.

A written agreement, "to remain with A B two years for the purpose of learning a trade," is not binding for want of an engagement in the instrument by A B to teach. *Lees* v. *Whitcomb*, 6 Law J. C.P. 213, s. c. 5 Bing. 34, s. c. 2 M. & P. 86, s. c. 3 C. & P. 289.

According to all law, and upon principle, where there is fairly a doubt as to the rights of parties, and an agreement without fraud, it is binding. In a case of doubt as to legitimacy, an agreement between claimants to divide the property is valid.

The case is different where there is a question, whether the parties dealt with equal knowledge of the subject.

So where (as in the case of *Gordon* v. *Gordon*) there is a suppression of a material fact by one of the parties, viz. the private marriage of the father, which the defendant knows, and calls a mere ceremony. The fact, whatever its character may have been, should be communicated at the time of the agreement.

Such communication is essential to the fairness and validity of the transaction between brothers on a question of rights depending upon legitimacy. *Hutchins* v. *Dickson*, 2 Bligh, 348, 349.

(C) STAMP.

Two persons entered into an *agreement*, which was stamped, for letting land. One of them complained that he thought the other would not perform his contract,—whereupon a third person made a *proposal* in writing, that if the contract was broken, he would let land on the same terms. The first contract was not fulfilled; and it was verbally agreed that the proposal should be accepted.

In support of an action for a breach of the terms of the first agreement: Held not necessary that that *proposal* should be stamped. *Drant* v. *Brown*, 3 Law J. K.B. 111, s. c. 3 B. & C. 665, s. c. 5 D. & R. 582.

An agreement containing the specification of goods, and an undertaking "to finish them in a tradesmanlike manner," does not require a stamp, being a contract for the sale of goods, and not making them. *Hughes* v. *Breed*, 2 C. & P. 159. [Abbott]

If parties enter into a written agreement, which is duly stamped, and indorse terms on the back of of it varying the original agreement, such new terms will not be admissible in evidence without a fresh stamp; and the indorsement of such terms must be considered as putting an end to the original agreement; and therefore the plaintiff cannot recover upon either, but must be nonsuited. *Reed* v. *Deere*, 7 B. & C. 261, s. c. 2 C. & P. 624.

Where A, a common carrier, on receiving 260*l.* from B, undertook, by a memorandum, to deliver it to C, fire and robbery excepted, in consideration of the carriage being paid: Held, that as the carriage, the subject matter of the agreement, did not exceed 20*l.*, it was admissible in evidence without a stamp. *Latham* v. *Rutley*, 1 R. & M. 13. [Abbott]

The plaintiff had lost his part of an agreement under seal after it had been duly stamped.

At the trial of an action on the agreement, the defendant, upon notice, produced his part, unstamped, and the plaintiff the draft of the agreement.

Held, that the defendant's part, unstamped, might be received in evidence. *Munn* v. *Godbold*, 3 Bing. 292, s. c. 2 C. & P. 97.

### (D) COPY OF.

If the copy of an agreement be obtained under a judge's order, it will be upon this condition, that the defendant shall not object to the insufficiency of the stamp. *Price* v. *Boultby*, 1 C. & P. 466. [Park]

Where the plaintiff and defendant were about to enter into partnership, and the attorney for the latter prepared a draft of an agreement, on which the terms of the partnership were to be founded; and the plaintiff's attorney, having perused and approved of it, returned it to the defendant, who afterwards caused a deed to be engrossed from it, which he signed, but which was neither signed nor executed by the plaintiff: The Court, on application by the latter, for a copy of the deed and agreement, would not order the defendant to grant an inspection or copy of such deed, but confined such application to the draft of the agreement, on the grounds that the plaintiff had no interest in the deed, he never having executed it, and that the defendant did not hold it in the character of trustee. *Ratcliffe* v. *Bleasby*, 3 Law J. C.P. 208, s. c. 3 Bing. 148.

After an agreement had been entered into, between a player and a manager of a theatre, the treasurer made a memorandum of it in a book kept by him for his private use. There was not any other written account of the agreement. The Court would not direct a copy to be given to the player on suing the manager. *Dibdin* v. *Elliston*, 3 Law J. K.B. 92.

### (E) PERFORMANCE.

[See SPECIFIC PERFORMANCE, and *post*, F.]

*Semble*—If one party only signs a contract, the other may enforce it.

But *quere*—Whether the party who has signed is not at liberty to recede from the contract until some act has been done by the other party to bind himself?

Where a contract is signed by one party only, and the other files a bill for a specific performance, it will make the contract binding on himself. *Martin* v. *Mitchell*, 2 J. & W. 426, 7, 8.

A man must complete the thing required of him, before he can charge for it; therefore, if he executes it in such a manner as that no benefit results to his employer, he is not entitled to any compensation. *Hammond* v. *Holiday*, 1 C. & P. 384. [Best]

Where, in an action of assumpsit for curing 497 sheep of the scab, it appeared that the plaintiff agreed he should not be paid anything, unless he cured *all*: It was holden that he could not recover, because forty out of the flock were not cured. *Bates* v. *Hudson*, 6 D. & R. 3.

An engineer was employed to form plans and make estimates for the erection of a bridge. He intrusted another to examine the bed of the river, who reported it to consist of hard marl rock. On that report the engineer made his estimates. It turned out that the bed of the river was not hard marl rock, but that an additional expense for piles was necessary: The Court held, that the engineer was not entitled to anything for his work and labour, inasmuch as by his negligence the party had been deceived in the matter. *Moneypenny* v. *Hartland*, 3 Law J. K.B. 66, s. c. 1 C. & P. 352, s. c. 2 C. & P. 378.

It was agreed, on the sale of a large quantity of oats, that they should be "delivered in April, or sooner," alongside a sloop or warehouse of the vendees. A vessel arrived, with the oats on board, alongside such a warehouse, on the 29th of April, but it would have occupied four days to unload her. The vendees refused to accept the oats.

The Court held, that there had not been delivery within the time stipulated, and that the vendor could not recover the price of the oats fixed in the agreement. *Cox* v. *Todd*, 4 Law J. K.B. 34, s. c. 7 D. & R. 131.

Although an entire contract is not divisible, and a part-performance cannot therefore be the subject of an action on the contract itself; yet, if there be part-performance, with the assent of both parties, an action may be maintained to recover a fair value or reward, in respect of that part-performance. *Shipton* v. *Casson*, 4 Law J. K.B. 199; s. c. 5 B. & C. 378, s. c. 8 D. & R. 130.

Where the subject-matter of the contract is the trade and good-will of a public-house at a fixed time; the given day is the essence of the contract; and an offer to pay on the following day is of no avail. *Coslake* v. *Till*, 1 Russ. 376.

Where, under an agreement, A undertook to transfer a public-house and assign the licences, and B to pay the good-will at a specified period, under penalties,—it was holden, first, that, as A was unable to assign the licences, and B to pay the money at the time of appointment, the contract was at an end; secondly, that a cheque on a brewer could not be deemed an offer to pay, although it was proved to be the usual mode of settling such a transaction; and, lastly, that, the contract being rescinded, B might recover back his deposit. *Clarke* v. *King*, 2 C. & P. 286, s. c. 1 R. & M. 394.

A makes an agreement with B for the sale of premises, at the time in the possession of C, under an agree-

ment for four years, (three of which have expired,) and undertakes to B that he will do such repairs as are left undone by C at the expiration of his (C's) tenancy. B makes an agreement with C, in pursuance of which C quits before the end of the four years, leaving the premises out of repair. *Semble*, that A is bound to perform the repairs at the time of C's quitting, though it is before the expiration of the tenancy, as created by the agreement between A and C. *Goodson* v. *Gouldsmith*, 2 C. & P. 555. [Best]

If a party, by his own wilful act, disable himself from performing a contract to be executed upon a contingency, although it may be possible for him to regain the power of completing it, when that contingency shall happen, yet the disability so occasioned will be a sufficient breach to give an immediate right of action.

Accordingly, where an agreement was made to grant a lease of certain premises so soon as the grantor should come into possession, and after this agreement, but before he actually became possessed, he executed a renewed lease to other parties than the one with whom he had made such agreement: it was held, that an action brought immediately thereupon was not premature. *Ford* v. *Tiley*, 5 Law J. K.B. 169, s. c. 6 B. & C. 325.

In general, a court of equity will not direct any inquiry as to damage sustained by the non-performance of an agreement. *Williams* v. *Hignett*, 6 Law J. Chanc. 125.

### (F) WHERE ENFORCED OR RELIEVED AGAINST IN EQUITY.

[See SPECIFIC PERFORMANCE.]

A, being a younger child, becomes entitled, upon the death of her father, by his appointment under a marriage settlement to L, as a portion charged on lands, and to 1500*l.* under his will, charging only his personalty. The other younger children became entitled to similar portions and bequests. The widow was entitled to a jointure under the settlement, and plate and household furniture under the will; B (as eldest son) enters upon the estate, under the limitations of the settlement, and being in possession, carries on a correspondence on the subject of an increase of the jointure of the widow, and the portions of the younger children with W, a common friend of the family, acting as the agent of B, as well as the widow and younger children. In the course of this correspondence, he proposes by letter, on certain conditions, to increase the portions of his brother and sister, and the jointure of his mother, and gives directions to one of his brothers to pay the increased jointure, and the interest upon the increased portions, which is done accordingly. After the interest had been paid for one year, a treaty of marriage was commenced between A and C, who applied to the common friend to ascertain the amount of A's fortune, and was informed by him of the correspondence with B, and that he had authority to state, that 4000*l.* was the amount of A's portion, to be secured on B's estate. Upon the faith of this communication, A and C intermarried. The interest upon the increased portion was paid by the agent of B to A and C for three years after the marriage. B, in the meantime, had possessed, in consequence of the correspondence, part of the personalty which belonged to the widow and the younger children under the will; and had received, without objection, accounts from his agent, including the allowances paid to the widow, and the younger children, by way of interest upon the increased portions, &c.

Upon a bill by A and C, to enforce the payment of the increased portion, to which the widow and the other younger children were defendants, and by their answers, submitted to perform the conditions on which the increase of portion and jointure was proposed; Held, that the effect of the correspondence, with all the circumstances of the case, amounted to an agreement which the court of equity ought to enforce.

In the letter on which the husband and wife relied, as the agreement in consideration of the marriage, B says, "I can never be reconciled to the marriage, &c." Then he proceeds to speak of the arrangement between him and his family, and repeats his part of the agreement as to the younger children:" 4000*l.* each, to be secured on certain lands; my sister's to be secured to herself for life; then among her children, &c." After stating the conditions for this increase of portion, he concludes, "This, I think, is an abstract of the agreement, and, when put into the form of a deed, if assented to by them, I am ready to execute at any time." And he adds, "I will not entangle myself with Mr. J R (the husband). If this match goes on, I will neither meddle nor make with it or their settlements."

Whether such a letter written before the marriage to W, the common friend, and in the circumstances before mentioned, could be enforced as an agreement, in consideration of marriage—*quære*. *Montgomery* v. *Reilly*, 1 Bligh, N. S. 364.

The plaintiff's father, by an agreement made in 1778, engaged to give his son 500*l.* on his marriage, and the father of the wife agreed to give 250*l.* to his daughter, and the agreement was suffered to remain dormant until 1810, when the wife and her father were dead (the latter having died in 1808). An agreement was afterwards entered into between the plaintiff and the two eldest sons of his wife's father's five surviving children, whereby the two sons agreed to pay the plaintiff the 250*l.* in satisfaction of the marriage portion. In 1816, the plaintiff filed a bill against the trustee under the wife's father's will, the two sons and the other children praying that the agreement might be established, and the plaintiff paid the 250*l.*: Held, that the last agreement of 1810 was valid, and would support the bill against the parties who signed it, but against them only, there being no fraud or misrepresentation shewn; that the engagement of 1778 was a mere simple contract agreement, and did not create a trust, but that the defendants, who signed the agreement of 1810, had concluded themselves thereby, and were, therefore, decreed to pay the plaintiff two fifths of the 250*l.* Bill dismissed as against all the rest, with costs, the plaintiff to be paid no costs. The principle of the above decision was, that the Court cannot relieve a party from a binding agreement obtained without misrepresentation;—in other words, mere folly, without fraud, is no foundation for relief; but, *quære*, if the Statute of Limitations would have been a good plea to such a bill. *Milnes* v. *Cowley*, 8 Price, 621.

A partner, who superintended, exclusively, the accounts of the concern, agreed to purchase his co-partner's share of the business, for a sum which he knew, from accounts in his possession, but which he concealed from his co-partner, was an inadequate consideration; the agreement was set aside. *Maddeford* v. *Austwick*, 1 Sim. 89.

The commissioners of a canal make an agreement for letting the tolls, not warranted by the act under which they derived their authority, and prejudicial to an interest expressly reserved by the act to the public; this agreement is acquiesced in for forty-seven years, without complaint on the part of any of the shareholders, and, during that period, the lessee remains in undisturbed possession of the tolls: the Court will not, at the suit of shareholders, disturb his possession by the appointment of a receiver.

*Semble*—After such acquiescence, it is not competent to shareholders, in respect of their private interest, to impeach the agreement.

*Semble*—Though the public interest could not be bound by the agreement, nor by the acquiescence of the shareholders and commissioners, it is not competent to shareholders to impeach that agreement in respect of such public interest. *Gray* v. *Chaplin*, 2 Russ. 126.

A court of equity will not relieve against fraud, where the transaction, in which the fraud was practised, was a contract for the purchase of securities purporting to be granted by a foreign government not recognized by the government of this country. *Thompson* v. *Barclay*, 6 Law J. Chanc. 93.

## (G) ACTION ON.

### (a) *Pleadings.*

It is not necessary that the declaration on a parol agreement should set out the whole of the same. If it state so much as applies to the particular breach, it will suffice. *Ward* v. *Smith*, 11 Price, 19.

In an action on a special agreement, the declaration stated, that, by a certain memorandum, made between the plaintiff and one G G, the plaintiff agreed to sell and deliver to G G a lace-machine, for 220*l.*, to be paid as follows:—40*l.* on delivery, and 1*l.* per week thereafter, until the full amount was discharged with interest. And it was further agreed, that the 1*l.* per week should be paid to the defendant, who was authorized to receive the same for the plaintiff, as his trustee; and in default of G G paying the defendant the 1*l.* per week, he should forfeit the whole money which might be then paid, and the machine should be returned to the plaintiff. And afterwards, in consideration of the premises, and of plaintiff, at the request of the defendant, appointing him to receive the said sum of 1*l.* per week for the machine from G G, the defendant undertook and promised the plaintiff, to take the machine and pay the balance, should there be any default by G G in the weekly payments to the plaintiff: Held, that the declaration was bad, no sufficient consideration for the defendant's promise being shewn. *Bates* v. *Cort*, 2 B. & C. 474, s. c. 3 D. & R. 676.

The defendant having discovered that the plaintiff, a teacher in the family of a nobleman, was his sister, induced her to leave her situation, and to reside with him. Disputes arose, and the plaintiff was obliged to leave the defendant's house, when through the interference of a mutual friend, he consented to allow her 50*l.* quarterly for her life. He discontinued to pay it. She brought an action, alleging in her declaration, that, in consideration that she would leave or had left the lucrative profession of a teacher, he undertook to pay her 50*l.* quarterly for her life: the Court held, that she had not supported the allegation, because, at the time she left, no such contract was made. *Wilson* v. *Wilson*, 2 Law J. K.B. 31.

Where in assumpsit the plaintiff declared, that he had bargained with J S for the purchase of three houses, for a certain sum, and that the defendant agreed to give him 40*l.* for his bargain, if he would permit him to be the purchaser instead of the plaintiff; and averred that he did become such purchaser: Held, that such declaration might be supported, although there was no written contract for the purchase of the houses between the plaintiff and J S, as the latter allowed the defendant to become the purchaser, and he was, in fact, let into possession of the premises. *Seaman* v. *Price*, 3 Law J. C.P. 58, s. c. 2 Bing. 437.

A contract to satisfy a debt by providing a cargo of wine, must be declared on specially; and an action will not lie for the old debt. *Hoppe* v. *Symonds*, 2 Chit. 324.

Where there is a special agreement, and it is conditional, the plaintiff must declare specially; and if the plaintiff affirms that the agreement was cancelled, he must prove that it was acquiesced in by the defendant. *Davis* v. *Nichols*, 2 Chit. 320.

An agreement "to furnish goods in a tradesmanlike manner," need not be declared on specially. *Hughes* v. *Breeds*, 2 C. & P. 159. [Abbott]

In assumpsit for the breach of an agreement, by which the defendant agreed to assign his interest in the lease of a public-house to the plaintiff, and the jury found that he had no title or right to assign, and the agreement contained a clause that the defendant should not carry on the business of a victualler within five years from the time of making the agreement, but which was omitted in the declaration: Held, that as it formed no part of the consideration on which the action for the breach of the agreement was founded, the declaration was sufficient; although it was insisted that the clause in question rendered the agreement void, as being in restraint of trade. *M'Allen* v. *Churchill*, 4 Law J. C.P. 183.

An obligor, who binds himself to perform certain works according to a specification and other detailed and working drawings, to be furnished during the progress of the works, with power for the obligee by his surveyor to direct additions or omissions, must, in a plea of performance, *quoad* such parts in which no orders were given by the surveyor to vary and deviate from the original plan, shew an authority in the surveyor to give such directions, or aver that the deviation or variation was an omission or addition. *Rex* v. *Peto*, 1 Y. & J. 37.

Where parties contract under seal, the remedy by either should in general be by action of covenant; and neither is allowed to maintain assumpsit on the subject matter.

But, where a contract under seal has been performed, an action of debt for the stipulated reward

is maintainable; the declaration proceeding on the contract, and averring that it has been performed.

Accordingly, by articles of agreement under seal the plaintiff agreed to build certain houses for the defendant, at a certain sum, according to a specification; and it was declared, that any deviation from the specification should not invalidate the contract, but an allowance should be made accordingly: Held, that an action of assumpsit could not be maintained for certain additional work and materials, found at the defendant's request in the course of the building; that they were included in the term "deviation," and that the defendant was liable only in an action of covenant.

In declaring upon a contract, it is not necessary to state any matter of exemption in favour of either of the parties, if it be of itself a legal exemption, independent of the contract.

And, *semble*, that if, in pleading, in setting out a contract, two grounds of exemption are stated, and it appear by the contract that there was a third ground of exemption, but that they are all legal grounds of exemption, which needed not to have been stated at all, this is no variance—*sed Quære. Briggs* v. *Crosthwaite*, 5 Law J. K.B. 311.

It is not necessary, in declaring upon a written contract, to use a single word that is in the contract itself, provided its legal effect be properly stated.

Nor is it necessary to aver any matter which happens to be part of the contract, if such matter would be implied by law. *Magor* v. *Wilks*, 5 Law J. K.B. 308.

A agreed to sell and B to buy a ship, which A undertook should be fitted similar to another ship. Before the time for completing the fittings, B repudiated the contract, and refused to take the ship. Previous to this refusal, A had done extras to the ship at B's desire. A did not go on with the fittings, but sold the ship, and brought his action against B for the loss upon the sale. In his declaration he averred, that the ship was fitted "according to the form and effect of the agreement," and also, that it was ready for delivery at the proper time: Held, that he could not recover on the special contract, nor for the extras, on the count for work and labour. *Parmeter* v. *Burrell*, 3 C. & P. 144. [Best]

(*b*) *Evidence.*

Though an agreement be applicable to the matter in issue, yet, if it be not signed by the defendant, the plaintiff is not bound to give it in evidence. *Wilson* v. *Bowle*, 1 C. & P. 8. [Park]

To prove an agreement between landlord and tenant to take certain stock, a bill of exchange, in which a memorandum was inserted, was tendered in evidence, but rejected, on the ground that it could not be read in evidence as an agreement without an agreement stamp. *Nicholson* v. *Smith*, 3 Stark. 128. [Abbott]

Where, in an action for not giving the plaintiff possession of certain apartments in the defendant's house, the declaration stated loss generally: Held, that the plaintiff might give evidence of particular loss sustained by the non performance of the agreement. *Ward* v. *Smith*, 11 Price, 19.

A witness, on his cross examination, after proving a contract for the sale of goods, disclosed that the goods had been sold under a written agreement, which the plaintiff had shewn the witness: It was holden, that such contract was evidence for the plaintiff, without calling the broker, by whom it purported to have been made and signed. *Smith* v. *Blandy*, 1 R. & M. 257. [Best]

Proof of a contract in the precise words used in stating it on the record, is not necessary; but it is sufficient if, in substance and effect, the contract averred, and that proved, are the same.

But an averment in general terms, of a contract to supply an article of the best quality, is not sustained by evidence applicable only to a particular species of that article.

Thus, where the contract averred was for "excellent claret, of excellent quality, &c.," proof of an agreement for excellent Pauillacs, &c. (which is a particular sort of claret,) was held insufficient to support the averment. *Ullock* v. *Reddelieu*, 5 Law J. K.B. 208.

Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately; and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: Held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiff could not exclude the second agreement and proceed upon the counts setting out the first only. *Reed* v. *Deere*, 7 B. & C. 261.

In an action against a person for injuring a horse by driving him to Chatham instead of Dartford, a statement by defendant that he drove only to Dartford, is sufficient to prove that the contract was to drive only to Dartford. *Ware* v. *Juda*, 2 C. & P. 351.

A party who contends that the contract upon which he is sued was illegal, must prove it to be so, although the proof be of a negative; because *primâ facie* it will be presumed to be legal. *Sissons* v. *Dixon*, 4 Law J. K.B. 299, s. c. 5 B. & C. 758, s. c. 8 D. & R. 526.

To admit proof of the handwriting of a subscribing witness to a contract, it is sufficient to shew that he has not been seen for eighteen months, and that every possible inquiry has been made for him, without going on to prove that application has been made to the parties who executed the agreement. *Evans* v. *Curtis*, 2 C. & P. 296. [Abbott]

An averment that in consideration that the plaintiff *would* consent to suspend proceedings on a cognovit against A, the defendant promised to pay, is proved by evidence of a contract which states, that in consideration of the plaintiff *having* consented to suspend proceedings, the defendant promised to pay. *Payne* v. *Wilson*, 6 Law J. K.B. 107, s. c. 7 B. & C. 423.

If the declaration in an action by B against A, aver that C did not leave the premises in good repair at the expiration of his tenancy, the agreement between A and C need not be produced to prove such averment. *Goodson* v. *Gouldsmith*, 2 C. & P. 555. [Best]

Where a broker effects a sale between two parties, the bought and sold notes delivered to them, and not the entry in his book, are the proper evidence of the contract. *Thornton* v. *Meux*, 1 M. & M. 43. [Abbott]

The entry of sale made in the broker's book, is not, of necessity, to be treated as the only evidence of a contract to satisfy the Statute of Frauds.

Therefore, where the terms of a contract of sale were entered in the broker's book, and not signed by him; but he delivered to the parties the bought and sold notes, embodying the terms of the entry, and signed those notes,—it was held that the parties were bound. *Goom* v. *Afflalo*, 5 Law J. K.B. 31, s. c. 6 B. & C. 117, s. c. 9 D. & R. 148.

A broker delivered to the vendor bought and sold notes, written on one sheet of paper, and the day for payment of the goods was inserted at the end of the bought note only; but in those made out for the purchasers, the day was inserted at the end of the bought as well as of the sold note: Held, that, as the bought and sold notes delivered to the vendor were both written on one sheet of paper, the whole must be considered as forming one contract; and, consequently, there was no variance. *Maclean* v. *Dunn*, 6 Law J. C.P. 184, s. c. 4 Bing. 722, s. c. 1 M. & P. 761.

A paper containing the terms of a contract cannot be referred to by a witness who is called upon to prove the contract, if the paper itself is inadmissible for want of a stamp. *Turner* v. *Ford*, 6 Law J. K.B. 122; s. c. as *Turner* v. *Power*, 7 B. & C. 625, s. c. 1 M. & M. 131.

If a party, by the payment of money, and by his conduct in other respects, signify his assent to the terms of a written agreement, signed by other persons, but not signed by him, he will not be entitled, in an action arising out of that contract, to give verbal evidence of a subsequent variance, in order to proceed against any of those persons as on a new and independent contract, or to recover back the money so paid, as money had and received, without resorting to the written agreement.

Thus, where a party entered his horse for a sweepstakes, towards which he paid 30*l.*, but did not sign the written agreement prescribing the terms upon which the race was to be run, and which had been signed by the other subscribers,—it was held, in an action brought by him against the stakeholder, that he could not, in order to recover the sweepstakes, go into verbal evidence of a subsequent variance in the written agreement; nor entitle himself to the amount of his subscription, by mere proof of the payment, until the written agreement had been given in evidence. *Day* v. *Canning*, 5 Law J. K.B. 231.

*Quere*—Whether a defendant, resisting the specific performance of an agreement, on the ground of alleged surprise and fraud, will be allowed to give parol evidence of a term of the contract, said to have been made at the same time with, but contradictory to, those terms of it which were reduced into writing, and signed by him? *Bunning* v. *Bunning*, 1 Law J. Chanc. 56.

## CONTRIBUTION.

The right and duty of contribution is founded in doctrines of equity; it does not depend upon contract.

The duty of contribution extends to all persons who are within the scope of the equitable obligation.

In the case of lands descending to co-parceners subject to a debt, if the creditor proceeds against one of the co-parceners, the others must contribute.

If the creditor discharges one of the co-parceners, he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions. *Stirling* v. *Forester*, 3 Bligh, 591.

*Case* lies by one coach-proprietor against his co-proprietor, to recover contribution for damages given against him for an injury sustained through the negligence of their coachman, if it appear that the plaintiff was not present when the wrong was committed. *Wooley* v. *Batte*, 2 C. & P. 417. [Park]

Persons being churchwardens, overseers, and trustees of the poor, directed, in consequence of a resolution of the vestry, a prosecution to be instituted against certain persons accused of having concurred in the misapplication of parochial monies: one of them having been compelled to pay the bill of costs of the attorney employed in the prosecution, is entitled to contribution from the others. *Wrighton* v. *Masterman*, 5 Law J. Chanc. 14.

## CONVEYANCER.

A certificated conveyancer can maintain an action for business done by him, in drawing conveyances and deeds. *Poucher* v. *Norman*, 3 Law J. K.B. 115, s. c. 3 B. & C. 744, s. c. 5 D. & R. 648: s. p. *Davies* v. *Sibley*, 6 D. & R. 4.

If a certificated conveyancer induce a creditor of a bankrupt to employ him in investigating a bankrupt's affairs, by representing himself to be an attorney and solicitor, he is not entitled to recover anything for his trouble: and even if he paid fees to counsel in the course of the investigation, he cannot recover them of his employer as money paid, laid out, and expended. *Crammond* v. *Crouch*, 3 C. & P. 77. [Tenterden]

The Court has no summary jurisdiction over a conveyancer, he not being an attorney, in respect of deeds detained by him from his clients, or in respect of any other disputes between him and them. *Ex parte Charles*, 6 Law J. K.B. 122.

## CONVICTION.

(A) Form.
(B) Evidence.
[See Game.]

### (A) Form.

Two persons being arrested on board a boat laden with smuggled goods, within the port of F, which was within an exclusive local jurisdiction, afterwards were taken with the boat, &c. to the harbour of D, and convicted by two magistrates of the town and port of D, according to the 43 Geo. 3, c. 121, s. 7, 57 Geo. 3, c. 87, s. 5, and 3 Geo. 4, c. 110: The Court determined, that a conviction, only stating that they had been found and taken on board a boat in the port of F, was bad, as it did not shew that the magistrates of D had no jurisdiction over the offence. But, semble, that in this case only the magistrates of the local jurisdiction of F had authority to convict; and that the 45 Geo. 3, c. 121, s. 7, gives jurisdiction to those magistrates only who reside near to the first harbour into which any

vessel, &c. shall be carried, or where any persons shall be arrested according to that clause. *Ex parte Kite*, 2 D. & R. 212, s. c. 1 B. & C. 101.

A conviction is bad, which states an offence to have been committed in the alternative. *Rex* v. *Sadler*, 2 Chit. 519.

Therefore, a conviction for being on board a boat, liable to be forfeited under 6 Geo. 4, stating, that it had "casks attached thereto of the description used, or intended to be used for the smuggling of spirits," was holden bad. *Rex* v. *Pain*, 5 B. & C. 251, s. c. 7 D. & R. 678.

It is not a misdescription to state on a conviction, that an act of parliament, passed in the 25th year of the king's reign, when, in fact, the parliament in which the act was passed, was continued by prorogation, from the 24th to the 25th. *Rex* v. *Windsor*, 2 Chit. 513.

A conviction stated, "that A B hath been convicted before me, C D, of having been found on board a certain vessel, subject and liable to forfeiture under the provisions of a certain statute, 24 Geo. 3, c. 47, s. 1, for being found hovering within the limits of a port of this kingdom," &c.: Held insufficient,—first, because it did not shew that the ship was hovering without lawful excuse; and second, that the party convicted was a British subject. *Ex parte Cæsar Hawkins*, 3 D. & R. 209, s. c. 2 B. & C. 31.

A conviction under the 2 Geo. 2, c. 26, s. 4, for working a boat on the river Thames for hire, without being previously qualified, must state that the defendant worked the boat for hire. *Rex* v. *Taylor*, 2 Chit. 575.

On a conviction under a penal statute: Held, that no advantage could be taken of a defect in the same, unless it appears on the face of it. *Rex* v. *the Justices of the Hundred of Cashiobury*, 3 D. & R. 35.

A conviction on the 45 Geo. 3, c. 121, s. 7, must shew the specific fact which forms the ground of forfeiture. *Ex parte John Smith*, 3 D. & R. 461.

If a conviction on a penal statute does not negative all the exceptions in the statute by which the defendant might be protected, it will be insufficient. *Rex* v. *Mallison*, 2 Ken. 384, s. c. 2 Burr. 679.

Apprentices were convicted on the 4 Geo. 4, for misconduct in their master's employment; this act only extends to apprentices upon whose binding out no larger sum than 25*l.* has been paid: Held, that the conviction was bad, for not shewing, that no larger sum than 25*l.* had been respectively paid. *Rex* v. *Taylor*, 7 D. & R. 622.

### (B) Evidence.

Where a statute gives part of a penalty to the parish wherein the offence is committed, the party may be convicted on the oath of a witness residing within the parish, provided such witness does not pay rates. *Rex* v. *Cottrell*, 2 Chit. 487.

It must appear in a conviction, that the evidence upon which a defendant has been convicted, was given in his presence; and, therefore, where a conviction merely alleged, that the defendant on such a day appeared before a magistrate, on a summons, and the magistrate proceeded to examine into the offence, and that it appeared to him, on the oath of the witness, that the offence was committed, it was held bad. So the evidence whereon the defendant is convicted, must appear on the face of the conviction. In a conviction under the Hawkers Act, 45 Geo. 3, c. 78, (now repealed,) against a party for travelling about from town to town and selling goods by retail the place of sale not being his usual place of abode, the conviction should specify the goods sold. A conviction need not specify how the witnesses were sworn. *Rex* v. *Selway*, 2 Chit. 522.

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## COALS.

By the 47 Geo. 3, c. 68, the amount of penalties depends entirely on the number of chaldrons improperly sold: Held, that the justices had no jurisdiction over the matter, as the superior courts have jurisdiction over the penalty of 20*l.* for every chaldron of coals, under 47 Geo. 3, c. 2. *Reeve* v. *Poole*, 4 B. & C. 155, s. c. 6 D. & R. 29, s. c. 1 C. & P. 622.

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## COPYHOLDS.

(A) Nature of the Tenure.
  (*a*) *Grant.*
  (*b*) *Custom.*
(B) Surrender and Admittance.
(C) Heriots.
(D) Forfeiture.

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### (A) Nature of the Tenure.

#### (*a*) *Grant.*

A grant of copyhold lands was made to P C for her life, and the life of T E, and the life of the survivor. By another grant, the reversion was given to M C, B C, &c. for their lives, and the life of the longest liver. P C died, having devised the lands to T E, who entered and held them more than twenty years. M C and B C now brought an ejectment to gain the possession: the Court held, that the right of M C, B C, &c. arose on the death of P C, because there cannot be a general occupant of copyhold lands; and that the action was barred by the Statute of Limitations. *Doe d. Forster* v. *Scott*, 4 Law J. K.B. 39, s. c. 4 B. & C. 706, s. c. 7 D. & R. 190.

#### (*b*) *Custom.*

It is the custom of a manor, that when a copyhold tenement has been granted to any person to hold the same to him for the lives of two or more persons, and the life of the longest liver of them successively at the will of the lord, according to the custom of the manor, and the grantee or copyholder die in the lifetime of any of those persons, without having devised the tenement by his will, then one or more of the persons surviving him become entitled, by virtue of the grant, to hold the tenement, in the order in which they are named in it, during his or their lifetime: The Court held, that the custom was reasonable and good in law.

A copyholder of the same manor, having a tenement granted to him as sole purchaser for the lives of two persons, and the longest liver of them successively, according to the custom of the manor, and having paid a fine, was admitted. Afterwards

be made his will, by which he devised the tenement to one of those two persons: The Court held, that the devise was not inconsistent with the grant and custom, and, therefore, that the right of entry of the lord was barred. *Doe d. Nepean, Bart.* v. *Goddard*, 1 Law J. K.B. 179, s. c. 1 B. & C. 522, s. c. 2 D. & R. 773.

*Semble*, That a special custom to make presentments of surrenders out of court at any time afterwards, several courts intervening, would not be a good custom; as it might lead to fraud upon purchasers. *Doe d. Priestly* v. *Calloway*, 5 Law J. K.B. 118, s. c. 6 B. & C. 484.

(B) Surrender and Admittance.

[See Parties to Suits—Vendor and Purchaser—Mandamus.]

Where a tenant in possession of copyholds, grantable for lives, obtained, at his own expense, a grant of the same copyholds to his son in remainder, and at the same time surrendered it to the use of his will: Held, that the son was but a trustee for his father, and not entitled to it by way of advancement. *Prankerd* v. *Prankerd*, 1 S. & S. 1.

The executor of a termor of copyhold lands must be admitted, and pay a fine to the lord. *Earl of Bath* v. *Abney*, 1 Ken. 471, s. c. 1 Burr. 206.

Although copyholders holding in joint tenancy, cannot compel the lord to make partition between them, they may, by surrenders to other persons, turn their joint tenancy into a tenancy in common without consent of the lord; and,

*Semble*, That the lord would be compelled to accept such surrenders. *Ex parte Lee*, 5 Law J. K.B. 295.

A surrender of a *copyhold* tenement, made by a feme coverte, to the use of her husband, in his presence, and with his assent, testified by his immediate admittance under it, she having been first solely and secretly examined by the steward, is a valid surrender. *Seaman* v. *Maw*, 4 Law J. C.P. 97, s. c. 3 Bing. 378.

A surrender to uses, reserving a power to revoke them, can be maintained. *Boddington* v. *Abernethy*, 4 Law J. K.B. 181, s. c. 5 B. & C. 776, s. c. 8 D. & R. 626.

Where, by the custom of a manor, persons not being previously customary tenants, or not dwelling in the manor, purchasing by surrender, customary lands within the manor, were liable to pay a larger fine to the lord than tenants or inhabitants, and a person not being a tenant or inhabitant had purchased the equity of redemption in a customary estate, and in order to save a larger fine due in respect thereof, had subsequently become the purchaser of a smaller estate, the Court granted a mandamus to the lord and steward to admit him to the latter, and as the return thereto did not allege any act of fraud in the transaction, the mandamus was made peremptory, although the effect of admittance to the smaller estate would be to defeat the lord's claim to the fine due upon the larger estate first purchased. *Rex* v. *the Lord and Steward of the Manor of Meer and Ferton, in Staffordshire*, 2 D. & R. 824.

The court-roll of a manor is not a record; and may, therefore, be explained by evidence.

If the court-roll of the presentment of a surrender cannot be found, other evidence is admissible to shew or to infer the fact of presentment.

The rough draft of the presentment,—that draft being found among the muniments of the manor,—was held to be admissible to supply the place of an inrolment which could not be found. *Doe d. Priestly* v. *Calloway*, 5 Law J. K.B. 188, s. c. 6 B. & C. 484.

(C) Heriots.

Where a copyhold estate, in the possession of one owner, paid but one heriot,—but several, if divided among several owners,—if it afterwards becomes re-united in the person of a single owner, one heriot only is payable. *Garland* v. *Jekyll*, 2 Law J. C.P. 227, s. c. 2 Bing. 273, s. c. 9 B. Mo. 502.

The mere creation of a tenancy in common, of a tenement for which heriot is to be paid or rendered, does not sever the tenement into two, so as to multiply the heriots.

Therefore, where two persons took under a devise as tenants in common, and one surrendered his interest to the other, (there having been no severance): It was held, that at the death of that other who took the entire interest, the lord was entitled to heriot originally demandable, and not to two heriots. *Holloway and Padwick* v. *Berkeley*, 5 Law J. K.B. 1, s. c. 6 B. & C. 2, s. c. 9 D. & R. 83.

(D) Forfeiture.

A pardon under the sign manual, according to 6 Geo. 4, c. 25, s. 1, has the effect of restoring civil rights so completely as to prevent the consequence of an inchoate forfeiture not completely effected by entry.

Therefore, where a copyholder was attainted of felony, and was pardoned as above, and the lord had not entered in pursuance of the forfeiture: It was held, that the pardon restored the copyholder to his tenement, for which he might maintain ejectment. *Doe d. Evans* v. *Evans*, 4 Law J. K.B. 322, s. c. 5 B. & C. 584, s. c. 8 D. & R. 399.

The devisee of a copyhold estate has only a title until admittance, and such a right cannot be forfeited to the lord, but will continue in the heirs of the surrenderor. *Jefferies* v. ———, Ken. 110.

A bill, by a lord of a manor, praying a discovery of the boundaries of copyholds, against a copyholder, and charging him with having confounded the boundaries, ought to waive the forfeiture.

Even though the forfeiture be not waived, the copyholder cannot, by demurrer, protect himself from answering those parts of the bill, which do not allege acts or circumstances tending to produce a forfeiture. *Bishop of Durham* v. *Rippon*, 4 Law J. Chanc. 32.

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## COPYRIGHT.

(A) Subject of.
(B) In whom vested.
(C) Assignment of.
(D) Piracy of.

(A) Subject of.

*Quære*—Whether there is any legal right of pro-

perty in the sentiments and language of a lecture delivered orally, and which cannot be shewn to have been reduced into writing?

Persons attending an oral lecture, have no right to publish it for profit.

An action upon the implied contract will lie against a pupil attending an oral lecture, who causes it to be published for profit.

The Court will grant an injunction against third persons publishing lectures orally delivered, who must have procured the means of publishing those lectures from persons who attended the oral delivery of them, and were bound by the implied contract. *Abernethy* v. *Hutchinson*, 3 Law J. Chanc. 209.

At common law, there is no property in a work of an immoral or libellous tendency, and no action can be maintained for the infringement of the supposed copyright in such a work. *Stockdale* v. *Onwhyn*, 4 Law J. K.B. 122, s. c. 5 B. & C. 173, s. c. 7 D. & R. 625.

A person may have copyright in tables calculated by himself, even though the very same tables should have been published long before his appeared.

*Quære*—Whether an injunction will be granted to protect a copyright in tables founded on the author's personal calculation of them, when they are of such a nature that the same calculation could be made within a short time by any other person.

An injunction will not be granted, where, according to the case made by the plaintiff, there has been long acquiescence under the injury against which he at length seeks protection. *Bailey* v. *Taylor*, 3 Law J. Chanc. 66.

A *part* of a work published at uncertain intervals, of which thirty copies only are printed, twenty-six of which are subscribed for, the principal costs of publication being defrayed by funds devised by a testator for that purpose, is not a book demandable by the public libraries under the 54 Geo. 3, c. 156. *Trustees of British Museum* v. *Payne*, 4 Bing. 540, s. c. 2 Y. & J. 166.

### (B) In whom vested.

The right of printing the statutes is exclusively vested in the King's printer. *Rex* v. *the University of Cambridge*, 2 Ken. 397, s. c. 1 Black. 105, s. c. 2 Burr. 661.

But, *semble*, that the University of Cambridge has a right of printing the statutes. *Basket* v. *the University of Cambridge*, 2 Ken. 397, s. c. 1 Black. 105, s. c. 2 Burr. 661.

The person who forms the plan of the work, to be composed by the labours of various persons, who employs different writers to contribute to it, and who pays them for their contributions, is the author and proprietor of such a work, within the statute of Anne. *Barfield* v. *Nicholson*, 2 Law J. Chanc. 90.

### (C) Assignment of.

Where the copyright of a work has been assigned by the author to the plaintiff, and the plaintiff and author swear that A (a stranger to the suit,) has only a qualified interest in the work, but A, in an affidavit filed by the defendant, swears, that under a bargain between him and the author, he has the entire copyright of the work, but does not state any deed of assignment; the plaintiff cannot obtain an injunction till he has established his right at law. *Lowndes* v. *Duncombe*, 1 Law J. Chanc. 51.

A foreigner published a piece of music in France, in 1814. In the same year, he came to England, and, *by parol*, sold the copyright of it in England to some publishers of music. Afterwards, in January 1822, the author executed an assignment *in writing* of the copyright to them. In the meantime, in 1818, an Englishman bought a copy of the work in France, and published it on his return to England, and sold copies of it after January 1822: The Court held, that the publication by the English publishers could not be considered as a publication by the author *himself*, so as to vest any right in him, in 1814, which might afterwards pass to the publishers by the assignment in January 1822; and, consequently, that the publication of it by the Englishman was lawful, both before and after January 1822. *Clementi* v. *Walker*, 2 Law J. K.B. 176, s. c. 2 B. & C. 861, s. c. 4 D. & R. 598.

A general assignment of a copyright in writing endures only for fourteen years. But where an author by parol gave a compilation to a publisher unconditionally: It was holden, that such gift was not impliedly limited to the term of fourteen years. *Rundell* v. *Murray*, 1 Jac. 311.

### (D) Piracy of.

If A sells to B the copyright of a work, containing letter-press and plates, which are to be found in prior works, if A subsequently furnishes the same letter-press and similar plates to C, for the purposes of a rival work, C's publication will not, in respect of such letter-press, and plates, be held to be a piracy upon B's work.

If A sells a work to B, and covenants not to do anything which may be detrimental to the sale or circulation of that work, and if afterwards A, and a partner, publish a rival work on the same subject, the partner will be restrained as well as A.

If A, having entered into such a covenant with B, sells the materials of a rival work to C, who concludes his agreement, and pays his money without any notice of the covenant, an injunction, on the ground of that covenant, cannot be maintained against C.

If an injunction has been granted against a work, which is proposed to be published in successive numbers, on the ground of piracy in the published numbers, the injunction will not be modified, so as to permit the publication of the future numbers, while the question of piracy as to the others, remains undetermined. *Barfield* v. *Nicholson*, 2 Law J. Chanc. 90.

Where the Court is called upon to restrain a publication, on the ground that it is a piracy of a composition which has been substantially reduced into writing; it is the duty of the Court to see that the plaintiff produces his written composition.

An injunction will not be granted to restrain an alleged piracy of lectures delivered orally, when no written composition, substantially the same with these lectures, is produced. *Abernethy* v. *Hutchinson*, 3 Law J. Chanc. 209.

In an action on the statutes 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, by the proprietor of a print, it is necessary to prove that the date of its publication, as well as the name of the proprietor, appear on the face of it; but he need not describe himself *as proprietor*. *Newton* v. *Cowie*, 5 Law J. C.P. 159, s. c. 4 Bing. 235.

The infringement of the copyright of a work tending to impugn the doctrines of the Scriptures, will not be restrained by an injunction, but the party must bring an action. *Lawrence* v. *Smith*, 1 Jac. 471.

The Court will interfere to protect copyright from piracy, at the suit of plaintiffs who appear to have a good equitable title, even though it should not be quite clear that legal title is complete.

Mode in which the Court exercises its jurisdiction, where one work of compilation, such as an Encyclopædia, copies matter from a preceding work of the same description. *Mawman* v. *Tegg*, 2 Russ. 385.

## CORN.

Measuring corn by the *hobbett*, is illegal, within the 22 Car. 9, c. 8. *Tyson* v. *Thomas*, 1 M. & Y. 119.

## CORONER AND CORONER'S INQUEST.

A writ for the election of a coroner was delivered to the deputy of the under-sheriff on the first of April; the next county court was held on the 13th of April, and was adjourned to the 27th of April, when the election took place: Held, that the provisions of the 58 Geo. 3, c. 68, were not complied with, and that the election was void. *In re Coroner of Stafford*, 5 Law J. Chanc. 26, s. c. 2 Russ. 475.

A coroner, in the exercise of his discretion as judge, may legally exclude from his court any individual not connected with the proceedings, or whose presence he may deem injurious to the ends of justice.

And even though he act illegally, he is not amenable by *civil action* for what was done in his judicial capacity.

But, if he do an illegal act, not from an error in judgment, but wantonly or corruptly, he may be punished by another course of law. *Jeremiah Garnett* v. *Ferrand*, 5 Law J. K.B. 221, s. c. 6 B. & C. 611.

The allowance of ninepence a mile for a coroner's charges on his travelling to take inquests, is only in respect of the number of miles he may actually travel for each; and therefore, a coroner was not allowed to charge the same expenses against each inquest, where one travelling served for more inquests than one. *Rex* v. *the Justices of Warwick*, 4 Law J. K.B. 206, s. c. 5 B. & C. 430, s. c. 8 D. & R. 147.

After a conviction, on an information against a coroner, for corruption in his office, the judge, who tried the cause, would neither commit him nor hold him to bail, being of opinion that he had no intention to abscond. *Rex* v. *Whitcomb*, 1 C. & P. 124. [Hullock]

An information does not lie against a party, for burying a dead body, which had been found drowned, without holding the coroner's inquest: but an indictment will. *Rex* v. *Proby*, 1 Ken. 250.

A coroner's inquest omitted to state the place where the death happened, or where the body was found; the names of the jurors were not inserted in the body of the inquisition, and it was subscribed by them with the initials only of their christian names: Held, that these were defects in substance, and could not be amended; and the inquisition was quashed. The inquisition found that the death was occasioned by a coach and horses, the property of A and B, & Co.: Held, that this finding could not be altered upon affidavits, that the property was in. A & B alone. *The King* v. *Evett*, 5 Law J. M.C. 36, s. c. 6 B. & C. 247.

## CORPORATION.

(A) Of the Charter.
- (a) *Acceptance.*
- (b) *Construction.*

(B) Rights and Disabilities.
(C) Grants by.
(D) Bye Laws.
(E) Officers and Members.
- (a) *Qualifications.*
- (b) *Election.*
- (c) *Rights, Duties, and Liabilities.*
- (d) *Amotion.*

(F) Remedies by and against.

### (A) Of the Charter.

#### (a) *Acceptance.*

No corporation can accept part, and reject the residue of a charter granted to them by the Crown. *Rex* v. *Westwood*, 4 B. & C. 781, s. c. 7 D. & R. 267.

One who has become the member of a company, created by charter, is not at liberty to impeach it by shewing that the charter was never accepted by those to whom it was originally granted. *Tobacco-pipe Makers* v. *Woodroffe*, 4 Law J. K.B. 301, s. c. 8 D. & R. 530.

There is no particular mode laid down by law to shew that a charter has been accepted. Any unequivocal act is sufficient. Acting under the charter, or signing a consent to accept it, will equally serve to shew the fact of acceptance.

One who has at first refused to accept a charter is not thereby debarred from accepting it afterwards.

By a new charter, an old corporation, consisting of a mayor and burgesses, was made to consist of a mayor, aldermen, chief burgesses, and burgesses; the three former to constitute the common council. The common council and a majority of the burgesses expressed their assent to the new charter, some by voting at an election held under it, and others by a written declaration: Held, that this was a sufficient acceptance of the new charter; and *quære*, whether a majority of the burgesses need have concurred in such acceptance. *The King* v. *Hughes*, 6 Law J. K.B. 190, s. c. 7 B. & C. 708, s. c. 1 M. & R. 625.

#### (b) *Construction.*

By the charter to the borough of Denbigh, it is granted, "that the aldermen, bailiffs, &c. may elect two of the capital burgesses to be aldermen for one year, with authority to execute by themselves, or, in their absence, by their deputies, the office of aldermen."

It is also granted, that, in the event of the death or removal of any alderman, another may be elected in his stead.

There is a proviso, that, in the absence of any of the aldermen, the bailiffs and capital burgesses (the welfare of the borough requiring it,) may elect others in the place of them.

It is also granted that the aldermen shall be justices of the peace.

The Court held, that the aldermen elected for the year, could not delegate their offices of justices of the peace; and, consequently, that a deputy alderman could not exercise the functions of a magistrate. *Jones* v. *Williams*, 3 Law J. K.B. 112, s. c. 3 B. & C. 762, s. c. 5 D. & R. 654, s. c. 1 C. & P. 459, 669.

There is no rule in law which says, that a subsequent charter shall be controlled by an antecedent one, unless it appears that the former was the foundation of the latter. *Rex* v. *Haythorne*, 5 B. & C. 410, s. c. 8 D. & R. 228.

Where a charter of a corporation, after directing that the corporate officers should for ever thereafter be nominated and chosen out of the free burgesses, proceeded to nominate the first corporate officers; and amongst the common councilmen was named one who was not at the time of his nomination a free burgess: Held, that the charter having nominated him as a common councilman, and he having accepted the office, he is by necessary implication entitled to all the privileges of a free burgess. *Rex* v. *Perkins*, 4 D. & R. 427.

Where a modern charter nominated a corporate officer: It was holden, by necessary intendment, to make him a free burgess, notwithstanding he was not one before. *Rex* v. *Downes*, 5 B. & C. 182, s. c. 7 D. & R. 777.

A petition at the instance of the Commons, prayed the King to suffer them to affirm the charter of a corporation; the King replied, that it was assented to and agreed in Parliament, that the liberties in the petition mentioned should be confirmed under the king's great seal: accordingly, the King confirmed the charter: Held, that this proceeding was not a statute; and therefore the King might grant a new charter varying the former. *Rex* v. *Haythorne*, 5 B. & C. 410, s. c. 8 D. & R. 228.

In ascertaining the meaning and effect of a charter, contemporaneous documents, proceedings in causes relating to it, and parol testimony, may be resorted to, in order to explain and give to the charter a construction, but not to contradict it. *Governors of Lupton School* v. *Scarlett*, 2 Y. & J. 330.

The act of the majority of a corporation is in general considered as the act of the whole: therefore where one clause in an act of parliament declared, that "all powers and authorities given to certain commissioners might be executed by the major part of them assembled at a meeting, not being less than thirteen;" and another clause empowered those commissioners "at any meeting at which not less than thirteen should be present, by writing under their hands, to appoint a treasurer:" It was held, that a written appointment signed by twelve commissioners of a meeting, consisting of seventeen, was a valid appointment. *Cortis* v. *the Kent Waterworks Company*, 5 Law J. M.C. 106, s. c. 7 B. & C. 316.

### (B) RIGHTS AND DISABILITIES.

A company's right to have a livery must be founded on a charter or custom, and cannot be presumed. *Vintners' Company* v. *Passey*, 1 Ken. 500, s. c. 1 Burr. 235.

Prescription will legalize a company bearing more than one name.

Documents relating to a company, not kept in their chest, but at the clerk's house, are inadmissible.

A custom, that any person exercising a particular trade, shall become members of a particular company, is legal.

Prescription will legalize a company bearing more than one name. *The Warden and Merchants of Shrewsbury* v. *Hart*, 1 C. & P. 113. [Hullock]

### (C) GRANTS BY.

*Semble*—That if a regular corporate resolution be passed for granting an interest in a part of the corporate property, and upon the faith of that resolution expense be incurred, the corporation is bound to make a legal grant in pursuance of that resolution. *Marshall* v. *the Corporation of Queenborough*, 1 S. & S. 520.

### (D) BYE-LAWS.

A person was sued for a penalty on a bye-law for exercising a trade in a city, not being a freeman: The Court ordered the corporation to allow the defendant to inspect the bye-law in the corporation-books. *Harrison* v. *Williams*, 2 Law J. K.B. 121, s. c. 3 B. & C. 162, s. c. 4 D. & R. 820.

Every corporation has an incidental power to make bye-laws: therefore, a limited power vested in a select body, to make bye-laws in certain cases specified, does not divest the whole body from making bye-laws in other cases.

A corporate body consisted of mayor, bailiffs, aldermen, and burgesses. The bailiffs and aldermen formed a common council, and were chosen out of the burgesses. The charter vested the right of electing burgesses in the mayor and burgesses; the corporation made a bye-law vesting the right of electing burgesses in the mayor and common council: Held, (Bayley, J., *dissentiente*, and Abbott, C. J., *dubitante*,) that the bye-law was valid. *Rex* v. *Westwood*, 4 B. & C. 781, s. c. 7 D. & R. 267.

The presumption in favour of unrestrained trade among the King's subjects is so strong, that even the Lord Mayor's Court of London cannot support proceedings upon bye-laws in restraint of trade among the citizens, without first shewing the immemorial custom that none but freemen of the city shall carry on trade within it. The shewing the general custom to make bye-laws, is not sufficient. *Chamberlain of London* v. *Compton*, 4 Law J. K.B. 49, s. c. 7 D. & R. 97.

A bye-law may be explained and supported by reference to other bye-laws.

A bye-law, which imposes on the members of the company, the payment of an annual, or any other sum towards the funds of the company, is bad, and cannot be enforced, unless there be special circumstances to shew the necessity of the contribution.

But reasonable fines may be imposed to enforce the attendance of members, or their acceptance and service of offices, to which they are duly elected. *Tobacco-pipe Makers' Company* v. *Woodroffe*, 4 Law J. K.B. 301, s. c. 7 B. & C. 838, s. c. 5 D. & R. 530.

A bye-law, prohibiting persons from being admitted to their freedom, who have not been previ-

ously called and approved of at three meetings of the corporation, is not illegal. *Rex v. the Mayor of Durham*, 1 Ken. 512, s. c. 1 Burr. 127.

A bye-law, giving power of amotion to certain members of a corporation for a just cause, is legal. *Rex v. Richardson*, 2 Ken. 85, s. c. 1 Burr. 517.

A bye-law restraining the number of persons out of whom an election is to be made, is illegal. *Lee v. Wallis*, 1 Ken. 292, s. c. Sayer, 262.

Where, on the enrolment of indentures of apprenticeship, a bye-law directed the members of a corporation to pay a certain sum for the use of the corporation, the Court held it void and illegal. *Newsley v. Webster*, 1 Ken. 243.

A company was incorporated by letters patent, and empowered to make reasonable bye-laws for the good order, rule, and government of the company. They accordingly made a bye-law, that the steward for the time being should, on Lord Mayor's day, provide a dinner for the livery of the company (with such allowance from the company as they should think fit), or in default, pay a fine of 20*l.*, or swear that he was not worth 300*l.*: Held, that such bye-law was bad; and that, at all events, the allowance to be made by the company, being a condition precedent, should have been averred in the declaration. *Carter v. Sanderson*, 6 Law J. C.P. 232, s. c. 5 Bing. 79, s. c. 2 M. & P. 164.

The words "shall be lawful," when found in the bye-law of a corporation, are not to be construed as obligatory to do what the law ordains. Therefore, where a bye-law of the borough of Eye ordained that, upon the happening of any vacancy in the number of twenty-four common councilmen, such vacancies should be filled by freemen inhabiting the town, and that a great court should be holden once every quarter, at which "it should be lawful" for the bailiffs to admit to the *freedom* of the town such persons as had been resident therein for one whole year: Held, that this bye-law was only optional, and could not be enforced by mandamus to compel the admission of qualified inhabitants to the freedom of the borough. *Rex v. the Bailiffs and Corporation of Eye*, 2 D. & R. 172, s. c. 1 B. & C. 85.

### (E) OFFICERS AND MEMBERS.

#### (*a*) *Qualification.*

A custom, that any person exercising a particular trade shall become a member of a particular company, is legal. *The Warden and Merchants of Shrewsbury v. Hart*, 1 C. & P. 113.

Inhabitancy does not confer the right of being a corporator. Therefore, where an inhabitant of a borough applied for a mandamus to be enrolled and sworn a corporator, without shewing an inchoate right in every inhabitant to be a burgess: The Court refused the writ. *Rex v. the Mayor, &c. of West Looe*, 3 B. & C. 677, s. c. 5 D. & R. 590.

The business of an attorney is not such as will entitle a person, who has served seven years' apprenticeship, to be admitted as a freeman in a corporation, where one of the rights of admission is by apprenticeship to a freeman being a trader. *Rex v. the Mayor and Corporation of Doncaster*, 6 Law J. M.C. 57, s. c. 7 B. & C. 630, s. c. 1 M. & R. 545.

#### (*b*) *Election.*

If by a charter of incorporation no particular day for the election of the burgesses be specified, and there be no custom regulating it, notice must be given to the corporators of such meeting, and that, in such a reasonable time as to give them all an opportunity of attending and voting: therefore, where a bye-law directed that such notice should be given by ringing a bell at the Guildhall; and, it appeared, that some of the electors lived three miles off,—It was holden, that such bye-law was illegal. *Rex v. Hill*, 4 B. & C. 426, s. c. 6 D. & R. 593.

Where an university statute directed a particular mode of election of certain officers; and it appeared that certain ceremonies distinct from those mentioned in the act were to be observed: It was holden, that an elector by complying with the latter ceremonies, without having previously submitted to those directed by the act, did not thereby forfeit the office. *The case of Queen's College, Cambridge*, 1 Jac. 1.

Where, to qualify a president of a college, a particular amount of property is required, such qualification need not be produced at the election. *Case of Queen's College, Cambridge*, 1 Jac. 36.

Where elections are directed to be made by the Master and the majority of the Fellows of a college, the concurrent voice of the Master is necessary in all elections. *In the matter of Queen's College, Cambridge*, 6 Law J. Chanc. 176.

Where the right of election is not in the members of the corporation at large, but in a select body, a notice given to the members of that body calling a corporate meeting, need not express the purpose for which the meeting is called.

But where the right of election is in the members of the corporation at large, such a notice should express the purpose for which the meeting is called. *Rex v. Pulsford*, 6 Law J. K.B. 336, s. c. 8 B. & C. 350, s. c. 1 M. & R. 384.

It is not a general rule of law, that there cannot be a valid election to a corporate office, by a select definite body of the corporation, without notice being given of the purpose for which the assembly at which that election is made is to be held.

Therefore, where a plea to an information in the nature of a *quo warranto*, stated, that the defendant was elected by the major part of the common council duly assembled, and the replication averred, that "notice of the purpose" for which such assembly was to be held was not given,—the replication was holden to be bad on demurrer. *Rex v. Sir George Chetwynd, Bart.*, 6 Law J. M.C. 49, s. c. 7 B. & C. 695, s. c. 1 M. & R. 534.

In general, a member of a corporation can not question the election of him, for whose election he had himself voted.

Though, if, at the time of the election, the voter did not know of the facts, upon which he afterwards seeks to impeach the election, he may avail himself of them. But, until he shew the contrary, it will be presumed that he knew of all facts, which, as a member of the corporation, he ought to know.

When a person has a good title to a corporate office, and is admitted before a person who is a presiding officer *de facto*, his title cannot be afterwards impeached, even by a successful impeachment of the title of that presiding officer. *Rex v. Slythe*, 5 Law J. M.C. 41, s. c. 6 B. & C. 240.

Where the charter of a corporation provided,

that, "when any one or more of the capital burgesses for the time being should die, or dwell without the borough, or be removed from his office, it should be lawful to the other capital burgesses, at *that time surviving and remaining, or the greater part of the same*, of whom the mayor was to be one, to elect another, or others, of the burgesses of the said borough, into the place or places of the capital burgess or burgesses so happening to die," &c.: Held, that in order to make a good election, a majority of the entire body of capital burgesses must be present, and not merely of those then existing. *Rex* v. *Devonshire*, 1 B. & C. 609, s. c. 3 D. & R. 83.

It being directed by a charter, that out of certain persons to be nominated in a particular mode, "the mayor, aldermen, bailiffs, principal burgesses, and other burgesses, and inhabitants of the borough for the time being, (they being for that purpose congregated and assembled together, or the greater part of them as should be so congregated,) might, by the greater part of the voices of them assembled, choose one to be mayor:" Held, that in order to make a good election, a majority of each definite body must be present. *Rex* v. *Bower*, 1 Law J. K.B. 174, s. c. 1 B. & C. 492, s. c. 2 D. & R. 761.

Where a charter has conferred the right of election upon the majority of an assembly consisting of several definite bodies, or the greater part of them, a majority of the members of each of those definite bodies is necessary to make a valid election.

But if one of those definite bodies be, for other purposes, subdivided into integral parts, under distinct titles, it will not be requisite that, in such election, there shall be a majority of the members of each integral part.

A charter granted to a corporation by prescription, recognizes the existence of a body consisting of thirty-six chief burgesses, and directs that the mayor, recorder, "and the chief burgesses, being the common council of the said borough, of which chief burgesses some are called, known, or distinguished, by the name and distinction of chief-burgesses-councillors, of the borough aforesaid, or the greater part of them, shall have power and authority to choose, nominate, and appoint, a mayor, &c." and the mayor is to be chosen out of the chief-burgesses-councillors. It creates a court of record within the borough, which is to held before the mayor, recorder, and the chief-burgesses-councillors, before whom also the sessions of the peace are appointed to be held, out of whom, the justices for the borough are to be chosen, and by whom fines are to be imposed on persons refusing to take upon themselves offices to which they have been elected. When the common council are assembled in their elective capacity, it is sufficient if any nineteen chief burgesses are present; and it is not necessary that the presence of a majority of the twelve chief-burgesses-councillors, and the presence of a majority of the twenty-four chief burgesses, not being councillors, should concur. *Rex* v. *Headley*, 6 Law J. K.B. 53, s. c. 7 B. & C. 496, s. c. 1 M. & R. 345.

The general rule of construction for charters is, that where the select body consists of integral parts, and "a majority" must be present at an election to fill up a vacancy, there must be present a majority of each integral part.

But this general rule is not inflexible; and where the terms of the charter shew that it would be against the intention of the donor to adhere to the above rule, a different construction must be given.

Thus, where there were, a mayor, two bailiffs, and four jurats; and the presence of a "majority" was necessary to fill up a vacancy,—it was held, that the above general rule did not apply; for there could be no majority with regard to the bailiffs, who were but two in number; and, consequently that an election of a jurat, at which there were present, the mayor, the two bailiffs, and two out of the remaining jurats, was a good election, the general rule being inapplicable; and there being five, a majority of the whole seven, present. *Rex* v. *Gret*, 6 Law J. K.B. 331, s. c. 8 B.& C. 363, s. c. 2 M.& R. 391.

### (e) *Rights, Duties, and Liabilities.*

[See Quo Warranto.]

It is not compulsory on aldermen to reside within the borough, in the absence of proof, either that it is expressly required by the charter, or that their non-residence has been productive of a serious inconvenience: therefore, where a charter contained no such proviso, and it did not appear that an actual residence was necessary to the discharge of their duties: The Court refused a mandamus to compel the corporation to assemble for the purpose of considering the removal of the non-resident corporators. *Rex* v. *the Mayor of Portsmouth*, 3 B. & C. 152, s. c. 4 D. & R. 767.

The statute, 9 Anne, c. 20, s. 8, does not apply to the case of a person, who in one year has been elected and served under a charter, and in the next year is nominated by the Crown in a new charter.

Where a corporator is in office, and in a situation to exercise his rights, the Court will not interfere by mandamus to try the effect of them.

And, accordingly, where a corporator, by the situation of his name on the books, in rotation, was entitled to but one vote—whereas, if his name had been put in the proper place, he would have been entitled to two: The Court refused a mandamus to alter the situation of his name. *Ex parte Reynolds. Rex* v. *the Corporation of Yarmouth*, 5 Law J. K.B. 69.

A defendant, who has acquired a corporate character after the period of time to which the action relates, is not entitled to inspect the corporation books. *Mayor of Bristol* v. *Visger*, 8 D. & R. 434.

By the charter of a corporation, the aldermen were to be nominated out of the burgesses; a burgess having accepted the office of alderman, under a void election,—it was holden to operate as a surrender of a former office; and, therefore, upon being ousted, he could not be deemed a burgess. *Rex* v. *Hughes*, 5 B. & C. 886, s. c. 8 D. & R. 708: s. p. *Rex* v. *Hubball*, 5 Law J. M.C. 24, s. c. 6 B. & C. 139, s. c. 9 D. & R. 145.

### (d) *Amotion.*

These words in the charter of a corporation, that *it shall be lawful for the mayor and capital burgesses to remove any of their body for non-residence within the borough*, do not give a compulsory, but a discretional power of amotion. *Rex* v. *the Mayor of West Looe*, 5 D. & R. 414.

### (F) Remedies by and against.

A corporation composed of, and instituted by foreigners, according to the law of their country, may sue in this country by their corporate name. And if the name by which they have declared, be not directly consistent with the one specified in the charter, proof that they are one and the same company, is a sufficient answer to the objection. *The National Bank of St. Charles* v. *De Bernales*, 1 R. & M. 193, s. c. 1 C. & P. 569.

Where an act of parliament, creating a corporation, casts upon them the payment of a sum of money, as a performance of a duty, debt will lie against them to recover that sum, although there be no contract under seal. *Tilson* v. *Warwick Gas-Light Company*, 4 Law J. K.B. 53, s. c. 4 B. & C. 962, s. c. 7 D. & R. 575.

A corporation aggregate may maintain assumpsit, for use and occupation, against a tenant who has held the premises under them and paid them rent, on the ground, that as he had occupied, the consideration was executed. *The Mayor and Burgesses of Stafford* v. *Till*, 5 Law J. C.P. 77, s. c. 4 Bing. 75.

It is improper to direct a general inquiry into the property possessed by a corporation. *Attorney-General* v. *Mayor of Exeter*, 6 Law J. Chanc. 50.

Where a body politic are empowered to bring actions in the name of the treasurer or other officer, and it is declared that no action so brought shall abate by the death, resignation, &c. of such officer, a resolution to proceed, which is not acted upon during the continuance in office of one treasurer, need not be renewed on the appointment of his successor, in whose name they may recover, as well for causes of action arising before as subsequent to his appointment. *Cortis* v. *the Kent Waterworks Company*, 5 Law J. M.C. 106, s. c. 7 B. & C. 316.

If a party sustain damage from the overflowing of the sea, in consequence of the non-repair of sea-walls, which, by the terms of their charter, a corporation is bound to repair, he may maintain an action against the corporation for compensation. *Henry* v. *the Mayor and Burgesses of Lyme Regis*, 6 Law J. C.P. 222, s. c. 5 Bing. 91.

In what particular form a corporation shall account, and to what extent they shall be made responsible upon a breach of trust—*quære*. *Attorney-General* v. *Corporation of Dublin*, 1 Bligh, N.S. 312.

In an action against a body corporate, for negligently pulling down a house which belonged to them, whereby the plaintiff's house was injured; a letter written to the plaintiff, respecting the pulling down of the house by the defendant's surveyor, who had the management of all their buildings, is to be presumed to have been written by him in that capacity, and is therefore evidence against them. *Peyton* v. *the Governors of St. Thomas's Hospital*, 3 C. & P. 362. [Tenterden]

In a summary complaint under the act of 16 Geo. 2, c. 11, s. 24, respecting a wrong alleged to have been done upon the election of magistrates and councillors of a Scotch burgh, by the express provisions of the act, it is necessary that all the magistrates and councillors should be parties in the proceeding below; and, as appellants, or as respondents, upon appeal to the House of Lords; as, upon a similar proceeding before the act, by action of declaratur, all persons interested must be parties. *Angus* v. *Montgomery*, 3 Bligh, 98.

Where the whole body are not before the House, no judgment can be given. Cases which have been decided contrary to this doctrine (*semble*) are of doubtful authority.

Whether a special objection should be taken, at the election, and a vote put upon the objection, as a necessary preliminary to found the complaint under the act—*quære*.

The 7 Geo. 2, c. 16, s. 7, does not expressly require such notice to, and summons of, magistrates and councillors, as the 16 Geo. 2, c. 11, s. 24; but the latter act being passed to explain and amend the former, (*semble*) they may be considered in many respects as one act.

The proceeding, under the act 16 Geo. 2, must be within two months after the election or wrong done. Whether this can apply to a case of continuance upon the roll, upon an election many years before, without actual re-election—*quære*.

In the case of a party, not a magistrate or councillor, but having a vote, where the election is for life, and the party has demitted his office, being struck off the roll, (*semble*) there is no authority under the act to summon, and, *à fortiori*, no authority to hear and decide the case on summary application.

Whether this provision of the act is not confined to summary complaints under the act, and whether there is authority to extend the provisions to action of declaratur not under the act—*quære*. *Angus* v. *Montgomery*, 3 Bligh, 98.

The members of a corporation having filed an original bill in their individual names, but stating their corporate character upon an abatement of their suit, file a bill of revivor in their corporate name only. A demurrer for want of privity between the plaintiffs in the original bill and the bill of revivor, was overruled in the court below, and on appeal. *Walker* v. *the Warden and Fellows of Christ's College, &c.*, 1 Bligh, N.S. 9.

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## COSTS.

(A) In general.
(B) Plaintiff's right to.
(C) Defendant's right to.
(D) Of Creditors.
(E) On Motions and Rules.
*New Trial*, *Nonsuit*, *Error*. } See these titles.
(F) Extra Costs.
(G) Double and treble Costs.
(H) Security for.
(I) Taxation of.
(*a*) *In general.*
(*b*) *Attornies' and Solicitors' Bills.*
(K) Payment of, how enforced.
(L) In the Ecclesiastical Court.
(M) In the Courts of Admiralty.
(N) In Criminal Cases.

### (A) In general.

Parties to a cause, being served with a petition which is heard at the Rolls, and appearing by

counsel at the hearing, but having no interest in the matter of the petition, are not allowed the costs of their appearance. *Garey* v. *Whittingham*, 2 Law J. Chanc. 16, s. c. 1 Turn. 405.

Where three appointments are made by the Master upon an order for the plantiff to amend, upon payment of costs, and the attorney for the plaintiff attends the Master accordingly, but no one appears for the defendant, the Master should indorse the order, allowing the sum of 3*s.* 4*d.* for the costs of the attendance, without requiring an affidavit of the service of the appointments, or of the attendances. *Praed* v. *Hammond*, 2 Y. & J. 32.

If an action is brought for the benefit, and through the intervention of another, he is bound to bear the costs of the action. *M'Donald* v. *Ross*, 2 Bligh, 547.

The costs of a *remanet* are to abide the result of the cause, and are payable to the party who is ultimately successful, although they may have been incurred in respect of a former trial, in which he was successful. *Gibbons* v. *Phillips*, 6 Law J. K.B. 371, s. c. 8 B. & C. 487.

If a cause be made a *remanet* at one assize, the costs at that assize follow the verdict. *Standen* v. *Hall*, 1 Ken. 338, s. c. 1 Sayer, 272 : s. P. *Lord Mountcharles* v. *Charles Yorke*, 1 Ken. 341.

Slight grounds will induce the Court to discharge a rule for costs, for not proceeding to trial as in the case of a nonsuit. *Monday* v. *Wilkes*, 1 Ken. 349.

The defendant having a special jury, the plaintiff withdrew the record, and the defendant paid the jury: the money paid to the special jury is not part of the costs of the day. *Turnbull's case*, 2 Law J. K.B. 93.

A party producing a false affidavit is bound to pay the costs. *Bally* v. *Williams*, 1 M'Clel. & Y. 334.

Costs, as between solicitor and client, allowed to the archbishop and bishop, when made parties to a suit respecting the validity of an election of a vicar. *Edenborough* v. *Archbishop of Canterbury*, and *Carter* v. *Bishop of London*, 2 Russ. 93.

Where the bill has been amended, the Court, with a view to the question of costs, may look at the frame of the bill as it stood before amendment. *Parkhurst* v. *Lowten*, 6 Law J. Chanc. 120.

There cannot be a prospective order to pay costs as of proceedings to be had before the Master. The question as to such costs ought always to be reserved. *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N.S. 17.

Upon a summary complaint, under the 16 Geo. 2, c. 11, s. 24, the Court of Session have no power to award *costs in part*, the act directing that they shall allow to the party who prevails full costs of suit. *Angus* v. *Montgomery*, 3 Bligh, 98.

Where considerable delay has occurred in the prosecution of a suit, costs are not to be given, although the decree is reversed. *Colclough* v. *Sterum*, 3 Bligh, 181.

Defendants in a tithe cause made plaintiffs at law, for the purpose of trying a feigned issue, directed to assist the Court in determining the question of modus raised by the answer, succeeding on several occasions in obtaining verdicts, which were afterwards sucessively set aside as not satisfactory to the court of equity, and new trials granted, the last being taken by the plaintiffs at law by consent, each party to pay his own costs at law and in equity: bill dismissed on further directions, without costs.

So, where the defendant in equity (plaintiff at law) after two trials of the issue, on the third reformed the issue, and thereupon the defendant at law (plaintiff in equity) obtained on petition an order, that the issue be taken as confessed, after the cause had been carried down and notice of trial given: the bill was dismissed without costs, on the ground that the plaintiff in equity had been misled by the record down to the last moment, the Court holding that the defence should be so stated in the answer, as that the plaintiff might be fully and accurately aware of the whole of the matter really intended to be ultimately relied on, in resistance of his demand in the suit in equity.

Where, after several trials at law the jury ultimately found in one case a verdict for the modus (a district modus), not generally and as laid, but with an exception of certain lands within the district, not describing what lands, or in whose occupation they were; and in the other a verdict also for the modus; but the postea was accompanied with a certificate of the judge, noticing certain exceptions to the modus. The bills were dismissed without costs. *Williamson* v. *Thompson*, 11 Price, 745.

Costs will be given against a party who endeavours unsuccessfully to impeach a compromise, after a contingency has happened, which renders the compromise less for his benefit. *Naylor* v. *Wynch*, 2 Law J. Chanc. 132, s. c. 1 S. & S. 555.

Costs of an issue *devisavit vel non* refused, where there appeared on the trial to have been no pretence for the opposition to the will on the ground of insanity: But, in such a case, the heir is not bound to pay costs. *Tucker* v. *Sanger*, 13 Price, 608, s.c. 1 M'Clel. 424.

### (B) PLAINTIFF'S RIGHT TO.

Where a defendant paid 15*l.* into court against a demand of 27*l.* which the plaintiff at first refused to take, and proceeded in the action, but afterwards took it out of court; the plaintiff's proceedings not appearing to be vexatious, the Court refused to deprive him of the costs incurred between the obtaining the rule and the taking the money out of court. *Carr* v. *Smythies*, 6 B. Mo. 430, s.c. 3 B. & B. 168.

Where, in a country cause, before declaration, the defendant took out a summons to stay proceedings upon payment of a sum less than the plaintiff's demand, and costs, upon which no order was made; and the defendant afterwards paid that sum into court, which the plaintiff's agent, having in the meantime consulted his principal in the country, took out of court: Held, that the plaintiff, not having been guilty of fraud or vexation, was entitled to costs up to the time at which he took the money out of court. *Haworth* v. *Holgate*, 2 Y. & J. 257.

Where the defendant obtained a summons to stay proceedings in the action on the payment of debt and costs, up to the time of the declaration, which the plaintiff refused to accept, the Court would not deprive the latter of costs subsequently incurred, although the defendant paid the money into court, it appearing that there was nothing vexatious or oppressive in the plaintiff's conduct. *Hatchard* v. *Hague*, 5 Law J. C.P. 17.

Where a plaintiff obtains a mandamus to examine witnesses in India, and the rule does not provide for costs, the defendant, who does not join in the application for the writ, and does not derive or seek to derive any benefit under it, by examining or cross-examining witnesses, is not, in the event of a verdict against him, chargeable with the costs thereby occasioned. *Fairlie* v. *Parker*, 6 Law J. C.P. 105, s. c. 1 M. & P. 438.

Where a defendant obtains a mandamus under 13 Geo. 3, c. 63, s. 44, to examine witnesses in India, the plaintiff, having recovered a verdict, is entitled to his costs of cross-examining such witnesses. *Whytt* v. *Macintosh*, 6 Law J. K.B. 224, s. c. 8 B. & C. 317, s. c. 2 M. & R. 133.

Where the plaintiff in an action on a marine policy of assurance, having recovered for an average loss, obtained a new trial, the costs of the first trial being directed to abide the event, and at the second trial recovered again for no more than an average loss: Held, that he was entitled to the costs of one of the trials only, and the defendant to the costs of neither. *Hudson* v. *Majoribanks*, 2 Law J. C.P. 32, s. c. 1 Bing. 393, s. c. 7 B. Mo. 463.

The plaintiffs were nonsuited, and obtained a rule for a new trial, in which no mention was made of costs; and the defendant, not wishing to go down again to trial, gave them a cognovit in this form—"I hereby confess this action, and that the plaintiffs have sustained damages to the amount of one shilling, besides their costs, to be taxed by the Prothonotary, as he shall think the plaintiffs entitled." The Prothonotary having refused to tax the plaintiffs' costs of the nonsuit, the Court refused to interfere. *Elvin* v. *Drummond*, 6 Law J. C.P. 31, s. c. 4 Bing. 415, s. c. 1 M. & P. 88.

To a declaration of trespass *quare domum fregit*, with a count *de bonis asportatis*, the defendant pleaded the general issue and accord and satisfaction (the question at the trial being, whether a term for years had expired), and the jury found a general verdict for the plaintiff, with damages under 40s., and the judge certified the amount of damages under the statute 43 Eliz. c. 6, s. 2: Held, that the plaintiff was entitled to costs *de incremento*, notwithstanding the certificate. *Wright* v. *Piggin*, 2 Y. & J. 544.

If a plaintiff employs a person to conduct his cause, in the character of an attorney, who is not qualified to act as such, it does not deprive the former of his right to all his costs as against the defendant, in case he obtains a verdict. The defendant's remedy is, to bring the party so practising before the Court, who will deal with him according to the offence of which he may be found guilty. *Reader* v. *Bloom*, 3 Law J. C.P. 120, s. c. 3 Bing. 3, s. c. 9 B. Mo. 741.

In an action brought to recover the balance of an account, the parties agreed that the amount should be referred to two arbitrators, who, in settling the balance due, were to be guided by the decision of a jury, in regard of a certain cargo of cotton shipped by the plaintiffs, the costs of which formed one of the items. The jury found that the plaintiffs were not entitled to charge the defendants with the costs of the cotton; and the arbitrators, after excluding such costs pursuant to the verdict, found a certain sum to be due to the plaintiffs. The Prothonotary, on taxation, refused to allow the plaintiffs the costs of the trial which applied to the cotton: Held, that he was right in so doing. *Fairlie* v. *Parker*, 6 Law J. C.P. 105, s. c. 1 M. & R. 438.

Creditor proceeding at law against the executor, after a decree, allowed his costs at law incurred previous to notice of the decree, but not his costs of the motion to restrain his proceedings. *Anon.* 2 S. & S. 424.

In a suit for a partition and an account, the defendant, improperly disputing the plaintiff's title, ordered to pay so much of the costs as related to the account and to the proof of the plaintiff's title. *Hill* v. *Fulbrook*, 1 Jac. 574.

A plaintiff is entitled to have his costs out of the fund which is the subject of an interpleading suit. *Campbell* v. *Solomons*, 1 S. & S. 462.

Plaintiffs will be allowed the costs of making out their pedigrees, which shew them to be entitled to benefits under a will. *Silcocks* v. *Bell*, 1 Law J. Chanc. 137.

Where it appears on the face of a bill for a specific performance, that the plaintiff could not convey, according to the agreement, without the direction of the Court, he will not have the costs up to the hearing; but if the defendant insists on inquiries into the title, and fails in them, the plaintiff's costs incurred in these inquiries, and at the hearing on further directions, must be paid by the defendant. *Allen* v. *Currie*, 1 Law J. Chanc. 135.

### (C) DEFENDANT'S RIGHT TO.

[See MALICIOUS ARREST.]

Where, after verdict for plaintiff, a new trial was granted without mention of the costs, and the plaintiff discontinued: It was holden, that the defendant was not entitled to the costs of the trial. *Gray* v. *Cox*, 5 B. & C. 458, s. c. 8 D. & R. 220.

On making a rule absolute to set aside a trial, in consequence of an irregularity in the notice of it, the Court would not give costs, because the attorney for the defendant, having an opportunity, did not inform the plaintiff's attorney that he intended not to act on that notice of trial. *Scriben* v. *Montgomery*, 2 Law J. K.B. 36.

The defendant having been indicted for an assault, arranged with the prosecutor that he would submit to a verdict of guilty, if he was not to be brought up for judgment; upon that understanding he pleaded guilty: Held, upon a rule calling on the defendant for the payment of costs, that, as no mention of the costs was made at the trial, and as a prosecutor was not entitled to costs, as a matter of course, where the defendant submits to an understanding of the above description,—that the prosecutor cannot afterwards call upon the defendant for the payments of costs, inasmuch as he should have made it part of the stipulation. *Rex* v. *Rawson*, 2 B. & C. 598, s. c. 4 D. & R. 124.

Where, in a case in which a corporation are defendants, the record is withdrawn in consequence of the absence of a material witness, who is one of the corporation, and it does not appear that such absence arises from the act of, or is in collusion with the other corporators, the prosecutor will be compelled to pay the costs of not proceeding to trial pursuant to notice. *Rex* v. *the Mayor, &c. of Great Yarmouth*, 5 B. & A. 531.

### (D) OF CREDITORS.

Costs are not payable to a creditor where a debt has been disallowed by the Master, though it has on petition been allowed by the Court. *Watkins* v. *Maule*, 1 Jac. 105.

If a creditor sues, and it appears there are no funds applicable to the debt, he will be liable to costs. *Bluett* v. *Jessop*, 1 Jac. 240.

In a creditor's suit, bringing the heir-at-law and also the devisee of the debtor before the Court, as well as his personal representative, if the fund is not sufficient for the payment of the taxed costs of all the parties, all must abate proportionably. *Tovey* v. ——, 6 Law J. Chanc. 46.

A creditor who proves before the Master, has generally no costs; but if his proof is beneficial to the estate, as where he saves by it the expenses of a suit, and there are extraordinary costs, the Court will give them on petition. *Harvey* v. *Harvey*, 6 Mad. 91.

It is a general rule that creditors and next of kin, who go before a Master to establish their claim, have to pay the expenses of so doing; but if, after they have established their claim, they are allowed to mix in the suit, as if they had been parties, in respect of such proceedings, they may be entitled to their costs. *Waite* v. *Waite*, 6 Mad. 110.

After a decree for the administration of a testator's estate in England and Ireland, an incumbrancer upon the Irish estate, having come in and proved his debt, restrained from proceeding in a creditor's suit, instituted by him in the Court of Chancery in Ireland, received the costs up to the time of his having notice of the decree, and paying the costs of the application. *Beauchamp* v. *the Marquis of Huntley; Clarke* v. *the Earl of Ormonde*, 1 Jac. 546.

The Court *in banco* have no power to assist a defendant under the 5 Geo. 4, c. 104, s. 21, unless the judge who tried the cause has certified. *Jones* v. *Kenrick*, 6 Law J. K.B. 329, s. c. 8 B. & C. 337.

The defendant, an uncertificated bankrupt, being arrested, justified bail and pleaded the general issue, and the cause was set down for trial; but, having subsequently obtained his certificate, he pleaded it, *puis darrein continuance*, whereupon the record was withdrawn, and the action discontinued; and the defendant having ruled the plaintiff to reply, signed judgment of *non pros.* against him for want of a replication: Held, that he was not entitled to his costs prior to the plea *puis darrein continuance*. *Baker* v. *Morrey*, 6 Law J. C.P. 45, 1 M. & P. 138.

Where a verdict had been taken for the plaintiff, at the trial of a cause, for nominal damages, subject to the award of an arbitrator; and the latter afterwards, by his award, ordered the verdict to be entered for 38*s.*, the debt having been reduced to that sum by part payment before action brought: The Court ordered a suggestion to be entered on the roll, to deprive the plaintiff of costs, under the Middlesex Court of Conscience Act. *Nightingale* v. *Barnard*, 5 Law J. C.P. 145, s. c. 4 Bing. 169.

### (E) ON MOTIONS AND RULES.

Where only one notice of motion has been given, and the party against whom it is intended to be made does not appear on the day appointed, the Court has no rule enabling them to give the other party, who has attended, the costs of his attendance. *Ware* v. *Beckford*, 9 Price, 41.

In the Exchequer, in order to entitle a party to costs for an irregularity, he must apply to set aside the proceedings in the first instance. *Warren* v. *Cross*, 9 Price, 637.

Costs of shewing cause against a rule in the first instance are never given. *Rex* v. *Long*, 6 Law J. M.C. 21, s. c. 1 M. & R. 139.

The general rule of costs in motions is, that the costs of the party who succeeds either in making or in opposing a motion, are costs in the cause; and that the costs of the party who fails either in making or opposing a motion, are not costs in the cause. *Reg. Gen.* 1 Law J. Chanc. 141.

### (F) EXTRA COSTS.

In an action on the case, against the sheriff, for falsely returning to a *capias*, *Non sunt inventæ; per quod* the plaintiffs were outlawed, and put to expense in reversing the outlawry: Held, that the plaintiffs were not entitled to recover the *extra* costs of setting aside the outlawry. *Jenkins* v. *Biddulph*, 5 Law J. C.P. 138, s. c. 4 Bing. 161.

A creditor who makes an unsupported claim, is liable to additional costs. *Sharples* v. *Sharples*, M'Clel. 506.

Where a bill is filed for an account against a residuary legatee, who has taken the benefit of the Insolvent Debtors Act, and has rendered two supplemental bills necessary: Held, that the additional costs should be paid out of his share. *Brace* v. *Ormond*, 2 J. & W. 435.

Where a plaintiff has by an *ex parte* application taken out a commission to examine witnesses *de bene esse*, and the defendant demurs, and then joins in the commission, and cross-examines witnesses, if the demurrer is afterwards allowed, the defendant, besides the 5*l.* costs, will be allowed the expenses of the commission.

The allowance of additional costs, though made some time after the demurrer, it has been determined, must be incorporated with the original order allowing the demurrer. *Dew* v. *Clarke*, 1 Law J. Chanc. 37.

### (G) DOUBLE AND TREBLE COSTS.

Double costs, under 11 Geo. 2, c. 19, s. 22, are estimated by giving single costs, and half the amount of the single costs. *Staniland* v. *Ludlam*, 4 B. & C. 889, s. c. 7 D. & R. 484.

Verdict for plaintiff in trespass for an injury done, in pursuance of the Building Act, 14 Geo. 3, c. 78, subject to a reference,—the arbitrator awarded that the verdict should be for the defendant: Held, that he was entitled to treble costs. *Pratt* v. *Hillman*, 3 Law J. K.B. 253, s. c. 6 D. & R. 481.

### (H) SECURITY FOR.

A plaintiff resident in Ireland will be compelled to give security for costs. *Moloney* v. *Smith*, 1 M'Clel. & Y. 213: s. p. *Hill* v. *Reardon*, 6 Mad. 46.

Plaintiffs, an Irish company, whose concerns were all carried on in Ireland, were compelled to give security for costs, notwithstanding an affidavit that they had money in a banker's hands in London, and that many of the members resided in England. *Limerick and Waterford Railway Company* v. *Fraser*,

6 Law J. C.P. 9, s. c. 4 Bing. 394, s. c. 1 M. & P. 23.

A party will not be compelled to give security for costs while in this country, although he usually resides abroad. *Anon.* 8 Taunt. 737.

Nor, if he has property in England, will the Court require him to give security for costs, because he resides abroad, and only comes occasionally to England. *Croft* v. *King*, 2 Law J. K.B. 39.

The temporary absence of the plaintiff in a foreign country, is not sufficient to entitle the defendant to security for costs. For that purpose, a clear case of the plaintiff having left England, with an intention of permanently residing abroad, must be made out. *Cole* v. *Beale*, 1 Law J. C.P. 49, s. c. 7 B. Mo. 613.

A British officer will not be compelled to give security for costs, although he is serving abroad under a foreign power. *O'Lawler* v. *Macdonald*, 8 Taunt. 736.

A foreigner who is in the habit of residing in England for four months in the year, cannot be compelled to give security for costs. *Durell* v. *Matheson*, 8 Taunt. 711.

Plaintiffs resident in a foreign country will be compelled to give security for costs. *De Marneffe* v. *Jackson*, 13 Price, 603.

And the same rule applies, if the plaintiff reside out of the jurisdiction of the court. *Drury* v. *Johnson*, 13 Price, 489.

If a plaintiff be not actually domiciled in this country, the Court will require him to give security for costs; where, therefore, the plaintiff resided partly in this country and partly in Scotland, and brought an action against the defendant as his factor: Held, that the latter was entitled to such security. *Naylor* v. *Joseph*, 3 Law J. C.P. 207.

A husband being abroad is a sufficient reason to induce the Court not to call upon the wife for security for costs, when suing in her husband's name. *Mingoth* v. *Drummond*, 1 Ken. 469.

The defendant is not entitled to call on a plaintiff to give security for costs, though it is sworn and not contradicted, that the plaintiff usually resides abroad, and is about to quit the country. *Anon.* 5 Law J. Chanc. 71.

Nor will the Court make an order to stay proceedings until security be given for costs, upon the ground of the plaintiff being *about* to leave the country. *Willis* v. *Garbutt*, 1 Y. & J. 511.

A plaintiff resident abroad, who had been ordered to give the security for costs, but had not complied, ordered to give the security, and on default, his bill to be dismissed. *Camac* v. *Grant*, 1 Sim. 348.

The mere circumstance of the plaintiff being imprisoned does not entitle the defendant to call for a security for costs. *Baddeley* v. *Harding*, 6 Mad. 214.

A motion requiring a plaintiff, resident abroad, to give security for costs, must be made before plea.

*Semble*—that it cannot be required from a foreigner, a master of a vessel, in the habit of sailing to and from the ports of, though he has no fixed residence in, this country. *Kasten* v. *Plaw*, 6 Law J. C.P. 13, s. c. 1 M. & P. 30.

Where the plaintiff is a foreigner residing abroad, the Court will not entertain a motion for security for costs, until the defendant has appeared; or, if the writ be bailable, until he has perfected bail. *Ely* v. *Johnson*, 6 Law J. K.B. 237.

It is not necessary for an infant who sues by his *next friend*, to give security for costs, although the next friend is sworn to be insolvent. *Yarworth* v. *Mitchel*, 1 Law J. K.B. 112, s. c. 2 D. & R. 423.

Trustees, who are empowered to use a person's name in their legal proceedings, may be called on to indemnify him against costs. *Philpot* v. *Badham* 2 Law J. K.B. 41.

Where plaintiff sued in *formâ pauperis*, and the defendant, two years afterwards, made an application for security for, and taxation of the costs previously incurred,—The Court refused the application. *Jones* v. *Peers*, 1 M'Clel. & Y. 282.

Swearing that the plaintiff is insolvent, and that the action is brought in his name for the benefit of J S, is no ground to induce the Court to compel the plaintiff to give security for costs. *Morgan* v. *Evans*, 7 B. Mo. 344.

If, after issue joined, the plaintiff be discharged out of custody as an insolvent debtor, the Court will stay the proceedings until the assignee or one of the creditors give security for the costs. *Hedford* v. *Knight*, 2 Law J. K.B. 114, s. c. 2 B. & C. 579, s. c. 4 D. & R. 81.

Where the plaintiff had assigned over his property to trustees for the benefit of his creditors, which trustees were suing in the plaintiff's name, the Court required that the plaintiff should give security for costs. *Lister* v. *Wolfe*, 6 Law J. K.B. 369.

The Court will grant a rule for the attorney of the plaintiff to give security for costs, on an affidavit, that the action has been brought without the authority of the plaintiff. *Fairband* v. *Zeimar*, 2 Law J. K.B. 57.

Security for costs will be required in trespass against parish officers, for distraining for poor-rates, if it appear that the plaintiff has refused to pay the rates by the desire of his landlord, who is also the attorney in the cause. *Tenant* v. *Brown*, 5 B. & C. 208.

The plaintiff sued in an inferior court for a sum less than 10*l.*, but laid his damages at 20*l.* The defendant removed the cause into the Court of King's Bench: The Court held, that, under 19 Geo. 3, c. 70, s. 6, he ought to enter into recognizances to pay the debt and costs. *Attenborough* v. *Hardy*, 2 Law J. K.B. 172, s. c. 2 B. & C. 802, s. c. 4 D. & R. 362.

The statute 51 Geo. 3, c. 124, s. 3, requiring recognizances on removing a cause out of an inferior court, when the damages are laid at less than 15*l.*, extends to all actions, as well on torts as to those for contracts. *Lee* v. *Good*, 2 Law J. K.B. 169, s. c. 4 D. & R. 350.

An agreement to found a motion for security for costs under the 1 Geo. 4, c. 87, is not established by a letter from the son of the late tenant, requesting leave to keep possession for two years. *Rees d. Stepney* v. *Thrustout*, 1 M'Clel. 492.

Where an attorney took a mortgage from an insolvent as a security for costs to be incurred, the Court ordered it to be given up. *Jones* v. *Tripp*, 1 Jac. 322.

Mortgage by client to attorney for costs due, and to become due, held, a valid security for the costs then due only. *Williams* v. *Piggott*, 1 Jac. 598.

After an undertaking to accept short notice of trial, a defendant is not entitled to security for

costs. *Montellano* v. *Garcias*, 1 Law J. C.P. 9, s. c. 1 Bing. 67.

(I) TAXATION.

(*a*) *In general.*

Where a party, under a bond of indemnity, compromised the matter, and paid what costs the solicitor stated to be due: It was holden, that he might nevertheless have them taxed. *Balme* v. *Paver*, 1 Jac. 305.

Decree ordered the defendant to retain his costs when taxed, out of the balance in his hands, and pay the residue into court. The defendant having delayed to get his costs taxed,—It was holden, that the plaintiff must move that he may bring in his bill of costs to be taxed within a limited time. *Newsome* v. *Shearman*, 2 S. & S. 95.

Where it is agreed by attornies in a cause that certain persons shall tax the costs, as between party and party, the Court will not afterwards refer the bill to the Master to be taxed. *Iveson* v. *Conington*, 1 Law J. K.B. 71, s. c. 1 B. & C. 160, s. c. 2 D. & R. 307.

In a suit for an account by the assignees of a bankrupt, against the executor of the solicitor to the commission, bills of costs, for which the executor takes credit, as against the sum due from his testator to the bankrupt's estate, will, on motion, be referred for taxation. *Stephens* v. *Davis*, 6 Law J. Chanc. 66.

Where a bill of costs has been paid, the client ought not to obtain an order of taxation as of course.

But where a bill had been paid pending the suit, and under some degree of pressure practised by the solicitor towards the client, the Court refused to discharge an order for taxation, obtained subsequently, as of course. *Howell* v. *Edmunds*, 6 Law J. Chanc. 29.

The Court will not order the costs to be taxed, as between solicitor and client, without consent, where one residuary legatee is plaintiff, and the other defendant. *Fenner* v. *Taylor*, 6 Mad. 3.

Motion with costs for special direction to the Master, requiring him to deduct in his taxation of the costs of the parties, the costs which he should allow to the defendant from those which he should allow to the plaintiff, who had become insolvent after the decree had been passed, was refused with costs. *Rumney* v. *Beale*, 10 Price, 113.

Previous to declaration filed, defendant took out a summons to stay proceedings on payment of a certain sum and costs; which the plaintiff refused, on the ground that the sum was too small; and plea and declaration. But, after plea, the defendant having paid rather a larger sum into court than the amount tendered, which the plaintiff had taken out,—It was holden, that the Master was bound to tax the costs previous as well as subsequent to the summons. *Edwards* v. *Harrison*, 11 Price, 533.

Where the plaintiff was nonsuited in consequence of the defendant not admitting the handwriting of a party, which he had promised to do previously to the trial, and the plaintiff obtained a rule to set the nonsuit aside, and have a new trial, on the ground of a breach of faith, which rule was afterwards made absolute, but was silent as to costs; and the defendant obtained a verdict on the second trial: Held, that the costs of the application for a new trial were costs in the cause; and that the plaintiff was not entitled to them on taxation, as he should have engrafted them in the rule when the application for the new trial was made. *Truslove* v. *Burton*, 3 Law J. C.P. 79, s. c. 9 B. Mo. 64.

A feigned issue having been tried, and found for the prosecutor on the original information: Held, that the costs to be taxed upon such feigned issue, were only the costs of the *feigned issue itself*. *Thomas* v. *Powell*, 2 Ken. 293, s. c. 1 Burr. 603.

In consequence of a groundless claim of an administratrix to free-bench out of her intestate's copyhold estate, she is made defendant in a suit; under an order of reference to take an account of the costs and expenses incurred by her solicitor, in his character of solicitor to her as personal representative of her intestate, the Master must allow the costs of that suit, and has no authority to disallow them, because he may think that the suit was occasioned by the improper claims of the administratrix herself. *Watkins* v. *Maule*, 1 Law J. Chanc. 82.

In the taxation of costs *de incremento*, the Court will not interfere with the jurisdiction of the Master, by ordering a new taxation in favour of a defendant, on the ground that the plaintiff has been the cause of increasing the amount of costs, by unnecessarily proceeding to trial after an offer to *sign* a cognovit, unless in a very clear and strong case. *Semble, aliter*, where there has been no previous delay of the plaintiff by the proceedings of the defendant, and the conduct of the plaintiff has been palpably vexatious, or the defendant has made the offer in good time, and an executed cognovit actually tendered. But a rule calling on the plaintiff to shew cause why the Master should not review his taxation of costs, under circumstances, having been discharged on affidavits, filed in answer, stating facts which furnished a sufficient reason for what the Master had done, was discharged with costs. *Williams* v. *Wynne*, 9 Price, 344.

The Court will allow taxed costs on overruling frivolous exceptions to an answer to a bill for discovery, instead of 40*s*., the ordinary costs. *Jones* v. *Steele*, 1 M'Clel. & Y. 274.

A party will be entitled to the costs of issuing and serving an order of sequestration *nisi*, to enforce payment of taxed costs, though, upon a petition to review the taxation, their amount should afterwards be reduced, if the other party has not employed due diligence in obtaining a review of the taxation. —— v. *Duke of Marlborough*, 1 Law J. Chanc. 24.

The attendance of a witness will not be enforced by the Court of Common Pleas, in order to enable the Prothonotary to tax a bill of costs arising in that court, although referred to him for that purpose by a Master in Chancery. *Protheroe* v. *Thomas*, 8 Taunt. 670.

On the taxation of costs, the Prothonotary allowed for various sums expended in experiments, and a compensation for loss of time to scientific and professional gentlemen employed in making them, with a view to ascertain the increased risk or advantage in a new process of boiling sugar, by means of heated oil, and who were called as witnesses at the trial; the Court directed him to review his taxation, on the ground that no such allowance or compensation ought to be made. Where the plaintiff brought

four actions against two insurance companies, for a loss by fire, and a verdict was found for the former against each company, on two of the causes only: Held, that costs were to be apportioned equally, although these causes only were set down for trial at the same Sittings, there being a demurrer pending on the other. *Severn* v. *Olive*, 6 B. Mo. 235, s. c. 2 B. & B. 72.

The Prothonotary has a discretion in the allowance of expenses of plans made and used for the information of the Court. *Holmes* v. *Holmes*, 2 Law J. C.P. 133, s. c. 2 Bing. 75, s. c. 9 B. Mo. 158.

The Court will not allow the costs of documentary evidence, procured by the plaintiff, but not read, nor entered as read. *Stuart* v. *Greenall*, M'Clel. 705.

Where the judge, who tries a cause by a special jury, certifies that it was a proper case for a special jury, the Master must allow the full costs of the jury, where the verdict is found for the defendant. *Broadrick* v. *Clarke*, 12 Price, 154.

Where the plaintiff obtained a rule on the 6th of February, to discontinue the action on payment of costs, but the costs were not taxed until the 11th of March: Held, that when the costs were taxed, and the judgment of discontinuance entered up, it related back to the day when the rule for discontinuance was obtained, and, therefore, it must be considered that the action was discontinued from that period. *Brandt* v. *Peacock*, 1 B. & C. 649, s. c. D. & R. 2.

To ground an application to the Court for an order on the Master to review his taxation of costs, it is not essential that the undisputed items should be brought into court. *Bagnall* v. *Underwood*, 11 Price, 510.

The Court will not direct a Master to review his taxation of costs, unless the application be supported by an affidavit shewing the objectionable charges, and the grounds of objection. *Daniel* v. *Bishop*, 13 Price, 129.

The Master will not be ordered, on *motion*, to review his taxation of costs; such an application must be made by *petition*. *Anon.* 1 Law J. Chanc. 104.

An affidavit is necessary on an application for leave to file exceptions to the Master's certificate of the taxation of costs, and must state the facts on which the exceptions are founded; and the notice should state the exceptions intended to be filed, and the ground of the exceptions. *Jenkinson* v. *Royston*, 9 Price, 215.

The proper mode, in the Court of Exchequer, of objecting to the Master's taxation of costs is, to move upon affidavits, stating the ground of objection, for leave to file exceptions to the report. *Wright* v. *Southwood*, 1 Y. & J. 420.

Three days' notice must be given to a Prothonotary prior to a motion for a review of his taxation of costs. *Offley* v. *Weaver*, 1 Law J. C.P. 23.

An attorney, on the taxation of costs, should wait at the Master's office, until the matter is called on; and unless he has done so, the Court will not allow the Master to review his taxation. *Gregory's case*, 1 Law J. K.B. 5.

If a party, inadvertently, does not attend a taxation, the Court, if the Master state that items might have been taken off by the presence of the party, will order him to review his taxation. *Anon.* 1 Law J. K.B. 56.

The Court refused to grant a rule to compel the Prothonotary to review his taxation, where the Prothonotary refused to allow costs on account of gross misconduct on the part of the plaintiff's attorney, although proceedings had been stayed by defendant, under a rule for staying them on payment of debt and costs. *Adams* v. *Staton*, 1 Bing. 69, s. c. 7 B. Mo. 365.

The Court refused to direct the Master to review his taxation as to the costs of certain proceedings, which had been set aside with costs, in the absence of proof that the attorney had resorted to such proceedings *mala fide*, or from motives inconsistent with a fair intention of the party. *Lloyd* v. *Crutchley*, 13 Price, 211.

Where exceptions are taken to the Master's certificate of the taxation of costs, on the ground that he has not charged the solicitor with all the monies received by him, with which he ought to have been charged, and such exceptions are allowed, and the Master directed to review his report in that respect; the Court does not give the exceptant the costs of such proceedings, on the ground, that they are necessary to correct a mistake or misapprehension of the Master. *Wright* v. *Southwood*, 1 Y. & J. 527.

(*b*) *Of Attornies' and Solicitors' Bills.*

A special application for the taxation of a solicitor's bill, where all that was sought might have been obtained by motion of course, refused, with costs. *Anon.* 1 Law J. Chanc. 104.

The Court has no jurisdiction to order a solicitor's bill to be taxed on his own application. *Sayers* v. *Walond*, 1 S. & S. 97.

Searching as to whether satisfaction has been entered on the roll, whether issue has been joined, and whether issue has been docketed in an action between A and B, are not taxable items within the 2 Geo. 2. *Fenton* v. *Correa*, 1 R. & M. 262. [Abbott]

An attorney's bill for business done in the Insolvent Debtors Court, is taxable. *Smith* v. *Wattleworth*, 1 C. & P. 615. [Abbott]

A charge for filling up a bail-bond in an action, is a charge which renders the attorney's bill subject to taxation. *Fearn* v. *Wilson*, 5 Law J. K.B. 28, s. c. 6 B. & C. 86, s. c. 9 D. & R. 157.

Where an attorney makes out one bill against one of his clients, which contains taxable items, and another against that client jointly with others, which has no taxable item, the former does not draw the latter with it for taxation. *Langley* v. *Furnival*, 6 Law J. K.B. 330.

In an action on an attorney's bill for "attending A and B, the proposed bail of the defendant, and examining them as to their competency to justify;" and for "attending the plaintiff in several actions commenced against the defendant, and arranging with him to take a cognovit therein:" The Court held the items taxable. *Watt* v. *Collins*, 1 R. & M. 284. [Best]

The Court ordered an attorney's bill to be taxed, because it contained items for drawing a warrant of attorney, which had not been executed. *Wilson* v. *Gutteridge*, 2 Law J. K.B. 221, s. c. 3 B. & C. 157, s. c. 4 D. & R. 736.

An attorney's bill of costs, when he is acting as agent to another, employed by the party in respect of whose business the agency charges have been incurred, will not, on an application of the client, be ordered to be referred to the Master for taxation. *Ex parte Wildbore*, 8 Price, 677.

An attorney's bill, after it has been paid, is not liable to taxation, unless it can be impeached on the ground of gross overcharge, fraud, or mistake; and this rule is conclusive, even where it has been paid by trustees acting under a deed of trust for sale, and the taxation is applied for on behalf of the *cestui que trust* interested in the surplus arising from the sale. *Wilkinson, dem., Fosters, vouchees*, 1 Law J. C.P. 25.

The Court made an order, that the bill of an attorney should be taxed after a trial had been had, upon condition of the party bringing the amount of the verdict into court. *Nuttall's case*, 1 Law J. K.B. 154.

Where, in an action for an attorney's bill, the defence insisted on was, that the plaintiff had been overpaid, but the plaintiff obtained a verdict,—a motion to refer the bill to the Master for taxation was held to be too late. *Stables* v. *Brayshaw*, 3 Law J. K.B. 160.

The Court will not grant an attachment against an attorney for not performing his undertaking to refund money, upon his bill being taxed. The usual course is, to make the order for taxing it a rule of court. *Morling* v. *Tongue*, 1 Law J. K.B. 108.

Where the items disallowed in a crown solicitor's bill, amount to so large a sum as to become matter of reprobation by the Court, it will not only order that the costs of taxation be paid by the solicitor to the defendant, but if he has received the whole bill by sums paid him in advance, will order him to refund the difference with interest. Delay in a gross case of this description will not deprive the applicant of his right to relief. *Rex* v. *Bach*, 9 Price, 349.

Where a bill for costs delivered by a solicitor was taxed after his death, and more than a sixth part was deducted: Held, that his executrix was not liable to pay the costs of taxation. *Miller*, v. ——, 4 Law J. Chanc. 71, s. c. 2 S. & S. 463, as *In re Cole*.

But where an action was brought on an attorney's bill by the executor, instead of the surviving partner, and the Master having deducted less, but having allowed credit for a sum, which, with the deduction, amounted to more than a sixth: It was holden, that the costs of taxation were to be paid by each party. *Gale* v. *Parkington*, 1 M'Clel. & Y. 354.

Where an attorney's bill is reduced by taxation more than one-sixth, the Court have no discretion; because the statute provides, that the attorney is to pay the costs. *Dickens* v. *Woolcot*, 8 D. & R. 589.

After action brought on an attorney's bill, the defendant obtained an order to tax, and more than a sixth was struck off it: Held that he was not entitled to the costs of taxing. *Benton* v. *Bullard*, 6 Law J. C.P. 115, s. c. 4 Bing. 561.

Where the Prothonotary refused to allow costs, on account of gross misconduct on the part of the plaintiff's attorney, the Court refused a rule for the Prothonotary to review his taxation, though defendant had stayed proceedings under a rule for staying them on payment of debt and costs, *Adams* v. *Staton*, 1 Bing. 69, s. c. 7 B. Mo. 365.

An attorney, who is entitled to the costs occasioned by the taxation of his bill, must apply for them at the time, or he cannot recover them by motion after making a subsequent settlement. *Whitfield* v. *James*, 1 Bing. 207, s. c. 7 B. Mo. 365.

On the taxation of costs before the Master, an attorney's clerk admitted, that the suit in which the costs were taxed was conducted by his employer from motives of charity, on behalf of the plaintiff: Held, that the admission of the clerk was sufficient to bind his master. *Ashbourn* v. *Price*, 1 D. & R. N.P.C. 48.

In consequence of a groundless claim of an administratrix to free bench out of her intestate's copyhold estate, she is made defendant in a suit: under an order of reference to take an account of the costs and expenses incurred by her solicitor, in his character of solicitor to her as personal representative of her intestate, the Master must allow the costs of that suit, and has no authority to disallow them, because he may think that the suit was occasioned by the improper claims of the administratrix herself. *Watkins* v. *Maule*, 1 Law J. Chanc. 82.

### (K) Payment of, how enforced.

In order to discharge a plaintiff out of custody for costs, it must appear that they had been paid for him. Where, therefore, the affidavit only stated that they had been paid to the defendant by the treasury: Held insufficient. *Butt* v. *Conant*, 6 B. Mo. 65, s. c. 3 B. & B. 3, s. c. 1 Gow. 86.

Where a person, not a party to the suit, is ordered to pay costs, a motion for a four day order or commitment must be preceded by motion. *In re Partington*, 6 Mad. 71.

The Court will not interfere in a cause, merely for the purpose of disposing of the costs, where the subject of the suit has been disposed of out of court. *Roberts* v. *Roberts*, 1 S. & S. 39.

It is not compulsory that an attorney should sue in a court of requests, unless his privilege of suing in the superior court is taken away by express words; hence, where an attorney of the Court of Common Pleas sued by attachment of privilege, and recovered less than 5*l.*, the Court would not restrain him from taking out execution for costs. *Johnson* v. *Bray*, 5 B. Mo. 622, s. c. 2 B. & B. 698.

### (L) In the Ecclesiastical Courts.

Where a party succeeds in establishing a disputed interest, he is entitled to costs. *Northey* v. *Cock*, 2 Add. 294.

Where a party intervening in a cause, alleges that he will proceed no farther, it is a matter of course to give costs, unless some special facts are laid before the Court to shew that he is not liable. *Hunter* v. *Balmes*, 3 Phil. 260.

An executor under a prior will, may put an executor under a subsequent will upon the most solemn proof as to its validity; but if the executor of the former will cannot prove his case, he is liable to costs. *Mansfield* v. *Shaw*, 3 Phil. 22.

The Court, upon an application after an appeal, will not compel the payment of costs incurred in the court below. *Brisco* v. *Brisco*, 3 Phil. 38.

The obligation on a party to pay costs pursuant

to a monition, under particular circumstances, will not be dispensed with, by the party to whom such costs were due binding himself by an agent out of court to waive them.

The expense of a monition for payment of costs always added in the taxation; and if such monition is not obeyed in the first instance, the further necessary expenses fall on the party whose neglect or refusal to obey in the first instance occasioned them. *Coates* v. *Brown*, 1 Add. 345, 351.

Where a party is put in contempt, and proceedings are had against him merely as a *pœnam*, he may be condemned in costs of that suit, whether it be a criminal or civil suit. *Forster* v. *Forster*, 1 Add. 462; see *Bridgwater* v. *Crutchley*, 1 Add. 473.

Where a suitor prays to be heard *upon insufficient grounds*, the Court is bound to reject such a petition with costs. *Thomas* v. *Maud*, 1 Add. 481.

Where a party has been committed for non-payment of costs, but, in consequence of the process being erroneous, is released, the Court, at the application of the party to whom they are due, will consider itself bound to direct a new monition for payment of them. *Austen* v. *Dugger*, 1 Add. 307.

Where a next of kin calls for proof, *per testes*, of a will, and merely interrogates the witnesses produced in support of it, he is not liable to costs for it; at least, under ordinary circumstances. *Aliter*, in the case of a mere legatee under a former will, whom the Court, as it may, is at all times disposed to condemn in costs, wholly or in part, where, in putting the executors of a latter will on proof, *per testes*, of such latter will, he so interrogates (although he merely interrogates) the witness in support of it, as to manifest any spirit of vexation, or undue litigation on his part. *Urquhart* v. *Fricker*, 3 Add. 56.

In all suits of nullity of marriage brought by, or on the part of, the husband, the wife, *de facto*, is regularly entitled, as well to alimony pending suit, as to payment of all such costs as she incurs in her defence. Hence, the costs of the defence, are (in the first instance, at least,) as necessary a charge upon the husband's funds, as are those of the prosecution of every such suit: and this, although fraud in procuring the marriage is expressly charged upon the wife in the libel; and although costs are prayed in the libel (and may ultimately be awarded by the Court) against the wife. *Earl of Portsmouth* v. *Countess of Portsmouth*, 3 Add. 63.

### (M) In the Court of Admiralty.

Costs and damages seem incident to a sentence of restitution, where there has been *no probable ground of seizure*. *Barossa*, 1 Hag. 75.

Condemnation of a proctor in the costs created by the introduction of irrelevant matter, owing to his unfair representation. *Frederick*, 1 Hag. 225.

Partial allowances, no impeachment of a previous title to costs. *Tartar*, 1 Hag. 14.

### (N) In Criminal Cases.

Where an indictment is preferred at the Sessions, and removed into the King's Bench by *certiorari* by the prosecutor, he is not entitled to costs under the 7 Geo. 4, c. 50. *Rex* v. *Richards*, 6 Law J. M.C. 104, s. c. 8 B. & C. 420.

Where a prosecution had been carried on by subscription, and it did not appear that the persons in whose name it was carried on had personally incurred either expense or liability,—it was held, that they were not entitled to costs as "prosecutors," under the stat. 5 W. & M. c. 11, s. 3.

Whether the relations of a deceased person, whose body has been disinterred for the purpose of dissection, and who prosecute the offender, are "parties grieved," under that statute—*quære*. *Rex* v. *Cook*, 6 Law J. M.C. 52, s. c. 1 M. & R. 526.

If an indictment be quashed by a judge, who will not try it, because there are defects apparent on the face of it, and nothing is said about costs, and afterwards another bill for the same offence be found, the Court will not order the prosecutor to pay the costs of the first indictment. *Rex* v. *Tremearne*, 3 Law J. K.B. 57, s. c. 5 D. & R. 413.

On indictments, the Court of King's Bench has neither power to compel the defendant to go before the Master, nor to give the prosecutor costs. *Rex* v. *Richardson*, 6 D. & R. 141.

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## COUNSEL.

The Court intimated to the counsel, that, in the absence of their clients, they ought to take upon themselves the responsibility of going on, or sending the matters in dispute to a reference. *Anon.* 1 Law J. K.B. 117.

If counsel, having to argue a special case, do not attend on the day appointed, judgment will be given in their absence, and the case will not be restored, although it appears that their attendance was necessary in another court. *Harber* v. *Rand*, 9 Price, 53.

Counsel's name need not be repeated if there is no new engrossment, on any amended bill signed by the same counsel who signed the draft of the original bill. *Webster* v. *Threlfall*, 1 Law J. Chanc. 52, 74, 109, s. c. 1 S. & S. 135.

Communications with professional men relating to a cause being privileged from disclosure,—it was holden, that the retainer of a counsel in a cause was within the preceding rule. *Foote* v. *Hayne*, 1 C. & P. 545, s. c. 1 R. & M. 105. [Abbott]

*Quære*—Whether an admission made by counsel, in his address to the jury, that part of his client's demand had been satisfied, is receivable in evidence, if his client heard it, and made no objection to it at the time. *Colledge* v. *Horn*, 3 Law J. C.P. 184, s. c. 3 Bing. 119, s. c. 10 B. Mo. 431.

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## COURTS.

[See Jurisdiction.]

The Vice Chancellor of England has no authority to disturb or alter any order or decree made in Scotland. *Cruickshank* v. *Roberts*, 6 Mad. 105.

The Lord Chancellor exercising a visitorial jurisdiction, is not bound down by any regular and exact forms of proceeding. *The Case of Queen's College, Cambridge*, 1 Jac. 19.

A party who applies to the equitable jurisdiction of a court of law, cannot afterwards come to a court of equity for similar relief. *Mego* v. *Mego*, 3 Law J. Chanc. 220.

The Court of King's Bench will, if they think

proper, interfere, on motion, in those cases where, in former times, an *audita querela* could be sustained. *Puller* v. *Allen*, 1 Law J. K.B. 54.

The jurisdiction of the Court of Common Pleas does not extend to bring a defendant up, out of a criminal custody, in order to remand him. *Freeman* v. *Weston*, 1 Law J. C.P.72, s. c. 1 Bing. 221.

The appeal against a decision of the County Court of a county palatine, must, in the first instance, be to the Court of Common Pleas thereof. *Jewett* v. *Summons*, 3 Law J. K.B. 220.

Since the 57 Geo. 3, the Court of Exchequer is like the Court of Chancery, open as a court of equity during the year. *Joseph* v. *Simpson*, 10 Price, 25.

Therefore the Lord Chief Baron may take motions for special injunctions during vacation. *Tucker* v. *Sanger*, 10 Price, 132, s. c. 1 M'Clel. 424; *Cresswell* v. *Long*, ibid. 133; *Williamson* v. *Thompson*, ibid. 134; *Rigby* v. *Drakeley*, ibid. 134.

A court of equity may grant a compensation—that power being ancillary to its authority to enforce contracts. *Newham* v. *May*, M'Clel. 511.

A question as to the jurisdiction of the Ecclesiastical Court ought not to be raised on motion. *Telford* v. *Morrison*, 2 Add. 321.

Letters of request from a bishop's commissary lie to the Court of Arches. *Burgoyne* v. *Free*, 2 Add. 405.

An affidavit, sworn during the term, is sufficient to bring the subject before the Court as "depending" during the term, within the words of the royal warrant, giving the Court jurisdiction after term as to matters so "depending." *Ex parte Smith*, 4 Law J. K.B. 57, s. c. 7 D. & R. 382.

*Quære*—Whether the Court of Chancery, when deciding on a plea, has jurisdiction to determine to which party a dignity belongs? *Strathmore* v. *Strathmore*, 2 J. & W. 541.

Although it is highly useful in legal questions to resort to the assistance of courts of law, yet courts of equity are not bound to adopt the opinion of those courts to which they send for advice. *Lansdowne* v. *Lansdowne*, 2 Bligh, 60, 86: s. P. *Maxwell* v. *Ward*, 11 Price, 3.

A, being entitled to a sum of 300*l.* secured on the poor's rates of the parish of S, in the manner required by a private act of parliament, receives the interest up to 1802, but does not make any claim or receive any payment from 1802 to 1812: in the meantime, in 1810, an act had been passed, repealing the former act, under which the money had been lent, but providing, that the debts and liabilities, contracted under the old act, should be paid by the commissioners appointed, and under the authorities given them by the new act; and also providing, that the commissioners should sue and be sued by their clerk. A files a bill, praying an account of what is due to him for interest on the bond, payment of what shall be found due to him, and the appointment of a receiver: Held,

That a court of equity will not grant him any relief.

Clauses in the act, providing that persons aggrieved by the commissioners should appeal to the quarter sessions, and that a certain notice should be given before any action was commenced against them, do not apply to a bill filed under such circumstances for equitable relief. *Drewry* v. *Barns*, 5 Law J. Chanc. 47, s. c. 2 Russ. 94.

A court of equity will interfere to correct a formal instrument in which a mistake has occurred; but it is upon very clear evidence, generally written evidence; as, where a marriage settlement, executed in pursuance of previous articles, does not follow the terms of the articles. *Hodgson* v. *Hancock*, 1 Y. & J. 317.

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## COVENANT.

(A) Construction of.
(B) Valid or Void.
(C) What shall run with the Land.
(D) In Leases. [See Lease.]
(E) Action of, where maintainable.
(F) Pleadings and Evidence.
(G) Where enforced or relieved against in Equity.

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### (A) Construction of.

Covenants are construed the same in equity as at law. *Maxwell* v. *Ward*, M'Clel. 464.

A covenant to furnish a good title may be qualified, and restricted by a subsequent covenant for quiet enjoyment. *Milner* v. *Horton*, M'Clel. & Y. 647.

Where a covenant is against the acts of particular persons, it extends to illegal as well as legal acts done by them. *Fowle* v. *Welsh*, 1 Law J.K.B. 17, s. c. 1 B. & C. 29, s. c. 2 D. & R. 133.

A covenant that a man has not "permitted or suffered" any act which has a certain effect, is consistent with his having previously consented to such an act by another person, his own consent not being a necessary impediment to the transaction. *Hobson* v. *Middleton*, 5 Law J. K.B. 160, s. c. 6 B. & C. 295.

The words "for and notwithstanding any act done by the covenanter," which in general restrict the covenant to his own acts, may be rejected, where, from the context, and the subject-matter, it appears that such a restriction was not intended.

Accordingly, in an assignment of outstanding debts, the covenantor covenanted, that, "for and notwithstanding" any act done by *himself*, it should be lawful for the assignee to receive the debts without any let, suit, interruption, or denial of the assignee, *his executors or administrators, or any person claiming under him or them.* After the death of the covenanter, his executor received one of the debts assigned: Held, that the restrictive words in the covenant might be rejected: and that the executor was liable to an action. *Belcher* v. *Sikes*, 6 Law J. K.B. 14, s. c. 8 B. & C. 185.

Where the assignor of a term covenanted, amongst other things, that he had not done any act whereby, &c., but that the lease was good, valid, and subsisting, "and that" he had good right, title, &c. with a covenant for further assurances: Held, after oyer of the indenture upon demurrer to a declaration, setting out only the latter part of the covenant, viz. for good title, that the latter part of the covenant was referable to the first, and connected with it by the words "and that"; it was therefore confined

to acts done by the defendant alone. *Foord* v. *Wilson*, 8 Taunt. 543, s. c. 2 B. Mo. 592.

Where a party covenanted that so long as the defendant should continue and be in actual receipt of the profits of a rectory, she would pay a yearly sum during the life of the rector, by two half-yearly payments: Held, a covenant for the payment of such yearly sum, whilst the covenantor is in receipt of the profits during the life of the rector, and not whilst he is merely in receipt of the profits. *Combe* v. *James*, 2 Chit. 700.

On a demurrer to a declaration at the suit of the heir of a party to whom premises had been conveyed, on a covenant that the defendant, with his eldest son when of age, should suffer a recovery, and execute such other assurances as counsel should advise: It was holden, first, that notice to the covenantor, of the applicant's title, was not necessary. Secondly, that no request to the son was requisite. Thirdly, that the words "as counsel shall advise," did not apply to the covenant to suffer a recovery, but only to "other assurances." *Blicke* v. *Dymoke*, 2 Law J. C.P. 140, s. c. 2 Bing. 105, s. c. 9 B. Mo. 203.

Defendant covenanted "not to permit or suffer any warehouse-door to be opened or put out to the front of" a certain street: Held, to extend to every warehouse he might have, whether before or after the conveyance, or in the occupation of another, or to a door not level with the front of the street. *Mayor of Liverpool* v. *Tomlinson*, 7 D. & R. 556.

A man makes a settlement of Black Acre, under which his children take each a vested remainder in fee, in their respective shares of it; and he covenants that he shall, by his last will or otherwise, give, devise, and bequeath, all other his real estates to his children and their heirs, share and share alike: at the time of his death, the father was seised in fee of two-tenths of the settled estate, which he had acquired by devise from a deceased child: Held,

That the covenant extended to those two-tenth shares of the settled estate.

Held also, that such a covenant operates at the testator's death for the benefit of such children only as are then alive. *Needham* v. *Smith*, 6 Law J. Chanc. 107.

The plaintiff, by indenture, reciting that he had for many years carried on the trade of a fish-factor, &c., and that he had an interest in certain fisheries in Scotland, assigned to the defendant, a certain branch of his trade, together with his interest in the fisheries, with a covenant that he would not in any manner interfere therewith: and the defendant thereupon consented to pay to the plaintiff an annuity of 250*l*. In an action by the plaintiff for the non-payment of the annuity, the defendant pleaded that the plaintiff did interfere with the trade which he had assigned to the defendant: Held, bad on demurrer,—the covenant by the defendant to pay the annuity, and that by the plaintiff, not to interfere with the branch of the trade assigned, being distinct and independent covenants, for the breach of either of which separate actions might be maintained; and A's covenant not to interfere, could not be considered as a condition precedent, as it formed only a part of the consideration for the annuity. *Carpenter* v. *Cresswell*, 6 Law J. C.P. 27, s. c. 4 Bing. 409, s. c. 1 M. & P. 66.

### (B) VALID OR VOID.

The plaintiffs, being possessed of nine sixteenth parts of an East-India ship, and being managing owners of her, sold five sixteenth parts to the defendant, who was a naval officer.

In the deed were the following covenants:—That the plaintiffs should *continue* to be managing owners of the ship as long as they should faithfully conduct the concerns of her; that, after the ship had completed her then voyage, the defendant should be appointed to the command of her in all future voyages; that the plaintiffs should appoint his successor upon terms to be approved of by the executors of the defendant; that the plaintiffs, as managing owners, should be paid a commission on the money to be expended by them; that they should keep the books of account; that they should divide the proceeds of the ship rateably among the owners; that the plaintiffs should be employed by the defendant as his agents in the concerns of the ship, and to effect the insurances; that the plaintiffs should have the right of nominating all the officers to serve on board the ship; and that, if the defendant or his executors sold his shares, the purchaser should be bound to the performance of the same covenants: The Court held, that the deed was of itself bad in law. *Card* v. *Hope*, 2 Law J. K.B. 96, s. c. 2 B. & C. 661, s. c. 4 D. & R. 164.

### (C) WHAT SHALL RUN WITH THE LAND.

A, being seised of a mill and certain premises, leased the premises to B, yielding and paying certain rents, and doing suit to the mill, by grinding all such corn there as should grow upon those premises. A subsequently devised the premises and the mill to C, who brought an action upon the implied covenant, against the representive of B for not grinding the corn at the mill: Held, that the reservation of the suit to the mill was a species of rent, and that the implied covenant was one running with the land as long as the premises and the mill belonged to the same person, and, therefore the action was well brought. *Vivyan* v. *Arthur*, 1 Law J. K.B. 138, s. c. 2 D. & R. 670, s. c. 1 B. & C. 410.

A covenant, by a vendor, to furnish the vendee of lands with the title-deeds, is a covenant which runs with the land, for the benefit of the purchaser. *Barclay* v. *Raine*, 1 S. & S. 449.

### (E) ACTION OF, WHERE MAINTAINABLE.

To create a covenant in a deed, the word *covenant* need not be specifically introduced; hence, where it was agreed that A B should retire from a mercantile establishment, and C D and E F should continue the business in partnership, and that A B should advance two-thirds of the capital required to C D, and E F the other third; and the deed between the parties stated, among other stipulations—"Whereas an account of all the debts of A B, in his business of a merchant, has been this day taken, and the balance in his favour amounts to 38,033*l*.: and whereas it has been agreed by and between A B, C D, and E F, that the whole of the debts and credits of A B shall be received and paid by C D and E F: and that the balance of 38,033*l*. shall be accounted for and paid by them, in manner hereinafter mentioned; and A B, by indenture, hath assigned the debts and

credits to them; this indenture further witnesseth, that it is agreed, in consideration of 12,000*l.* paid to A B by E F, and for raising 24,000*l.* as C D junior's share of the capital, the sum of 36,000*l.*, part of the 38,033*l.*, is to be retained by C D and E F, and the remaining 2,033*l.* paid to A B by instalments, at six, twelve, and eighteen months; and if any of the debts shall prove bad, the loss shall be borne by C D and E F:" The Court held, that an action of covenant was clearly maintainable on the preceding clause against C D and E F, for non-payment of the debts due from A B, at the time of his retiring. *Saltoun* v. *Houstoun*, 2 Law J. C.P. 93, s. c. 1 Bing. 433, s. c. 8 B. Mo. 546.

On a covenant made with a man and his heirs, the covenant running with the land, his executors cannot sue, unless they shew either a breach in the lifetime of their testator, or that the breach has been the means of damnifying the personal estate. *Sampson* v. *Easterby*, 5 Law J. K.B. 291.

## (F) PLEADINGS AND EVIDENCE.

Covenant by the defendant to permit and suffer the covenantee, "peaceably and quietly to enjoy," &c. a certain annuity secured on premises, demised by defendant for a term to trustees for the purpose of such security, and for raising out of those premises, either by mortgage or sale, a sum of money to be paid by the annuitant; and that the covenantor would not hinder, molest, or disturb him, in the peaceable enjoyment, &c., *and would do all such further and other lawful and reasonable acts and things, devices*, conveyances, and assurances in the law, *for the further and better granting, and securing*, &c. as should be required. *Breaches*—That (an arrear of annuity having accrued,) the defendant did not permit the plaintiff (the covenantee) to enjoy, &c., but, on the contrary, prevented, molested, and disturbed him in this, to wit, that, although *requested to do a reasonable act* for the further securing, &c., that is to say, that the defendant (the covenantor) *should direct* the trustees to raise, levy, and pay to plaintiff the said arrears and sum of money, &c., yet he would not, &c.; and that although requested to *direct the trustees to take up money on mortgage of* the said premises, for the purpose of paying, &c., and to *join therein*, and deliver up the deeds, would not, &c.: Held, ill assigned, the refusal to direct not being an act of molestation; for the covenant not being personal in that respect, and it not being shewn that the act required to be done by the defendant was such a necessary act, as that the annuity could not be enjoyed without its being done on his part, and that he was consequently under an obligation to give such direction, it was not broken by such refusal. Judgment arrested. Such an objection is not cured by a judgment by default, if cured after verdict. *Warn* v. *Bickford*, 9 Price, 43.

In assigning a breach of a special covenant that the premises should be saved and indemnified from all charges and incumbrances, &c., it seems that it is sufficient to allege that the evictor, "being lawfully and rightfully entitled" to a rent issuing out of the premises, caused a distress to be made thereon; but if the plaintiff undertakes to set out the articulars of the evictor's title, and it appears to be bad, a demurrer may be sustained. *Milner* v. *Horton*, M'Clel. 647.

It is usual to serve the defendant with a copy of the further breaches suggested on the roll, pursuant to the 8 & 9 Wm. 3, c. 11, previous to the execution of the writ of inquiry. *Gillingham* v. *Wakett*, M'Clel. 568.

Where, in an action of *covenant* against the assignee of the lessee, for not repairing, the premises were stated, in the declaration, to be situate within the liberties of Berwick-upon-Tweed, and the venue was laid in the county of Northumberland: Held, that it should have been laid in the borough of Berwick, as it formed no part of the county of Northumberland. *Mayor of Berwick* v. *Shanks*, 4 Law J. C.P. 152, s. c. 3 Bing. 459.

Where, in *covenant*, the plaintiff declared that the defendant had engaged himself as the clerk, bookkeeper, and traveller of the plaintiff, for a term that was not expired; and that, during such term, the defendant was not to be employed for any one else, without the plaintiff's consent in writing; and that, by an indenture, made between the plaintiff and the defendant, (one part of which the plaintiff brought into court,) the defendant, for the considerations therein mentioned, covenanted with the plaintiff, that he would not enter into or pass through certain towns, to solicit or take orders, within a certain time therein mentioned; and assigned for breach, that the defendant did enter into such towns, and solicit and obtain orders in them, within the time prohibited: Held, that the declaration was sufficient, as it stated that the defendant covenanted for the considerations mentioned in the deed; and that the defendant should have craved oyer of that instrument, if he meant to object to the sufficiency of the consideration; and that not having done so, the consideration for the agreement must be presumed to be legal. *Homer* v. *Ashford and Ainsworth*, 4 Law J. C.P. 62, s. c. 3 Bing. 322.

An informality in a declaration assigning a breach of covenant, cannot be taken advantage of after judgment by default. *Brookes* v. *Hebord*, 8 D. & R. 69.

The plaintiff declared in covenant. The defendants craved oyer of the lease, and then pleaded *non est factum*: The Court held, that the only question which could be agitated on that issue was, whether the deed so set out was or was not executed by the defendants.

The plaintiff declared against the defendants for not delivering, for the repairs of certain premises, sufficient timber growing thereon, according to their covenant. The defendants pleaded, that there was not timber growing on the premises sufficient and proper for the repairs: The Court held, that the plea (though informal for not stating that there was not timber sufficient for the repairs or any part thereof) was good, except on special demurrer. *Snell* v. *Snell*, 4 Law J. K.B. 44, s. c. 4 B. & C. 741, s. c. 7 D. & R. 249.

An error in a declaration in covenant may be aided by intendment; therefore, where in an action for non-payment of rent on the four most usual days of payment in the year, the declaration stated, that a large sum became due on the 24th of June, for three quarters' rent of the term *then elapsed*: On demurrer, it was holden good, because the words *then*

*elapsed* must be construed to mean three quarters preceding the 24th of June. *Henniker* v. *Turner*, 4 B. & C. 157, s. c. 6 D. & R. 7.

A declaration in covenant on a demise of *lands* is proved by shewing a demise *of all that piece or parcel of ground and premises, containing by estimate one acre*. *Birch* v. *Gibbs*, 6 M. & S. 115.

In a marriage settlement the husband covenanted with *three* persons, that, if his wife survived him, his heirs or executors should pay her an annuity for her life. Two of the trustees did not sign the deed. The other trustee brought an action on the covenant, alleging in his declaration that the other two had not signed the deed: The Court held, on demurrer, that the declaration was bad, and that the three trustees should have joined. *Petris* v. *Bury*, 3 Law J. K.B. 29, s. c. 3 B. & C. 358, s. c. 5 D. & R. 152.

In an action of covenant, a tenant in common seised of one-fifth part of certain demised premises, assigned for breach, that on the 24th of June 1824, at &c., a large sum of money, to wit, 21*l.* 15*s.* being one-fifth part of the whole rent, for three quarters of a year of the term *then* elapsed, became due, and was still in arrear: Held, on special demurrer—first, that the allegation of the specific sum due was equivalent to an assignment of a breach for non-payment of "one-fifth part of the whole rent, 21*l.* 15*s.*" And, secondly, that the three quarters of a year, for which the sum was claimed to be due, were set forth with sufficient certainty. *Henniker* v. *Turner*, 3 Law J. K.B. 144.

In an action of covenant by the father of an apprentice against the master, for not using his best endeavours to teach, and make provision, according to the conditions of the indenture, a plea that until a certain time the master did so teach and provide, &c., but that the apprentice, without licence or consent, had then quitted the service, and had never returned, was held a sufficient answer.

And, where the rejoinder alleged that the apprentice had enlisted as a common soldier, and that the plaintiff did not request the defendant to receive him back, nor did the apprentice offer to return; and the surrejoinder stated, that the defendants had wholly discharged the apprentice from returning and offering to return,—it was held, that the surrejoinder was bad, as it ought, at least, to have alleged an offer to return. *Hughes* v. *Humphreys*, 5 Law J. K.B. 270, s. c. 6 B. & C. 680.

(G) WHERE ENFORCED OR RELIEVED AGAINST IN EQUITY.

[See SPECIFIC PERFORMANCE.]

If a covenant contains a condition of renewal, which directs that the parties' intention shall be signified in writing, which has not been complied with,—equity will interfere and relieve against such an objection, if it can be shewn that an intention to renew has been intimated in some way. *Maxwell* v. *Ward*, 11 Price, 13.

A bill cannot be entertained to compel a rector to perform a covenant in favour of another, entered into by him when he was presented. *Newdigate* v. *Helps*, 6 Mad. 133.

The Court refused to grant an injunction to restrain the further breach of a covenant, that certain buildings should be erected upon a general plan, the covenantee having, before making the application, consented to a partial deviation from the plan. *Roper* v. *Williams*, 1 Turn. 18.

The Court will not grant an injunction to a landlord who has relaxed in favour of some of his tenants, a covenant entered into for the benefit of all, to restrain the after-tenants from infringing that covenant. *Roper* v. *Williams*, 1 Turn. 18.

## CRIMINAL INFORMATION.

The Court of King's Bench will grant a criminal information against a person who abuses a public officer in the manner of discharging his duty. *The King* v. *Smith*, 1 Law J. K.B. 31.

John Thurtell was committed to prison to take his trial for the murder of Mr. Weare. The proprietor of a theatre represented the supposed facts of the case in such a manner, that, when a murderer was seized, the audience expressed themselves as understanding that he represented John Thurtell: The Court granted a criminal information against the proprietor. *Rex* v. *Williams*, 2 Law J. K.B. 30.

When a person has obtained a rule *nisi*, for a criminal information, the Court of King's Bench will not compel him to make it absolute. *Rex* v. *Sherwood*, 2 Law J. K.B. 78.

The Court will not grant a criminal information, on the ground of misconduct on the part of the county clerk, with respect to the exaction of excessive fees, if it appear that the fees demanded were similar in amount to those which had been sanctioned by other judges, and directed by the 23 Geo. 2, c. 33. *Rex* v. *the County Clerk of Middlesex*, 4 D. & R. 273.

## CROWN.

[See EXTENT.]

Mode of procuring the discharge of a crown debt, (arrears of taxes,) and obtaining release from process where the debt is paid by the crown debtor upon motion by the attorney-general. *Ex parte Bennett*, 11 Price, 770.

If money be imprested by the crown into the hands of an army-agent, for the purpose of being paid to officers to whom it is due, and it is never demanded by them, and therefore not paid by the agent; it remains the money of the crown in the hands of the agent, for which the agent is accountable to the crown. *Brummell* v. *M'Pherson*, 5 Law J. Chanc. 57.

## CUSTOM.

In an action of trespass, the lord of a manor set out various burthens borne by him, and then prescribed, not by reason of those burthens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or purchased elsewhere, and brought into and delivered, in a town within the manor, which had been parcel of the manor from time immemorial: Held, after verdict, that this was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough; and that after ver-

dict, if a legal commencement of a prescription can be presumed, it is sufficient to support the claim. *Rickards* v. *Bennett*, 1 Law J. K.B. 97, s. c. 2 D. & R. 389, s. c. 1 B. & C. 223.

A custom that the rector shall occupy in severalty forty acres, part of a common of twelve hundred acres, in discharge and satisfaction of all the tithes of hay and fodder on the whole common, may have a legal origin. *Anon.* 1 Law J. Chanc. 199.

A custom was proved, that the inhabitants within a manor should at the lord's mill grind "all their corn, which, after the grinding thereof, should be consumed in their respective dwelling-houses:" The Court held, that such a custom did not draw with it the further obligation on the inhabitants, of not consuming any other meal or ground corn than that produced by corn ground on the the lord's mill. *Richardson* v. *Walker*, 2 Law J. K.B. 180, s. c. 2 B. & C. 827, s. c. 4 D. & R. 498.

The lord of a manor had two mills, at either of which the tenants were bound by custom to grind all their malt which they might use in their dwelling-houses. The lord pulled down one of the mills: The Court held, that the custom was thereby suspended, and no action could be maintained against a tenant for not grinding his malt at the other mill. *Richardson* v. *Capes*, 2 Law J. K.B. 182, s. c. 2 B. & C. 841, s. c. 4 D. & R. 512.

Customs to bar entails in copyholds, both by surrender and by recovery, may be concurrently good in the same manor. *Doe dem. Whalhead* v. *Ossingbrooke*, 2 Law J. C.P. 105, s. c. 2 Bing. 70.

At the trial on an information, in the nature of a *quo warranto*, it was proved, that for the last twenty years the steward of a manor at the leet had nominated the jury who elected the mayor for the borough. No evidence was offered on the other side, and the jury found a verdict for the defendant: The Court held, that there was sufficient evidence to go to the jury for them to infer an immemorial usage, and that the custom was good in law. *Rex* v. *Jolliffe*, 1 Law J. K.B. 232, s. c. 2 B. & C. 54, s. c. 3 D. & R. 240.

In trespass for entering a garden, the defendant pleaded a custom to search for, &c. in the *locus in quo*, the custom, however, excepted "the scites of houses, &c., gardens, orchards, and highways." It appeared that the *locus in quo* had been planted with shrubs, within the last six years, and with potatoes just before the trespass: Held, that this was a garden within the exceptions in the custom. *Gilbert* v. *Tomlin*, 4 D. & R. 222.

To render a custom in a particular trade legal, it must be certain and uniform. *Wood* v. *Wood*, 1 C. & P. 50. [Burrough]

Where a custom in an inferior court was, that the plaintiff might issue a summons and attachment on the same day, returnable on the same day, and at the return of those writs, without either of them having been personally served on the defendant, and without the defendant having appeared to declare, might afterwards sign judgment by default: The Court held the custom illegal. *Williams* v. *Hugel*, 1 B. & C. 778, s. c. 3 D. & R. 719.

A declaration in case for not grinding plaintiff's corn according to custom, is good, though it neither specifies the particular toll, nor the consideration for it, nor that it is a reasonable toll: Whether it be a reasonable toll or not, is a question of law. *Gard* v. *Callard*, 6 M. & S. 69.

An averment of a custom, that "no person whatsoever, except freemen" of a city, shall be allowed to trade therein, is not supported by evidence of a custom, that no person except freemen, *or their widows*, shall be so allowed; and the variance is fatal, though the action be brought against a person not coming within the exception. *Harrison* v. *Williams*, 4 Law J. K.B. 178.

The custom of the country can have no operation where there is a contract with provisions applicable to the point in dispute.

Admitting the existence of a law founded on custom, in construing a written contract, the engagement of parties to each other by the express stipulation of a written instrument, excludes all consideration of the custom of the country. *Roxburgh* v. *Robertson*, 2 Bligh, 156—67-8.

Titles standing upon inveterate usage and practice, must be supported to the extent of the usage, but not beyond it. *Crawford* v. *Coutts*, 2 Bligh, 684.

The personal estate of an honorary freeman of the city of London, is, in case of his dying intestate, distributable according to the custom of London; and his widow is not barred of her customary share by a settlement which is expressed to be in lieu of all dower, or thirds, or other portion at common law or otherwise, out of his freeholds and copyhold lands. *Onslow* v. *Onslow*, 5 Law J. Chanc. 63, s. c. 1 Sim. 18.

## CUSTOMS.

[See REVENUE.]

## CUTTING AND MAIMING.

On an indictment on the 43 Geo. 3, c. 58, for cutting and stabbing: Held, that the statement, as to the situation of the wound in such an indictment, was immaterial. *Rex* v. *Griffith*, 1 C. & P. 298. [Park]

And the question is not as to the size of the wound, but as to the intention. *Rex* v. *Hunt*, 1 R. & M. C.C.R. 93.

An indictment for maliciously shooting at the prosecutor with intent to do him some grievous bodily harm, is supported by proof that the party committing the offence did it with the main object of preventing his legal apprehension. *Rex* v. *Gillow*, 1 R. & M. C.C.R. 85.

An indictment for cutting and maiming under the 43 Geo. 3, c. 58, is not proved by shewing that the defendant inflicted the wound for the purpose of producing temporary disability in a person lawfully apprehending the prisoner. *Rex* v. *Boyce*, 1 R. & M. C.C.R. 29.

## DAMAGES.

[See CONTRACT.]

The words *treble damages* in a statute mean three times the full amount of the damages found by the

jury. *Buckle* v. *Bewes*, 4 B. & C. 154, s. c. 6 D. & R. 1.

Where a statute gives double duties, the sum found by the jury is to be considered as the single sum which is to be doubled by the statute. *Attorney General* v. *Hatton*, 13 Price, 476, s. c. M'Clel. 214.

In an action on a contract, the surname of one of three joint plaintiffs was not inserted on the record, but was correctly inserted in the writ, and the defendant pleaded a tender, and paid money into court on the whole declaration, but failed at the trial in proving it, and a verdict of 1*s.* damages was found for the plaintiff; but if the Court should be of opinion that the variance was not fatal, then the damages to be increased to 23*l.* 9*s.* 5*d.*; on motion for that purpose, the Court refused to interfere. *Longridge* v. *Brewer*, 1 Law J. C.P. 42, s. c. 1 Bing. 143, s. c. 7 B. Mo. 522.

The plaintiff sued for damages against the defendants, for not fulfilling a contract to supply him with bacon: Held, that the *measure of damages* was the difference between the prices agreed on at the time of making the contract and the market prices at the times it ought to have been completed. *Gainsford* v. *Carroll*, 2 Law J. K.B. 112, s. c. 2 B. & C. 624, s. c. 4 D. & R. 167.

An officer cannot pledge or mortgage his commission.

If an officer pledges his commission as a security for a loan, and contracts with the lender to sell the commission and repay the debt out of the proceeds of the sale, that lender will nevertheless be postponed to *bonâ fide* creditors claiming under an equitable assignment of the money after the sale has been effected, and not having any notice of their debtor's prior contract.

The lender of money upon the security of such contract and deposit, will not be entitled to any preference over the general creditors of the borrower. *Collyer* v. *Fallon*, 3 Law J. Chanc. 23.

## DEBT.

[See Bond.]

The grantor of an annuity cannot maintain an action of debt at common law, nor by the 8 Anne, c. 14, to recover the arrears of an annuity for life issuing out of freehold lands. *Kelly* v. *Clubbe*, 6 B. Mo. 335, s. c. 3 B. & B. 130.

An action of debt by the drawer against the acceptor of a bill of exchange, payable to the drawer, or his order, for value received in goods, is maintainable. *Priddy* v. *Henbrey*, 1 B. & C. 674, s. c. 3 D. & R. 165.

Debt does not lie by surveyors of highways to recover the amount of composition-money duly assessed upon the defendant, in lieu of statute duty. *Underhill* v. *Ellicombe*, 1 M'Clel. & Y. 450.

In a declaration in debt, containing several counts, the sum demanded at the commencement was 33*l.* 1*s.*, and it concluded "to the damage of the plaintiff of 10*l.*" Plea: that the defendant did not owe to the plaintiff *the said sum of* 10*l.* *above demanded*. The plaintiff signed judgment as for want of a plea, and the Court set it aside (without costs), the defendant undertaking not to bring an action. *Edgington* v. *Town*, 6 Law J. C.P. 71, s. c. 1 M. & P. 276.

To an action of debt on a bond given to plaintiff as treasurer of a friendly society, a plea that the rules of the society had not been complied with pursuant to 33 Geo. 3, c. 54, is insufficient on demurrer. *Jones* v. *Woollam*, 2 Chit. 322.

Although a declaration in debt on a penal statute contains ambiguous words, yet they are cured by verdict, and must afterwards be taken to have been used in that sense which would sustain the verdict. *Huntingtower* v. *Gardiner*, 1 Law J. K.B. 120, s. c. 1 B. & C. 297, s. c. 2 D. & R. 450.

## DEBTOR AND CREDITOR.

[See Bond, and Parties to Suits.]

(A) Debtor.
(B) Creditor.
  (*a*) *Rights and Liabilities.*
  (*b*) *Priority of Payment.*
(C) Transfer of Debt.
(D) Composition.
(E) Fraudulent Alienation of Property.

### (A) Debtor.

Where it is agreed between debtor and creditor, that the amount claimed by the latter, for business done, shall be deposited in the hands of a third person, till the fairness of the items charged can be ascertained, the party with whom the deposit is made, will be liable to repay the amount to the debtor, if he pays it over to the creditor without the debtor's consent. *Cowling* v. *Beauchamp*, 1 Law J. C.P. 24, s. c. 7 B. Mo. 465.

A lighterman having a vessel, and being indebted to A and B, agreed to assign it to them for the debt, and their names were painted on it; but it was further agreed, that he should work the vessel, paying one third of the profits to A and B. After his death his widow worked the vessel, and carried three freights of limestone for A, and now brought an action against him to recover the amount: The Court held, that the action could be maintained by her, for that she ought to receive the whole freight, and then pay over the third to A and B jointly. *Weldrake* v. *Hirst*, 2 Law J. K.B. 2.

If the debtor refer the creditor to a third person for payment of his demand, and the creditor arrange with that third person in a mode different from that directed by the debtor, the latter will be discharged. *Smith* v. *Ferrand*, 5 Law J. K.B. 355, s. c. 7 B. & C. 19.

A person who is in custody under an attachment for non-payment of costs not exceeding 20*l.*, is not entitled to relief under the 48 Geo. 3, c. 122. *Rex* v. *Clifford*, 4 Law J. K.B. 172, s. c. 8 D. & R. 58.

On a bill by a creditor against an executor for payment of his demand, and an account of the testator's estate, the Court, in consequence of some doubt respecting the validity of the debt, retained the bill for a year, with liberty for the plaintiff to bring an action. And the Statute of Limitations having taken effect between the filing of the bill and the decree, the Court restrained the defendant from

insisting at law on the benefit of that statute. *Sirdefield* v. *Price*, 2 Y. & J. 73.

A, the widow and administratrix of B, continues B's trade after his decease; B at his death was indebted to C on balance of account; A continues to receive goods from, and to make payments to C as B had done, and she is charged in account by C with the debt; the payments made by her to C exceed the debt, but a balance is ultimately due to C: Held, that B's debt was discharged by A's payments, and that the ultimate balance cannot be proved as a debt against B's estate. *Sterndale* v. *Hankinson*, 1 Sim. 393.

If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. *Norbury* v. *Meade*, 3 Bligh, 246.

It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct, to cause the other debtor to be exempt from payment.

He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. *Stirling* v. *Forester*, 3 Bligh, 596.

## (B) CREDITOR.

### (a) *Rights and Liabilities.*

If a tradesman once gives credit to A, he cannot abandon his claim on A and charge B. *Leggatt* v. *Reed*, 1 C. & P. 16. [Park]

A simple contract creditor has no claim on the debtor's freehold, if his debt be secured on another part of the testator's property. *Alexander* v. *Holland*, 2 Ken. 4. Chanc.

A assigns to B, as a security for a debt due to him from A, a judgment recovered by A against C; B sues out execution upon the judgment; but, instead of levying the whole amount, enters into negotiations with C; he receives part of the sum due upon the judgment, but C dies insolvent before the residue of it is obtained: Held, that B will be restrained from suing A's representatives, upon his covenant for this residue, and that B must account to A's representatives, not merely for what he received upon the judgment, but for what, without his wilful default, he might have received. *Williams* v. *Price*, 1 S. & S. 581, s. c. 2 Law J. Chanc. 105.

A testator, the owner of plantations in Jamaica, having been for many years previous to his death, engaged in a course of dealing with a commercial house at New York, who furnished the necessary supplies to his estates, and were to reimburse themselves out of the produce consigned to them, one of his surviving trustees, who, after his death, had the management of the estates, continues the same course of dealing, and on passing his accounts annually, in an amicable suit instituted in the island, has credit for sums due in respect of the supplies so furnished, as being personally charged therewith; he afterwards dies insolvent, leaving a balance due to the American house, made up partly of sums for which he had had credit in passing his accounts, and partly of sums for which he had not so had credit: Held, that the New York house has a right to claim the payment of the whole balance against the produce of the estate, whether existing in the hands of the surviving trustees, or under the protection of the Court of Chancery in England.

To a suit for that purpose, the personal representatives of deceased trustees, who acted, are necessary parties, unless there be a waiver of all personal remedy against the trustees, in respect of the produce come into their hands. *Simond* v. *Hibbert*, 4 Law J. Chanc. 38.

Between A and B there were running accounts; A gave B a warrant of attorney with a defeasance, stating it to be given as a security for 4000*l.*, with interest: Held, that it was a continuing security, and applicable to any balance between its date, and the time of entering up judgment. *Woolley* v. *Jennings*, 7 D. & R. 824, s. c. 5 B. & C. 165, s. c. 2 C. & P. 144.

Where, after a decree in a creditor's suit, the plaintiff neglects to proceed, any other creditor has a right to file a supplemental bill. *Davies* v. *Williams*, 4 Law J. Chanc. 210.

Where a creditor has several securities, one of which is to protect him against all debts to be due by bill from his debtor, he does not lose the benefit of that security by entering into an arrangement with other parties to the bill debts; provided the debtor, or those who represent him, assent to his entering into that arrangement.

A, the creditor of B, by bills for which C and D are sureties, by a deed to which B and C are parties, discharges B and C, reserving his remedies against D; such reservation is not defeated by a stipulation that the bills shall be delivered up, it appearing that such stipulation was intended to be so modified as to give to A the benefit of such reservation. *Maltby* v. *Carstairs*, 6 Law J. K.B. 196, s. c. 7 B. & C. 735, s. c. 1 M. & R. 549.

A brewer, who supplies beer to a public-house, cannot charge any person as a primary debtor, but the person licensed to keep the house; and, if beer be so supplied on the credit of a person not licensed, the brewer cannot recover against such person, on the ground that it is a fraud on the Excise. *Mew* v. *Humphries*, 3 C. & P. 79. [Tenterden]

### (b) *Priority of Payment.*

If a surety in a bond (without any counter security to himself,) pays off the bond for his principal, he is merely a simple contract creditor, and not a specialty creditor, of the principal debtor. *Simpkins* v. *Poulet*, 2 Law J. Chanc. 81: s. p. *Copis* v. *Middleton*, 2 Law J. Chanc. 82, s. c. 1 Turn. 228.

It is not to be understood as a general doctrine of law, that a debt by simple contract is made special, because the creditor signs a deed of trust, which provides for the payment of that with other debts bearing interest by contract. *Hamilton* v. *Houghton*, 2 Bligh, 181.

Where the purchaser of an estate devises it, but dies before the purchase is completed, and the purchase-money is afterwards paid out of his personal assets, and the personal assets are not sufficient for the payment of his simple contract debts, the simple contract creditors have a right, as against the devisee of the purchased estate, to stand in the place of the vendor, with respect to his lien for the amount of his purchase-money. *Selby* v. *Selby*, 6 Law J. Chanc. 116.

### (C) TRANSFER OF DEBT.

A man had two debtors, the one of whom was indebted to the other. He consented that the debt due from the one should be carried to the account of the other; and, accordingly, in making out that account, he did, in his own handwriting, insert the sum due from that debtor: The Court held, that the debt had not been discharged, but that the man could sue his original debtor for it. *Curon* v. *Chadley*, 3 Law J. K.B. 63, s. c. 3 B. & C. 591, s. c. 5 D. & R. 417.

To make the transfer of a debt effectual, there must be—

1. A clear and unequivocal admission by the debtor that he owes the money.

2. An assent by him, at the request of his creditor, to pay a third person. And,

3. An extinguishment of the debt due to the third person from the creditor. *Fairlie* v. *Denton and Barker*, 6 Law J. K.B. 351, s. c. 8 B. & C. 395, s. c. 2 M. & R. 353.

### (D) COMPOSITION.

Where a composition-deed had been signed by a creditor in favour of his debtor, but he afterwards induced the debtor to give him a bill of exchange for the full amount of his debt, dated on a day prior to the composition-deed, and after receiving one instalment, sued the debtor upon the bill, and recovered the amount, minus the instalment paid: Held, that an action for money had and received might be maintained by the debtor against his creditor, to recover the difference between the amount of the composition deed and the full amount of the debt. *Turner* v. *Hoole*, 1 D. & R. N.P.C. 27.

The tenant of a farm for years, assigned all his leasehold and personal property, by deed, to trustees, for the benefit of his creditors, with a proviso, that it should be void, if the creditors for more than five pounds should refuse to execute, or otherwise consent to the deed: The Court held, that the non-execution of the deed by a creditor, was not evidence that he refused to execute, or consent to it; but that it was necessary to shew a positive refusal: *Holmes* v. *Love*, 2 Law J. K.B. 226, s. c. 3 B. & C. 242, s. c. 5 D. & R. 56, s. c. 1 R. & M. 138.

Although a sum, by way of composition or agreed instalment, ought to be paid in full, strictly on the appointed day; and, although in default of such payment, the creditor may resort to his original claim for the whole debt; yet, if he afterwards accept the composition, without objecting to the default, he will be bound by it. *Shipton* v. *Cassan*, 4 Law J. K.B. 199, s. c. 5 B. & C. 378, s. c. 8 D. & R. 130.

Where an indenture assigning effects to trustees for benefit of creditors, contained a covenant not to sue if the trustees fairly accounted for the effects assigned to them: Held, that if the trustees refused to account, the deed did not operate as a release of the creditors' right to sue. *Kesterton* v. *Sabery*, 2 Chit. 541.

A commission having issued, the bankrupt's funds were assigned to a certain person to secure five shillings in the pound, in consideration of its not being proceeded in. The agreement contained a clause that it should be void unless entered into by all the creditors. The deed afterwards prepared, contained a release, and recited the special circumstances as a consideration, but omitted the clause as to all the creditors coming in. The assignee of the effects gave a promissory note to the plaintiff, who executed the deed. In an action on that note, it appeared that one of the creditors had refused to execute the deed; and that the commission had been worked, and the funds withdrawn from the maker: Held, that such maker was not liable if he had used due diligence to get the creditors to execute the deed. *Enderby* v. *Corder*, 2 C. & P. 203. [Best]

A B, and his creditors, having entered into a composition-deed, under which an action was brought against the trustee for the amount of plaintiff's dividends, (the deed reciting that the debtor was indebted to the several creditors, whose debts were set opposite their names in the schedule annexed to the deed, and covenanting to pay a specific ratio of the debts): Held to be no defence to say, that the plaintiff (a creditor) did not set the amount of his debt opposite his name in the schedule. *Daniel* v. *Saunders*, 2 Chit. 564.

Where a debtor has entered into an executory agreement with his creditors, by which they are to accept, as a composition for their debts due to them respectively, certain instalments secured by promissory notes, a creditor will not be allowed to sue at law for his original demand, even after the expiration of the time for the payment of the first instalment, unless it appears that he has demanded the promissory notes, and that the debtor has refused to deliver them. *Salomonson* v. *Blyth*, 3 Law J. Chanc. 169.

By the terms of a composition deed, the defendant agreed that a certain sum should be divided amongst all his creditors in satisfaction of their debts; and that, in case they did not all accede to the terms proposed, and execute the deed within three months from its date, it should be void: Held, that the defendant, by satisfying one of his creditor's demand in full without his coming in under the deed, had thereby rendered it nugatory; and, consequently, that any other of the creditors might sue the defendant for his full demand; the deed furnishing no answer to such an action. *Spooner* v. *Whiston*, 8 B. Mo. 580.

A, an agent, held funds belonging to B, his principal, but had accepted bills drawn by B, to the full amount of them. B paid away the bills to his creditors, who, to relieve A from liability, and without the knowledge of B, accepted from A a composition of ten shillings in the pound, and gave him up the bills, A then holding funds belonging to B to the full amount of the bills. B afterwards became bankrupt, and his assignees brought assumpsit for money had and received against A for the difference between the amount of the bills and the composition: Held, that as B had been benefited to the full amount of the bills, the payment of the composition was as between him and A a full payment of the bills, and therefore that the action was not maintainable. *Stonehouse* v. *Reed*, 3 B. & C. 669, s. c. 5 D. & R. 603.

Assumpsit, on a promissory note, by the indorsee, against an indorser, for the accommodation of the maker. The plaintiff had signed an agreement to take five shillings in the pound, from the maker and

his father, as a collateral security, in full of his demand. The agent of the maker also represented to the plaintiff, before signing the agreement, that the defendant would remain liable for the rest of his debt, and that the agreement would be void, unless the other creditors signed: Held, first, that the surety was discharged by the plaintiff's execution of the agreement; secondly, that the representations of the maker's agent, as to the legal effect of the agreement, were immaterial, and did not avoid it: also, (per Justice Bayley) that parol evidence of one of their representations, which gave a meaning to the agreement different from that which appeared on the face of it, was inadmissible. *Lewis* v. *Jones*, 3 Law J. K.B. 270, s. c. 4 B. & C. 506, s. c. 6 D. & R. 567.

A creditor, who has agreed with his debtor by parol, to take part as a composition for his whole demand, and has actually received money from the debtor in part payment of the composition, is not bound thereby, but may still proceed for his whole demand, unless it can be shewn that he has, by entering into such an agreement, and taking part of the composition, induced some other creditor also to compound with the debtor, so as his subsequently proceeding for and recovering the whole amount of his own debt might be considered a fraud upon such other creditor.

The main ground on which the exception to the rule, that agreements which are *nuda pacta* are not binding on parties, is admitted, in cases of engagements by creditors to compound with debtors, is the equitable principle now adopted by courts of law, that, where they do or may operate as the means of fraud on some of the creditors if allowed to be broken, they shall bind. *Greenwood* v. *Lidbetter*, 12 Price, 183.

A deed of composition may be binding, though it shew that one creditor is ultimately to retain his right to the full amount of his debt, and the others are to take a composition.

Such a creditor, party to such a deed, is not bound by the general terms of a covenant to release on payment of a composition, if it appear, from the whole of the deed, that it is not intended to exclude him from his full claim.

Accordingly, where a creditor was a distinct party to a deed of composition; was described as a friend and creditor of the debtor; and joined in a covenant with him to the rest of the creditors, to pay the agreed instalment, and consented that his claim should be postponed until the composition was paid:—it was held, that the composition was not to bind him, although the deed contained a general covenant from all creditors to release. *Carpenter* v. *Sillcock*, 5 Law J. K.B. 61.

A covenant in a deed of composition with creditors, that the debtor shall deal with his creditors for twelve years, although valid in law, yet is a covenant not to be favoured; and the plaintiff seeking to enforce it, must shew that the articles supplied were good and marketable. *Thornton* v. *Sherratt*, 8 Taunt. 529.

*Semble*—That, if a deed of trust for payment of creditors be executed, a blank being left therein to be afterwards filled up by the insertion of a large sum as one of the debts due, such insertion (although made with the consent of the party conveying) amounts to an absolute vacation of the deed. *Rewett* v. *Browne*, 6 Law J. C.P. 194, s. c. 5 Bing. 7, s. c. 2 M. & P. 12.

Where defendant entered into a composition to pay his creditors 6*s.* 8*d.* in the pound, upon condition of being released, and nearly two years afterwards gave one of them, who had agreed to sign the composition-deed, a bond for the residue of her debt, without the knowledge of the other creditors; she not having received the amount of her composition, but divers of the other creditors having signed the deed and received their composition: Held, that an action might be sustained on this bond. *Took* v. *Tuck*, 6 Law J. C.P. 156, s. c. 4 Bing. 224.

(E) Fraudulent Alienation of Property.

A suit to set aside a settlement as fraudulent against creditors, entertained, where the plaintiff subsequently became a creditor by the breach of a covenant previously entered into by the settlor.

Where a deed is set aside as fraudulent against creditors, the property becomes assets, and subsequent creditors are let in.

In order to make void a deed as fraudulent against creditors, it is not necessary to prove that the party was insolvent at the time, if it appear that the intention was to delay creditors. *Richardson* v. *Smallwood*, 1 Jac. 552.

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## DECEIT.

[See Warranty.]

(A) Action for.
(B) Pleadings and Evidence.

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### (A) Action for.

Where a commodity has a fixed price or value, and is sold for a particular purpose, it must be understood that it is to be reasonably fit and proper for that purpose; and if it be not so, an action lies in the absence of a warranty. *Gray* v. *Cox*, 1 C. & P. 184. [Abbott]

### (B) Pleadings and Evidence.

A declaration in an action of deceit for fraudulently delivering less quantities of ale and beer, contained in casks, than bargained and sold, is insufficient, as it must specifically allege, that the casks contained a less quantity than they ought to have done. *Miles* v. *Dell*, 3 Stark. 23. [Abbott]

A declaration in tort, alleging that the defendant, on the sale of Teneriffe barilla, asserted that seven hundred and a half would produce a ton of soap, well knowing it would not do so, is not supported by evidence that he said he had made seven tons of soap out of fifty-one cwt., and no proof of the scienter. *Horncastle* v. *Moat*, 1 C. & P. 166. [Abbott]

In an action on the case, in the nature of deceit, proof of any one of the facts charged will be sufficient to maintain the action, provided the injury which is charged appears to have resulted from that one fact. *Brenning* v. *Stevens*, 5 Law J. K.B. 248.

Where in case for falsely representing that the "returns of the defendant's public-house had averaged, and then averaged, 300*l.* a month,"—the evidence proved that he said he was "doing 300*l.* a month in the house:" Held, first, not to be a vari-

ance; and second, that the circumstance of the defendant naming his brewer, and saying that he kept a pass-book, thereby enabling the plaintiff to inquire of the brewer, and to have asked for the pass-book, was to be taken into consideration by the jury, on the question, whether the defendant practised a fraud and deceit on the plaintiff. *Bowring* v. *Stevens*, 2 C. & P. 337. [Abbott]

In an action for misrepresenting the business of a public-house, evidence shewing the value of the premises goes in reduction of damages, but not in bar to the action. *Pearson* v. *Wheeler*, 1 R. & M. 303. [Abbott]

The insolvent, in an action of deceit, for representing that he was a solvent person, is a competent witness to prove that the defendant verified that fact. *Brant* v. *Robinson*, 1 R. & M. 48. [Abbott.]

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## DEEDS.

[See GRANT, and LEASE.]

(A) WHAT SHALL BE.
(B) EXECUTION AND DELIVERY.
(C) CONSTRUCTION AND OPERATION.
(D) VALIDITY OF, AND WHERE SET ASIDE.
(E) MISTAKES IN, WHERE RECTIFIED.
(F) ALTERATIONS IN.
(G) ENROLMENT.
(H) POSSESSION OF.
(I) DELIVERING UP.
(K) COPIES OF. } See Production and Inspection of Deeds, Books, and Papers.
(L) PRODUCTION AND INSPECTION OF. } See Production and Inspection of Deeds, Books, and Papers.
(M) REMEDIES ON.
(N) DEATH-BED DEEDS.

### (A) WHAT SHALL BE.

A letter or power of attorney to transfer stock in the public funds is a deed within 2 Geo. 2, c. 25. *Rex* v. *Fauntleroy*, 1 C. & P. 421, s. c. 1 R. & M. C.C.R. 52, s. c. 2 Bing. 413.

### (B) EXECUTION AND DELIVERY.

A person, acting by power of attorney to execute a deed for another, should not be a party to the deed, even though he describe himself as acting under the power of attorney. The deed should run in language as if the principal himself intended to execute the deed. *Berkeley* v. *Hardy*, 4 Law J. K.B. 184, s. c. 5 B. & C. 355, s. c. 8 D. & R. 102.

The attestation of a deed ought to be in the room where the instrument is executed, and formal words of delivery should be used; and it is expedient that the witness should hear the party say that he understands what he is doing. *Lloyd* v. *Freshfield*, 2 C. & P. 325. [Abbott]

An attesting witness must be called to prove the execution of a deed, or his absence must be well accounted for; hence, where, in an action on a bond, it was sworn that the attesting witness kept out of the way to avoid an arrest—the reason was holden insufficient; and the Court granted a new trial, as evidence of his handwriting had been received. *Pytt* v. *Griffith*, 6 B. Mo. 538.

On an attesting witness being called to prove the execution of a *deed*, he stated, that he knew one of the parties, and that he would not have attested it unless he had seen it executed by him; but that he did not know whether the signature to the deed was his handwriting: Held, to be sufficient proof of the execution. *Doe* v. *Claxton*, 4 Law J. C.P. 143.

Where a party to an action has, by his own deed, recited another, it is not necessary to prove the execution of that other deed.

Where a party takes an interest under a deed, subject to certain liabilities, but does not execute the deed, he is liable to an action on the case in respect of those liabilities, though not to an action of covenant. *Burnett* v. *Lynch*, 4 Law J. K.B. 274, s. c. 5 B. & C. 589, s. c. 8 D. & R. 368.

Proof of the handwriting of the subscribing witness to an instrument is sufficient, he being dead, without any further proof of the identity of the parties, except the identity of name and description. *Page* v. *Mann*, 1 M. & M. 79. [Tenterden]

If A and B are parties to a deed, and A refuses to give it in evidence, the testimony of the subscribing witness is dispensed with by proving, first, that he gave him notice to produce; secondly, A's possession; and, lastly, by producing a true copy. *Jackson* v. *Allen*, 3 Stark. 74. [Abbott]

The mere signing, sealing, and using words of delivery, is not conclusive evidence of the legal delivery of a deed; nor is any formal act necessary at the time of its execution, to indicate that it is to be an escrow. The question of deed or escrow is a question of fact to be decided by a jury upon all the circumstances attending the transaction.

It is not necessary that there should be a delivery, either to the grantee, or to some one authorized by him, or to a stranger, expressly for the use of the grantee, if the intention of the grantor be clear.

The mere fact of the grantor keeping possession of the deed, is not evidence that he intends to exercise or to reserve any controlling power over it; and is, therefore, consistent with an intention to deliver irrevocably for the benefit of the grantee.

Nor is it necessary that the grantee should have any knowledge of the existence of the deed, in order that his assent to it may be shewn or presumed. The law will presume assent, if the deed be for the benefit of the grantee. *Doe d. Garnons* v. *Knight*, 4 Law J. K.B. 161, s. c. 5 B. & C. 671, s. c. 8 D. & R. 348.

The date of a deed is *primâ facie* evidence of the date of its execution.

Where, in the body of a deed, its *date* is referred to, as a means of shewing the intention of the parties, the defendant, in an action on the deed, shall not be allowed to alter that apparent intention, by shewing a *delivery* different in point of time from the date. Thus, where a man covenants to do a certain act, within twenty-four months from the *date* of the deed, he shall not be allowed to plead, that the deed was *delivered* long after the date, and thus extend the time given for his performance of the covenant. *Styles* v. *Wardle*, 4 Law J. K.B. 81, s. c. 4 B. & C. 908, s. c. 7 D. & R. 507.

### (C) CONSTRUCTION AND OPERATION.

A, by deed of lease and release, in consideration of natural love, and of 100*l.*, granted and released certain premises after his own death, to his brother

B in tail, remainder to C, the son of another brother of A, in fee; and he covenanted and granted that the premises should, after his death, be held by B and the heirs of his body, according to the true intent of the deed: Held, that the deed could not operate as a release, because it attempted to convey a freehold *in futuro*; but that it was good as a covenant to stand seised. *Roe d. Wilkinson* v. *Tranmarr*, 2 Ken. 239, s. c. Willes, 682, s. c. 2 Wils. 75.

The right to sue upon a deed *inter partes*, is only available between those who are actually parties to it. *Barford* v. *Stuckey*, 5 B. Mo. 23.

The habendum is not an essential part of a deed. If the premises in a deed give an express estate in law, the habendum shall not be allowed to defeat it; the office of an habendum being to explain, (and, therefore, occasionally, either to enlarge or limit,) but not to defeat an estate created by the premises.

Accordingly, where a deed in the premises created an estate in fee; and the habendum was "to hold after the death of A," which would be creating an estate *in futuro*, and would, therefore, avoid the deed: It was held, that the habendum should not prevail to defeat the deed; but that the intermediate estate until the death of A should be carried on to the uses. *Goodtitle d. Dodwell* v. *Gibbs*, 4 Law J. K.B. 284, s. c. 5 B. & C. 709, s. c. 8 D. & R. 502.

Although it be a general rule that there shall be no savings out of a deed, or a record, by any collateral deed or record, and that no deed or record shall be construed or ruled by any thing except itself; yet, in cases of common assurance, as fines, recoveries, &c. another instrument may, by the agreement of the parties, create a saving. *Davies* v. *Bush*, 1 M'Clel. & Y. 84.

A deed of conveyance, after reciting that it had been agreed that £1,400, part of the purchase-money, should be paid to the mortgagee of the premises, and that the residue of the purchase-money, £460, should be paid to the purchaser, witnessed, that, in consideration of the sum of £1,400 paid to the mortgagee, at or before the sealing and delivery of the deed, the receipt whereof the mortgagee acknowledged, and from the mortgage-money and every part thereof acquitted and discharged the vendor and purchaser; and also, in consideration of the said sum of £460, paid to the vendor as before mentioned, the receipt whereof, and also the payment of the mortgage-money, making in the whole the sum of £1,860, the vendor thereby acknowledged, and, from the same and every part thereof, acquitted, released, and discharged the purchaser, &c.: Held, (*Vaughan*, B. *dissentiente*,) to be no estoppel upon the vendor, the release by the words "as before mentioned," &c., referring to and being qualified by the recital, which stated an agreement to pay the £460, and not an actual payment. *Bottrell* v. *Summers*, 2 Y. & J. 407.

It is not a sufficient ground for restricting an estate limited in a deed to a trustee and his heirs, to an estate for life, that the estate given to the trustee seems to be larger than was essential to its purpose, or that the limitation has been unnecessarily repeated. *Colmore* v. *Tyndall*, 2 Y. & J. 605.

A clause in a deed of tailzie, though confused and ungrammatical, may be intelligible; and if it has received a construction in judgment upon a former litigation, cannot be held unintelligible. *Elliott* v. *Pott*, 3 Bligh, 134.

A deed which is intended to pass the immediate possession, which is inoperative for that purpose, may serve to pass the reversion, if it be clear that the grantor's intention was to pass his interest, no matter by what mode, and if also there be words in the deed sufficient to carry the reversion. *Doe d. Were* v. *Cole*, 6 Law J. K.B. 20, s. c. 7 B. & C. 243, s. c. 1 M. & R. 33.

The description of a party as a relation is equivalent to a recital. *Whalley* v. *Whalley*, 3 Bligh, 1.

Where a deed has no date, or an impossible date, the date in other parts of the deed means delivery; but where it has a sensible date, the date of the deed means the day of the date, and not the day of the delivery. *Styles* v. *Wardle*, 4 Law J. K.B. 81, s. c. 7 D. & R. 507, s. c. 4 B. & C. 908.

### (D) VALIDITY OF, AND WHERE SET ASIDE.

No man can bind another by deed, unless he has authority, *by deed*, to do so. *Berkeley* v. *Hardy*, 4 Law J. K.B. 184, s. c. 5 B. & C. 355, s. c. 8 D. & R. 102.

A voluntary deed, executed by a person upwards of eighty years of age, in favour of the surgeon who was in the habit of attending him, held to be valid; the grantee having proved that the grantor executed it of his own free will, with a full knowledge of its nature, and through the intervention of his own solicitor. *Pratt* v. *Barker*, 4 Law J. Chanc. 149, s. c. 6 Law J. Chanc. 186, s. c. 1 Sim. 186, s. c. 1 S. & S. 1.

Where a voluntary deed has been executed for a purpose which has never been completed, and the deed has never been parted with, it will be considered in equity as an imperfect instrument. *Cecil* v. *Butcher*, 2 J. & W. 573.

In a grant of a remainder from an uncle to a nephew for a price grossly inadequate, but purporting, in the operative part of the deed, to be made in consideration of love and affection, there being no recital to that effect, but, the grantor being described as a nephew, a valid will of the reversion, previously made in favour of that nephew, is evidence of the truth of the consideration. *Whalley* v. *Whalley*, 3 Bligh, 1.

If the whole of the consideration, *indirectly* moving the parties to make a deed, be not stated in it, yet no advantage can be taken on a trial, when the instrument is produced in evidence as to the amount of the stamp; for the 48 Geo. 3, c. 149, s. 22, does not render it absolutely void. *Doe d. Higginbotham* v. *Hobson*, 1 Law J. K.B. 224, s. c. 3 D. & R. 186.

A deed of compromise, with respect to doubtful rights, will not be set aside, because the bargain was such as would have seemed disadvantageous to one of the parties, if she had known the full extent of her legal right. *Naylor* v. *Wynch*, 2 Law J. Chanc. 132, s. c. 1 S. & S. 555.

A release set aside for misrepresentation and concealment. *Harvey* v. *Cooke*, 6 Law J. Chanc. 84.

A, having previously borrowed 1000*l*. of B, executes to him a bond for that sum, and B, two days afterwards, executes a deed, whereby he covenants that the bond shall not be enforced; some years

afterwards, B, having become bankrupt, his assignees bring an action on the bond, and file a bill to have the deed of covenant declared fraudulent: Held, that the Court will not interfere against the legal operation of the deed, there being nothing to shew that B was insolvent when he executed it; and there being evidence that A had also, at that time, pecuniary claims on B, and that the execution of the bond was accompanied by an agreement that payment of it should not be enforced. *Slack* v. *Tolson*, 1 Russ. 553.

(E) MISTAKES IN, WHERE RECTIFIED.

The Court will rectify a deed which assumes by its recital to carry an agreement into execution, and in doing so, has exceeded its intended purpose. *Beaumont* v. *Bramley*, 1 Turner, 52.

A conveyance which passes more than was intended by the parties, may be rectified, and the excess deducted. *Beaumont* v. *Bramley*, 1 Turn.; and see *Ball* v. *Storie*, 1 S. & S. 210.

Whether a proceeding is competent to supply a defect in a deed or instrument arising from obliteration, if instituted after the accident or discovery of the defective state of the instrument, in a case where a party is not excluded by admission or former adjudication—*Quære.*

The same principle of decision cannot be applied to a document (the extract of a decree) in the custody of a party, as to a record in the keeping of the law. *Macdougall* v. *Hogarth*, 2 Bligh, 41—59.

(F) ALTERATIONS IN.

It seems that a material alteration in a deed does not render it wholly inoperative. *Doe d. Beanland* v. *Hirst*, 3 Stark. 60. [Bayley]

Lease of Lands by A to B at the request of C, D, and E, out of which, B was to grant underleases at the direction of C, D, and E (the object of which underleases was to secure a ground-rent to A and C), and subject to such underleases, was to stand possessed of the lease in trust for D and E, who were parties to the original lease; after C, D, and E, had executed the lease, and before A or B had executed it, the lease was altered with the consent and privity of C only, by an erasure, which excluded a certain portion of land inserted by mistake, but in which D and E had no interest. A and B then executed the lease: Held, that this alteration did not render it invalid. *Hall* v. *Chandless*, 4 Bing. 123.

(G) ENROLMENT.

A conveyance which, from the whole circumstances attending the transaction, is evidently intended for the benefit of a dissenting meeting-house, although there be no obligation upon any one so to appropriate the subject matter, is nevertheless void if not enrolled under the statute 9 Geo. 2, c. 36, s. 1. *Doe d. Turnbull* v. *Brown*, 6 Law J. K.B. 287.

(H) POSSESSION OF.

Where a deed is executed by a client in favour of his solicitor, the client reserving to himself a life interest and power of revocation, it is the duty of the solicitor to leave a counterpart of the deed in the possession of his client. *Balch* v. *Symes*, 1 Turner, 92.

(I) DELIVERING UP.

A person who has lent his deeds for the purposes of a cause to which he is not a party, which are brought, during the progress of the suit, into the Master's office, may petition in the cause to have the deeds delivered out to him. *Marriott* v. *White*, 1 S. & S. 17.

In a suit for an account, and for delivery of title-deeds, against a solicitor, who had acted in the capacity of steward, the Court, upon motion, ordered the deeds to be delivered up to the plaintiff, upon payment into court of so much of the balance claimed by the answer as was not covered by any security. *Balch* v. *Symes*, 1 Turn. 87.

Where a married man who has lived in adultery with a woman, and has had issue by her, executes a deed providing for her and the children, in the event of his death, and deposits this deed with his attorney, but afterwards obtains possession of it himself. On demurrer, it was held, that the woman and her issue might maintain a bill to compel him to deliver up the deed; and that as there was no breach of trust against the party with whom the deed was deposited, it was not necessary that he should be made a party, and that the bill was not multifarious, although it also sought performance of an agreement to pay an annuity to the woman, which a court of equity would not decree. *Knye* v. *Moore*, 1 S. & S. 61, ——— v. *Moseley*, 1 Law J. Chanc. 18.

(M) REMEDIES ON.

When a plaintiff declares as heir-at-law upon a deed made by the person through whom he claims, he must shew *how* he is heir-at-law; and the stating merely that he is *cousin* and heir-at-law is not sufficient. *Lidgbird* v. *Judd*, 4 Law J. K.B. 76, s. c. 7 D. & R. 517.

No one but a party, or one who claims through a party, can maintain any action on a deed. *Berkeley* v. *Hardy*, 4 Law J. K.B. 184, s. c. 5 B. & C. 355, s. c. 8 D & R. 102.

(N) DEATH-BED DEEDS.

Lands, &c. being limited to heirs of entail by simple destination, a deed was executed in *liege poustie* in favour of the heirs general of the disponer after his death without issue, with a power to revoke or alter that disposition on death-bed; and a declaration, that so far as it shall remain unrevoked, and not altered by a writing under the hand of the disponer, it shall have the effect of a delivered evident, though &c. By another deed, executed thirteen years after the first, all the lands, &c., together with the personal estate of the disponer, are vested in trustees, in trust to be sold, and the produce to be applied in payment of debts owing at his death, and legacies, &c. granted or to be granted, &c. (the objects of trust being different from those provided in the former deed); and the trustees are directed to convey, &c. the residue of the whole fund in favour of such persons, &c. as the disponer had directed or should direct by any writing executed, or to be executed, &c. On death-bed the disponer executed a deed of appointment, directing the trustees to convert the whole estate into money; and after giving certain legacies, he bequeaths the

residue to his heirs M and E for life, with remainder to other persons therein named: Held, that this was not a revocation of the first deed, so as to give to the heirs of entail a title to challenge the last deed *ex capite lecti*; although the disponees for life, under the second deed, being the heirs general of the disponer, had reduced the death-bed deed on that ground, and thereby, under the doctrine of approbate and reprobate, and forfeited by life-interest given to them by the second deed.

Where lands by an instrument in the nature of a will, are disponed in trust to sell and pay certain legacies, and, as to the residue, for such persons as the disponer shall by writing appoint; and afterwards, by deed made on death-bed, he disposes of the residue, the law of death-bed applies to the case, and the disposition is reducible on that ground, so far as it relates to lands.

Lands, entailed by simple destination, being given by testamentary disposition to the sisters and heirs of the disponer, under obligation as to part of those lands, that they should be conveyed by his sisters to the heirs of tailzie, entitled by strict statutory entail to the principal mansion, &c. where the lands subject to the obligation are situated, on condition that a certain sum shall be paid by a certain day by those heirs to the sisters. By a subsequent testamentary disposition, consisting of two deeds, the latter being made on death-bed, the lands of the disponer, including those in question, are vested in trustees, upon trust to sell and pay the interest of the produce to the sisters of the disponer for life, &c., who, as general heirs of the disponer, reduced the latter instrument, so far as it regarded lands destined heirs of line, as made on death-bed: Held, that the heirs of entail have no title or interest to reduce the same instrument on the same ground as to the entailed lands, nor to call for a conveyance on payment of the sum specified in the condition: 1. because their interest is excluded by the *liege poustie* deed, and is not restored, transferred to, or vested in them, because the disponees in that deed have forfeited or rejected their right under it: 2. because they must claim as disponees or legatees under that deed, and in such character they are barred from challenging the death-bed deed: 3. because, in the events which had happened, they could not fulfil the conditions on which alone the benefit of the disposition could be claimed: 4. because they are not entitled to avail themselves of the right of redemption according to the condition, and under the obligation imposed on the disponees in the first deed, inasmuch as that obligation does not extend to the trustees, who take under the death-bed deed. *Roxburghe* v. *Wauchope*, 2 Bligh, 619.

Though it be positively laid down, that a mere deed on death-bed shall not disappoint the heir, yet, if a former deed has been granted in *liege poustie*, the grantor may, by a death-bed deed, burden the grantee of the former deed, so as to leave nothing valuable remaining of the title to the beneficial interest in the estate given to such former grantee; the former deed, however, remains in that case valid as a title-deed to the estate, however burdened by the latter deed.

A death-bed deed cannot be supported, unless it is founded upon some claim to the estate, available against the heir, created by, and continued available until and at the death of the grantor, by a previous deed, to which the title under the death-bed may knit and attach itself, as a burthen by a death-bed deed attaches itself to an estate created by a *liege poustie* deed.

If a valid *liege poustie* deed exist at the death of the grantor, the death-bed deed will also be good. This *liege poustie* deed must, however, be in favour of a stranger, and not in favour of the heir *alioqui successurus*. A deed in his favour would be held to be an evasion of the law, and not effectual. The stranger disponee is bound to hold good any power reserved against him; if such a power be duly executed, he cannot complain.

A person, to take by a death-bed deed, cannot call upon the disponee under a former deed to denude, unless the estate is vested in him. Where it is so vested, the author of a death-bed deed, so far from revoking, asserts the validity of the *liege poustie* deed.

A testator may render a death-bed deed valid, by a clause in it that he meant a certain previous deed to subsist, if the death-bed deed should be found to be ineffectual; or if the disponee under it would not, or could not, take, from popery or other cause, then the disponee under such previous deed might, as against the heir *alioqui successurus*, claim the estate. In that case, the testator keeps alive the former deed to all those purposes, to enable the disponee in the death-bed deed to say to the heir, that he has no interest to impugn the death-bed deed. *Crawford* v. *Coutts*, 2 Bligh, 669—85.

## DEER.

[See GAME.]

An assistant keeper has no right, under 16 Geo. 3, c. 30, s. 9, to seize a person carrying a gun into grounds where deer are usually kept, in order to get his gun, without first demanding it.

16 Geo. 3, c. 30, s. 9, as to seizing the guns, &c. of persons carrying them into grounds where deer are usually kept, with intent to destroy deer; and as to to beating or wounding the keepers, &c. in the execution of their offices: Held, that an assistant keeper had no right to seize the person of one so armed in order to get his gun, without having first demanded the gun.

*Quære*—Whether an assistant keeper, appointed by the keeper only, and not confirmed by the owner of the forest, chase, &c. can, in the absence of the keeper, seize guns, &c. *Rex* v. *Amey*, 1 R. & R. C.C.R. 500.

Upon an indictment for a second offence against 42 Geo. 3, c. 107, by killing deer, objections were taken to the conviction for the first offence, viz. that it was not in the proper county, and that it was not correctly stated in the indictment for the second offence; and the conviction for the second offence held wrong. *Rex* v. *Allen*, 1 R. & R. C.C.R. 513.

## DEMURRER.

(A) WHERE ALLOWED.
(B) FORM OF.
(C) PRACTICE.

### (A) WHERE ALLOWED.

[See INTERROGATORIES, and PLEADING.]

It seems, in the Exchequer, the omission of the usual allegation in a bill in equity, of the plaintiff being a debtor, and an accountant to the King, is no ground of demurrer. *Cheetham* v. *Crook*, 1 M'Clel. & Y. 315.

After answer, the plaintiff amended his bill by adding several suggestions, without praying any new relief: on demurrer to this bill, it was overruled, on the ground that the defendant cannot demur to an amended bill which does not pray new relief. *Emmett* v. *Ayliffe*, 1 Ken. 131.

A demurrer was allowed to a bill which did not distinctly shew whether the plaintiff's title was at law or in equity. *Edwards* v. *Edwards*, 1 Jac. 229, 335.

A bill is demurrable if a party be joined, who appears on the face of the bill to have no interest in the matters in litigation. *Cuff* v. *Platel*, 1 Law J. Chanc. 2.

A bill, which states that a defendant is the heir-at-law of a person, who bought and afterwards sold the premises, and that he has in his possession deeds, &c. relating to them, does not thereby allege that he has an interest in the subject of the suit. *Smith* v. *Thompson*, 1 Law J. Chanc. 188.

If, of several co-plaintiffs, some have an interest in the matters of the suit and others have no interest, a general demurrer will hold to the whole bill.

A bill being filed by the obligee of a bond against the personal representative of a surety, who was an obligor, and one of the two principal obligors stated, that the other principal obligor was dead—that there was no personal representative of him—and that he left no assets out of which the plaintiff's demand could be satisfied: Held, that a demurrer could not be sustained, on the ground that there was no personal representative of one of the two principal debtors before the Court. *Musgrave* v. *Vick*, 5 Law J. Chanc. 150.

Where the bill contains a general allegation, and a general question applying to more lands than those which are the subject of the suit, the defendant, though not bound to answer the question generally, is yet bound to answer it as far as regards the particular lands to which the suit relates; and, therefore, a demurrer, generally and without an exception of those particular lands, to such an allegation and question, is bad.

If a defendant, who has substantially a good defence by way of demurrer, and has been already allowed to amend once, fails a second time, through a slip in pleading, which affects the substance of the demurrer, the Court, if it sees that it was his intention to avail himself of his defence only so far as it was substantially good, and to give the plaintiffs all the discovery to which they had a right, will permit him to amend a second time, upon payment of full costs to the other party.

An allegation in a bill, that the defendant, who is of the Roman Catholic religion, is gone abroad with a view to become, or has become, a member of a religious house, is demurrable; for the Court will intend, that the religious house mentioned in the allegation is a Roman Catholic religious house, and will not give the plaintiff the benefit of the possibility that the defendant may have exempted himself from penalties by taking the oath prescribed by 31 Geo. 3, c. 2, unless the bill brings him specifically within the exemption created by that statute.

Where a charge is demurrable, matter stated by way of inducement to the charge, is also demurrable. *Holden* v. *Weld*, 1 Law J. Chanc. 171.

Demurrer to a bill filed by a creditor, against A, the executor, and his partners B, C, &c. alleging, that assets of the testator had come into the hands of the partnership, and that all the partners claimed to retain these assets, in satisfaction of a debt due from the testator to their firm, but not alleging in terms collusion between A and the other defendants: the demurrer is overruled. *Gedge* v. *Traill*, 2 Law J. Chanc. 1.

If A is made a party to a bill for an account of a testator's estate, on the ground that he holds assets by collusion with the executor, he cannot protect himself from answering fully, by denying the collusion and demurring to the other parts of the bill.

If a bill states that A is the solicitor of B and of C, and then sets forth various dealings of A in the affairs of B and C, but does not allege that these affairs came to his knowledge in his character of solicitor: A cannot demur to the discovery, on the ground that the matters came to his knowledge only in that character. *Wayte* v. *Surman*, 2 Law J. Chanc. 28.

The Court, on a demurrer to a bill by creditors, praying a sale of testator's real estate to pay unsatisfied demands, the personal estate being insufficient, the testator having directed his debts to be paid by his executors, and devised his real estate, overruled (but without costs or prejudice to the question) as being premature, because the court would marshal assets, and, consequently, the cause must be brought to hearing to enable the Court to do justice. *Sanderson* v. *Wharton*, 8 Price, 680.

A general demurrer for want of equity allowed to a bill, alleging, that the defendant, who was the agent of A, and had in his hands monies and effects of A, had written a letter to a creditor of A, in which he promised to honour, on presentation, certain bills of exchange, drawn by that creditor, at A's request, upon the defendant, and praying that the defendant might be decreed to pay the bills of exchange out of the monies and effects of A in his hands, or otherwise, out of his own monies. *Baillet* v. *Mitchell*, 1 Law J. Chanc. 197.

Matters in equity arising within the county palatine of Lancaster, are within the jurisdiction of the Court of Exchequer, and therefore a demurrer for want of jurisdiction will be cancelled. *Cheetham* v. *Crook*, 1 M'Clel. & Y. 307.

A demurrer to a bill for a discovery, and to examine witnesses in aid of the defence to two separate actions for two distinct libels, was allowed on the ground, first, that it did not shew any right to the bill for a discovery, nor to the commission; and secondly, that two actions for several and distinct matters ought not to have been joined together in one bill. *Shackell* v. *Macaulay*, 2 S. & S. 79. See same case in several stages before the Lord Chancellor and Vice Chancellor, 3 Law J. Chanc. 27—42.

If A brings an action against B for the publication of a libel, and B puts in a plea of justification, and afterwards files a bill stating the matters contained

in the plea, and that the witnesses by whose evidence he could prove their truth are abroad, and therefore praying a discovery from A of the matters so alleged, and one or more commissions to examine witnesses abroad; a general demurrer to such a bill cannot be sustained. *Shackell* v. *Macaulay*, 3 Law J. Chanc. 30.

A bill for a commission to examine witnesses abroad, where an action has been begun; and a bill to examine witnesses *de bene esse*, is liable to a special demurrer, if it has not an affidavit annexed to it of the circumstances by which the testimony sought to be preserved is in danger of being lost. *Angel* v. *Angel*, 1 Law J. Chanc. 6, s. c. 1 S. & S. 83.

A demurrer to a bill to perpetuate testimony as to legitimacy by the eldest son of a peer, in the lifetime of his father, allowed. *Belfast* v. *Chichester*, 2 J. & W. 439.

As the construction of written instruments is the same at law and in equity, a demurrer will hold good to a bill which prays to be relieved against a judgment, alleged to have proceeded upon a strict construction of an agreement, in opposition to the true intent of the parties. *Ball* v. *Storie*, 1 Law J. Chanc. 214, s. c. 1 S. & S. 210.

An action at law being brought, to recover the produce of some foreign specie, remitted by a merchant abroad to an agent in London, the agent filed his bill, alleging generally, that there were mutual dealings and transactions between the parties, and praying that an account might be taken of them, and for an injunction;—a demurrer was allowed. *Frietas* v. *Dos Santos*, 1 Y. & J. 574.

Demurrer to a supplemental bill, after a decree in the original suit, allowed, on the ground, that it was only a different statement of the case alleged by the original suit, and was, in fact, a fresh suit for the same purposes. *Grant* v. *Grant*, 5 Law J. Chanc. 145.

### (B) FORM OF.

An allegation, that the defendants pretend that there is an outstanding legal estate, is not an averment which will entitle the plaintiff, upon the argument of a demurrer, to the benefit of an allegation that there is such an outstanding legal estate. *Wingate* v. *Roberts*, 2 Law J. Chanc. 164.

Though it is the usual course of the Court to determine on the written demurrer, before it enters upon the consideration of a case of demurrer assigned *ore tenus*; yet when the demurrer *ore tenus* is for want of parties, who have an interest in the question raised by the written demurrer, the Court will dispose of the demurrer *ore tenus* first. *Attorney General* v. *Heelis*, 2 Law J. Chanc. 35.

A demurrer *ore tenus* cannot be offered to part of a bill. *Shepherd* v. *Lloyd*, 2 Y. & J. 490.

Unnecessary allegations in a demurrer do not render it a speaking demurrer, if they do not introduce matter which does not appear in the bill. *Cawthorne* v. *Chalie*, 3 Law J. Chanc. 125, s. c. 2 S. & S. 125.

A demurrer is not a speaking demurrer, unless when it introduces a statement of a fact material to support the demurrer. *Davies* v. *Williams*, 4 Law J. Chanc. 210, s. c. 1 S. & S. 5.

A demurrer which covers too much cannot be sustained. *Wynne* v. *Jackson*, 2 M'Clel. & Y. 65.

Where there is a demurrer extending in principle to the whole bill, though in form purporting to extend only to part of it, the defendant, by answering any part of the bill, overrules his demurrer. *Dawson* v. *Sadler*, 2 Law J. Chanc. 172, s. c. 1 S. & S. 542.

### (C) PRACTICE.

The eight days within which a demurrer must be entered with the registrar, are eight office days. *Bullock* v. *Edington*, 1 Sim. 481.

It is irregular for a defendant who is not in contempt, and has not obtained an order for time, to file a general demurrer, if his solicitor has represented to the adverse clerk in court, that an order for time had been obtained. If that misrepresentation of the defendant's solicitor was called forth by a statement on the part of the plaintiff, that he was in a condition to seal an attachment, when in truth he was not in that condition, the defendant may file a general demurrer. *Gray* v. *Chaplin*, 3 Law J. Chanc. 47, s. c. 2 S. & S. 267.

If a defendant be under terms of pleading issuably, he cannot demur *specially* to the replication. *Sawtell* v. *Gillard*, 3 Law J. K.B. 108, s. c. 5 D. & R. 620.

If pending a demurrer which is overruled, the time allowed by the rules of court for pleading expires, the Court will grant further time to plead. *Duncan* v. *the Manchester Waterworks Company*, 8 Price, 698.

Where a demurrer was refused to be received, on a mis-statement that an attachment had previously issued for want of an answer:—The Court set aside an attachment subsequently issued, and gave leave to demur. *Evelyn* v. *Griffith*, 1 M'Clel. & Y. 265.

A defendant against whom an attachment has issued, cannot, upon payment or tender of costs, file a demurrer to the whole bill, without special leave of the Court. *Mellor* v. *Hall*, 3 Law J. Chanc. 171, s. c. 2 S. & S. 321.

Judgment of *non pros.* is regularly signed, if a *similiter* be not delivered. *Hollis* v. *Buckingham*, 3 D. & R. 1.

To a declaration in assumpsit, with several counts, the defendant demurred generally to the first counts, and pleaded the general issue to all the other counts: Held, that the demurrer must be delivered to the plaintiff's attorney, and not filed with the clerk of the papers. *Dymock* v. *Stevens*, 3 D. & R. 248.

If a general demurrer be filed instead of delivered, it is unavailable; hence, where the plaintiff signed judgment when it had only been filed, the Court held the judgment regular. *Fry* v. *Champneys*, 2 Chit. 295.

The attorney, and not the clerk of the papers, has a right to make up the demurrer books. *Herbert* v. *Taylor*, 4 Law J. K.B. 299, s. c. 5 B. & C. 766, s. c. 8 D. & R. 609.

The mere assertion, that a special demurrer is brought for the purpose of delay, is not a sufficient ground to induce the Court to suffer it to be argued on the last day of term. *Tibbett* v. *Perring*, 7 B. Mo. 440.

If the period for arguing a demurrer arrive before the paper-book has been delivered to the junior Baron, judgment will pass against him who has

neglected to deliver the same. *Rex* v. *Forman*, 11 Price, 161.

The Court will grant a *concilium* for the last day of term, if there are not four days left in the term, though the demurrer-book has not been delivered to the other side on stamp. *Gent* v. *Vandermoolen*, 13 Price, 247: s.p. *Milner* v. *Horton*, M'Clel. 493.

On an application for a rule to shew cause why an order for a *concilium*, granted on the 21st of June, for arguing on the 26th, the last day of term, a demurrer delivered by the defendant to the plaintiff's replication on the 18th of June, the demurrer-book being delivered on the 20th, but no rule given to bring in the demurrer,—the Court refused the rule, as it appeared that the demurrer was filed for delay, the plaintiff having tendered an issue to the country on the defendant's pleas, though four days had not been given to the defendant to return the demurrer. *Saville* v. *Jackson*, 11 Price, 337.

A defendant must shew full, reasonable, and ample cause, to induce the Court to permit him to withdraw a general demurrer, and plead specially. *Elworthy* v. *Cowell*, 6 B. Mo. 495.

Demendant allowed to withdraw demurrer and reply *de novo* in a writ of *formedon*, upon shewing good ground by affidavit. *Cholmely* v. *Paxton*, 3 Bing. 1.

If a plaintiff has obtained an order to take a demurrer off the file, and the defendant, before it is taken off, file a plea and answer, it will be irregular. *Cust* v. *Boede*, 1 S. &. S. 21.

On demurrer the Court is bound by plaintiff's allegation of fact, but not of law. *Cuthbert* v. *Creasy*, 6 Mad. 189.

When there shall be a demurrer to part only of the declaration, or other subsequent pleadings, those parts only of the pleadings to which such demurrer relates, shall be copied into the demurrer-books; and if any other parts shall be copied therein, the Prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client. *Reg. Gen. Hil.* 8 & 9 Geo. 4, 6 Law J. C.P. 102, s.r. 1 M. & P. 401, s.r. 4 Bing. 549.

## DESCENDANTS.

The word "descendants" is capable of such a construction, as to shew who fall within the class which that word describes. *Wright* v. *Atkins*, 1 Turn. 162.

## DESCENT.

[See Heir.]

The true rule of collateral descent is, that the nearest collateral relation of the whole blood, being on the side from which the estate descended, is heir.

Therefore, where a person seised of an estate by descent *ex parte materná*, dies without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor can inherit, however nearly related to the *propositus*, *ex parte paternâ*. *Hawkins* v. *Shawen*, 1 Law J. Chanc. 148, s. c. 1 S. & S. 257.

If a woman has an equitable fee, subject to a general power of appointment by will, and by will duly executed, not referring to the power, devise all her real estates to her only son, charged with legacies, the son takes the equitable fee by descent, and not as appointee under the power.

If the son die under age, without having had or called for a conveyance of the legal estate from the trustee, the equitable fee will descend to the heirs *ex parte materná*, and not to the heirs *ex parte paternâ*. *Langley* v. *Sneyd*, 1 Law J. Chanc. 14.

Where a man, who had married the owner of a customary estate in fee, took a grant of the freehold from the lord, upon which livery of seisin was afterwards given—*Semble*, the grant operated as an enfranchisement before the livery, and that the course of descent of the customary estate would not be altered. *Doe dem. Newry* v. *Jackson*, 1 B. & C. 445, s. c. 2 D. & R. 414.

## DETINUE.

An estate having been devised to the plaintiff's wife after marriage, he delivered the title deeds to a certificated conveyancer, and instructed him to prepare a conveyance and levy a fine, to which the plaintiff and his wife were parties, declaring the uses to their second son: Held, that the plaintiff could not maintain detinue for the deeds, as the property in the lands to which they related, was, by the operation of the fine, conveyed to his second son. *Phillips* v. *Robinson*, 5 Law J. C.P. 111, s. c. 4 Bing. 106.

If a person, who writes an answer to a demand made upon another person of certain things, says, that he has got them, and thereby induces the claimant to bring an action against him, he is liable to such claimant in detinue, although it does not appear that he had the general controlling power over the things. *Hall* v. *White*, 3 C. & P. 136. [Best]

In an action of detinue, the goods should be declared to be of some value. The want of a statement of value is bad upon general demurrer. The thing detained being a bill for the payment of a sum of money, does not raise such a presumption of any value as to dispense with the statement. *Stevenson* v. *Addison*, 5 Law J. K.B. 265.

## DEVISE.

[See Will; and for Bequest, see Legacy.]

(A) Construction of, in general.
(B) Of the Devisee.
(C) What Property passes.
(D) What Interest vests.
(E) Devises in Trust.
(F) Estates in Fee.
(G) Estates in Tail.
(H) Estates for Life.
(I) Copyhold Estates and Customary Lands.
(K) Estates in Mortgage.
(L) Joint Tenancy and Tenancy in common.
(M) Conditional and Contingent Devises and Limitations over.
(N) Executory Devises.
(O) Devises by Implication.
(P) Devises for Payment of Debts.
(Q) Lapsed or Void Devises.

### (A) CONSTRUCTION OF, IN GENERAL.

Interpretation of particular clauses and words in a codicil, with reference to the general plan of the change intended by the testatrix to be made in her former disposition by her will of her property. *Hopkins* v. *Towle*, 1 Law J. Chanc. 155.

In construing a devise, words may be supplied to restrain its generality, if the intent of the testator can be collected from other parts of the will. *Strong* v. *Cummin*, 2 Ken. 488, s. c. 2 Burr. 913.

It is a general rule of law, to be collected from a consideration of all the cases, that a particular intent expressed in a will must give way to a general intent; and courts are bound to give effect to the paramount intent. *Jesson* v. *Wright*, 2 Bligh, 49, 51.

Whatever the rule may be in the simple case of a rent-charge, in a devise the construction must be according to the intention. *Lansdowne* v. *Lansdowne*, 2 Bligh, 60.

A devise by testatrix of all her real property to A T and E O, except what she might mention in a codicil, means except what she shall mention in a valid codicil; and testatrix having made a codicil (which was void from being unattested), devising part of her real estate to other persons: Held, that notwithstanding this, the whole of the real property passed to the devisees under the will, and not to the heirs-at-law. *Denn* v. *Taylor*, 2 Chit. 681.

A person possessed of real and personal property, left it, by his will, under certain restrictions, to his wife for her life, or as long as she remained his widow; and after her decease or second marriage, as follows, viz. "Then my will is, that all my real and personal estate be divided according to the Statute of Distribution, in that case made and provided:"—The Court held, that the real property, after the death or second marriage, went to the heir-at-law, for want of a devise of it. *Thomas* v. *Thomas*, 3 Law J. K.B. 121, s. c. 3 B. & C. 825, s. c. 5 D. & R. 700.

A testator gives all his property to his daughter and her heirs, directing, at their decease, their debts, &c. to be paid; he then gives various legacies, and bequeaths the residue to his nephew: Held, that the daughter takes the personal property absolutely, and an estate tail in the real property, and that the legacies were meant to be given only upon the failure of heirs of the body of that daughter. *Widdison* v. *Hodgkin*, 2 Law J. Chanc. 9.

There is no distinction between a residuary and a specific devise of real estate, every devise of land being in effect specific, inasmuch as a residuary devise will only pass such real estate as the testator had at the time of making his will, and will not pass real estates subsequently acquired. *Spong* v. *Spong*, 1 Y. & J. 300.

Devise of lands to the use of A for life, with remainder to the use of the children of A, as tenants in common, in tail, with benefit of survivorship, with remainders over. A, having seven children, became bankrupt, and the lands were purchased under a local act of parliament by trustees for city improvements, and the value of the interest of the children was ascertained by a jury, without reference to the value of the estate for life of A, or the subsequent contingent remainders; and the amount was paid into the bank in the name of the Accountant-General. The Court doubted the propriety of the proceeding, and refused to order the dividends to be paid for the maintenance of the children of A. *Ex parte Whitehead*, 2 Y. & J. 243.

A testator having devised all the residue of his real and personal estate to trustees, upon trust, within six months after his decease, to raise 34,000*l.*, and having out of this sum made a provision for the maintenance of his two daughters E and S during their minorities, directed that a moiety of the interest arising from it should be paid to each daughter on her attaining the age of twenty-one, or marrying, for her separate use during a term of ninety-nine years, if she so long lived; and that in case either of them died, leaving no child, or issue of a child, the whole of the interest should be paid to the survivor for her separate use during the remainder of the term, if she so long lived; and subject to these and some contingent gifts, which never took effect, he bequeathed the 34,000*l.* to his trustees, upon trust, after the decease of his daughters, for such person or persons as should, under the subsequent limitations, be entitled to the residue of his real and personal estate. In these subsequent limitations the trustees were directed, upon each of his daughters attaining twenty-one, or marrying, to yield up to her a moiety of the residue of his real and personal estates, to hold the same to her and the heirs of her body, with remainder to the other daughter, and the heirs of her body, remainder to his own right heirs. In a suit instituted on behalf of the infant daughters, for the administration of the testator's estate, a decree was made for raising the 34,000*l.*, and the personal estate proving insufficient, part of it was raised by the sale of portions of the real estate. Afterwards S, with the concurrence of the heir of the surviving trustee, suffered a recovery of her moiety of the lands to the use of herself in fee, the tenant to the *præcipe* being made, and the uses of the recovery declared, by a bargain and sale, in which both S and the heir of the surviving trustee were conveying parties, but which was not enrolled within due time. At a subsequent period E suffered a recovery of her moiety of the lands; S died, leaving children, having received out of court the moiety of the principal of that part of the charge which had been received, but without having taken any steps to have the remainder of it raised.—It seems that E and S did not take *quasi* estates tail in the sum of 34,000*l.*: but held, that if E and S took *quasi* estates tail in the 34,000*l.* so as to be entitled to it absolutely, yet, under the circumstances of the case, the unraised portion of S's moiety of the charge was extinguished, and the unsold estates entirely exonerated. *Smith* v. *Frederick*, 1 Russ. 174.

G E, in his lifetime having by voluntary settlement conveyed his manor of M to trustees, in trust to secure the payment of an annuity to his wife for life, and subject thereto to the use of himself in fee, by his will confirmed that settlement; and having then an only daughter, devised his freehold and copyhold estate in S and his freehold estate at H, to trustees, in trust for the children of his daughter by her then husband, under certain limitations; by the residuary clause he devised all the residue of his freehold and copyhold estates, money in the funds, &c. to the same trustees, upon trust, to sell and convert the same into money, and set apart 50,000*l.* three per cent. consols for such son of his

daughter who, under the trust of a settlement then intended to be forthwith made, should become possessed of an estate tail in the manor of M; and the residue to be divided among the other children of his daughter. At the date of the will, G E's daughter had no children. Some time after making this will, the testator, G E, drew a line across the direction to sell the property devised by the residuary clause. After so doing he purchased a considerable freehold estate in W. and H. By a codicil to his will, made ten years subsequently, after reciting the erasure before mentioned, and that he was apprehensive that such erasure not being witnessed might lead to litigation, he declared that the sole intention of such erasure was to revoke that part only of the will, whereby he directed the sale of his freehold property; and then proceeded—"And I do hereby direct and appoint that the son, lawfully begotten of my daughter D, who shall first attain the age of twenty-one years, shall, on attaining such age, change his name for that of E; and I give and devise to the said son of my daughter, on his attaining the age of twenty-one years, and changing his name to E, all my freehold property, lands, tenements, and hereditaments, to have and to hold to him, his heirs and assigns for ever." By the same codicil he ratified and confirmed the aforementioned will, except as before excepted. G E died without again altering his will or codicil, and without making any settlement, stated in the residuary clause to be then in immediate contemplation, leaving his widow and daughter him surviving. At the death of the testator, D and her husband had, and now have, one infant son and four infant daughters. Upon a feigned issue from the Court of Chancery, it was holden—1st. that the devise of the freehold of part of the estate at S and of the freehold farm and estate at H contained in the will, was not revoked by the codicil;—2nd. that the manor of M did pass under the residuary devise contained in the will, and that such devise was revoked by the codicil;—3rd. that the manor of M did pass under the codicil to the first son of D who shall attain twenty-one years, and change his name to E;—4th. that the estate at W and H, purchased after the testator made his will, passed under the devise in the codicil to the first son of D who shall attain twenty-one, and change his name to E;—5th. that the surplus rents and profits of the copyhold estates at S, and of the freehold estate at the same place, and of the freehold farm and estate at H, after providing for the maintenance of the devisee thereof, belong to the surviving trustee under the will until a first son of D shall attain twenty-one;—and lastly, that the intermediate rents and profits of such of the testator's freehold estates as are effectually devised by the codicil to D's son, who shall first attain the age of twenty-one, and change his name to E, until such events take place, belong to the surviving trustees. *Duffield* v. *Elwes*, 3 B. & C. 705, s. c. 5 D. & R. 764.

A testator, by his will dated in 1558, after reciting that he had erected a free grammar-school at Tonbridge, did for the maintenance and continuance thereof, give unto the master and wardens of the Skinners' Company various messuages, specifying their respective yearly values, which amounted in the whole to 60*l.* 13*s.* 4*d*: then proceeding to direct how the rents should be applied, he ordered that 20*l.* should be paid yearly to the master of the school, and 8*l.* to the usher; that the master and wardens of the Skinners' Company should visit the school once a year, for which they were to have 10*l.* yearly; that 4*s.* a week should be paid to certain almsmen; that 25*s.* 4*d.* yearly should be expended in coals, to be distributed among the almsmen; and that the renter warden should have 10*s.* for his pains; the residue of the rents were to be employed by the master and wardens upon the needful reparations of the aforesaid messuages and tenements, and the overplus was to go to the use and behoof of the Skinners' Company, to order and dispose of at their wills and pleasures: Held, upon the recitals and language of two private acts of parliament, which the Skinners' Company had accepted. That certain of the lands, the yearly rental of which in 1558 was 43*l.*, did not pass by the will, but were subject to a prior trust, which was exclusively for the support of the master and the under-master of the school, and for the reparation of the said lands and tenements; and that the increased rents of those lands were to be applied to the maintenance of the school on an enlarged scale; that the Skinners' Company were entitled to the rents and profits of the remainder of the premises mentioned in the will for their own use and benefit, subject only to the payment to the almsmen and renter warden, to the payments for coals, and to contribution towards the expenses of repairing such part of the premises used for a school as had been originally erected for that purpose, as well as towards an increased sum of 200*l.* yearly allowed to the company for the expenses of visiting the school. *Attorney General* v. *the Master and Wardens of the Skinners' Company*, 2 Russ. 407.

A testator, who died in 1818, after devising a freehold house to his wife and her heirs, devised the residue of his freehold estates, situate in four specified parishes, or elsewhere in the county of Cambridge, to two trustees and their heirs, upon the trusts thereinafter declared concerning the same; that is to say, upon trust that they should sell his several copyholds in the parishes aforesaid, and after satisfying the costs of the sale out of the monies thence arising, should pay the residue to his executor for the purpose of satisfying, in the first place, certain legacies; and he then devised all the residue of his real and personal estate to A B. The testator, besides freeholds and copyholds situate in the four parishes, had freeholds not situate in the county of Cambridge, and copyholds not situate within the four parishes; and all the copyholds had been surrendered to the use of his will: Held,

That the beneficial interest in all the freeholds, whether situate in the county of Cambridge or elsewhere, passed to the residuary devisee.

That the legacies were a charge only on the copyholds situate in the four parishes.

That no estate in those copyholds passed to the trustees, but only a power to sell.

That any surplus of the monies arising from the sale, which might remain after satisfying the legacies, passed by the residuary clause.

That the copyholds not situate within the four parishes passed to the residuary devisee. *White* v. *Vitty*, 2 Russ. 484.

Where the devisor of an estate, resident at Irchester, devised the same to trustees in trust for the testator's grand-daughter for life, remainder to her children in tail, with cross-remainders, and for default of issue to testator's daughter for life, remainder to any one or more of her daughters as she should appoint, for their lives, remainder to all and every the children of such daughter so appointed; if such appointment should be to one daughter, then to her and her heirs, if to more than one, then the children to take their mother's share respectively *per stirpes*, as tenants in common, with cross-remainders between them, as to such their mother's share respectively, and on failure of issue of such daughters, with cross-remainders to the others of their issue; and for default of appointment, and of any appointment not exhausting the whole fee, as to the whole or any part of the devised estate, to his said daughter for life, remainder to all his daughters for life, with cross remainders for life between them, remainder to support, &c., and for default of issue of any of the daughters of his said daughter, to her and her heirs; in the event, the grand-daughter died without issue, and the daughter had nine daughters, several of whom married and had issue: Held, 1st, That the testator's daughter took an estate for her life, with an ultimate reversion in fee; 2dly, that in default of appointment, the daughters took respectively estates for life in remainder as tenants in common, with cross-remainders to themselves in tail respectively; 3dly. that in default of appointment, the issue of the daughter had no estate in the devised premises; and, 4thly, that the testator's daughter had power to designate which one or more than one of her daughters were to take; if more than one, they would take as tenants in common for life, with remainder to their respective children, as tenants in common in tail, with cross-remainders between them in tail, to take place as well with regard to the shares of their respective mothers, as of the shares of their aunts, failing their issue. *Medlycott* v. *Jortin*, 6 B. Mo. 1, s. c. 2 B. & B. 632.

Construction of general words of devise, with reference to preceding words of specific devise, and the actual situation of the real estate of the testator. *Hougham* v. *Sandys*, 6 Law J. Chanc. 671.

Where a testator by will directs his real estate to be sold, and the produce to be invested in the same manner as his personal estate,—that produce, so far as it is not disposed of by the will, goes to the heir, unless there is on the will satisfactory proof of the intention of the testator, that the money to be raised by the sale should go to the same persons, who would be entitled to his original personal estate. *Madgin* v. *Lumley*, 1 Law J. Chanc. 236.

A testator directs, that at a proper time his real estates be sold, and the money divided between A and B, but makes no other devise of them: the executor is not entitled to sell them.

A, being an infant, no sale of the lands can be made during her minority, except by the intervention of the Court. *Batho* v. *Fulton*, 2 Law J. Chanc. 196.

A testator directs his real estates, which are to be purchased, to be conveyed to trustees upon the same trusts as were in his will thereinafter limited concerning certain devised estates:—It being clear, that the intention of the testator would be defeated, if the purchased estates were conveyed to the same trusts as were thereinafter declared concerning the devised estates, and that it would be accomplished, if they were conveyed to the same trusts as were *thereinbefore* declared concerning the devised estates: Held, that the Court was bound to substitute "thereinbefore" for "thereinafter." *Bengough* v. *Edridge*, 5 Law J. Chanc. 113, s. c. 1 Sim. 173.

A testator devised certain lands to the defendant for life, without impeachment of waste, except as to timber growing in the park, avenues, demesne lands and woods adjoining to the capital messuage called Arbury, with various remainders over: Held, that by the phrase "woods adjoining to the capital messuage called Arbury," was meant all woods which served for ornament or shelter to that mansion-house, whether growing or not on the demesne lands. *Newdigate* v. *Newdigate*, 5 Law J. Chanc. 52, s. c. 1 Sim. 131.

Construction of the word "principal" in a will, with reference to the invested accumulations of the interest of specific sums. *Harvey* v. *Cooke*, 6 Law J. Chanc. 84.

In a will, the words "thereunto belonging" may, under circumstances, be construed in a popular sense in contradistinction to their strict legal interpretation; thus, under a devise of the rectory or parsonage of Minster, with the messuages, &c. thereunto belonging: Held, that a messuage and lands, not parcel of, or strictly belonging to such rectory, but which had been purchased by the proprietors of such rectory, at different times, between the 5 Jas. 1. and the year 1632, and had by the testator been purchased therewith, and as parcel thereof, were comprehended in and would pass under such devise; and so held, although, by the adoption of such construction, a general residuary devise of real estate might have nothing beneficially to operate upon. *Ongley* v. *Chambers*, 2 Law J. C.P. 49, s. c. 1 Bing. 483, s. c. 8 B. Mo. 665.

The word "appurtenances" in a devise, is not confined to the legal meaning of the word; and that which seems to be appurtenant to a messuage devised shall pass with the messuage, without the word "appurtenances," such appearing to be the intention of the testator; though he may have used the word "appurtenances" in other parts of his will when speaking of a messuage. *Doe d. Sims* v. *Sims*, 5 Law J. K.B. 140.

To a devise of "all my Briton Ferry estate," and "all my Penline estate," which lie in the county of Glamorgan, there were annexed certain deeds of lease and release made upon the marriage of the devisor, purporting to contain an account of the several parishes and tenements comprehended in the estates of the devisor's father, from which it appeared, under the head of the "Brecon estates," there was a parish called Lywell, in which was the messuage for which the ejectment was brought; and under the head of "Glamorgan estates," was a parish called Briton Ferry. At the trial, the defendant offered in evidence, account-books of former stewards of the devisor, and former owners of the lands devised, charging themselves with receipts of monies on account of such owners, amongst which was an entry—*Briton Ferry estate, in the county of Brecon;* and also in evidence, that the land in the declaration, together with the lands mentioned in

the schedules, had all gone by the name of the Briton Ferry estate, for *divers, to wit, fifty years before the death of the devisor;* and such of them as were in the county of Brecon, extending over twelve parishes, and containing above 4,000 acres: Held, first, that the expressions used in the will denoted an estate known to the devisor as the Briton Ferry estate, and not an estate locally situate in a parish or township, and consequently that being properly a question of parcel or no parcel, the evidence offered was admissible.—Second, that a description and enumeration of particulars by situation and names were not inconsistent with a name of the whole as composing an aggregate mass.—And, lastly, that the verdict finding that the premises were known by such name to the devisor, *for divers, to wit, fifty years before the death of the devisor,* was too loose and indefinite; the expression denoting only divers years, not fifty years, nor any other particular number of years. *Doe d. Beach* v. *Jersey*, 3 B. & C. 870.

A testator devised to his eldest son R P all his freehold messuage, wherein he then lived, with the yard, back estate, and premises thereto belonging; and to his eldest daughter A P, all his freehold front messuage, with the appurtenances, then in the occupation of one E, with a right of way and passage from the yard, and the use of the pump:—a coal-cellar, within the boundary of the messuage occupied by E, had been always used by the testator, and was occupied by his eldest son after his death: Held, that evidence of such occupation was admissible and conclusive, although it was proposed to shew, that the cellar was situate within the boundary of the house devised to the testator's eldest daughter: Held also, that it passed to the son under the first clause of the will. *Press* v. *Parker*, 3 Law J. C.P. 96, s. c. 2 Bing. 456.

Parol evidence admissible to prove a testator intended certain charges purchased by him, upon an estate devised, should be merged. *Astley* v. *Miller*, 1 Sim. 298.

A, upon the marriage of his niece with B, conveyed land at S to trustees, to the use, after the marriage, of him A for life, remainder to the use of the trustees for five hundred years; remainder to such uses as A by deed or will should appoint: the term of five hundred years was declared to be on trust to raise £1000 after the death of A, and pay the interest to B during his life, and after his death to his wife, the niece, if she survived him; and, after their death, to pay the principal to the children of the marriage, but if there were no children living at their decease, to such persons as A by deed or will should appoint, and, in default of appointment, to the executors and administrators of the niece.

The niece died in the lifetime of her husband and of A, leaving no children of the marriage; A, by his will, not referring to his power, devised his lands at S to C; and the husband of the niece administered to her: Held,

That A's will operated as a devise of his interest, not as an execution of his power:

That the will did not operate upon the charge of £1000, but that sum vested absolutely in B, as administrator of his wife, subject to the life-interest which B took under the settlement. *Farmer* v. *Bradford*, 5 Law J. Chanc. 157.

Under a devise of real estate in settlement, subject to a trust, for raising portions for younger children, during the minority of the tenant for life, out of the rents and profits, or by sale or mortgage: Held, that certain funds, which had been raised during the minority of the tenant for life, were applicable to the payment of the portions; and that the deficiency only could be raised by sale or mortgage. *Warter* v. *Hutchinson*, 1 S. & S. 276, s. c. 1 B. & C. 721, s. c. 3 D & R. 58, s. c. 5 B. Mo. 143.

### (B) Of the Devisee.

It does not follow that a testator does not intend that heirs of the body shall take, because they cannot take in the mode prescribed. *Jesson* v. *Wright*, 2 Bligh, 57.

The maxim of *nemo est hæres viventis*, is not applicable in the construction of a devise, which is to be, so far as it can be ascertained, and is consistent with law, in conformity to the intentions of the devisor. *Right d. Shortridge* v. *Creber*, 4 Law J. K.B. 324, s. c. 5 B. & C. 866, s. c. 8 D. & R. 718.

Construction of the word "survivors." *Crozier* v. *Fisher*, 6 Law J. Chanc. 118; *Crowder* v. *Stone*, 3 Russ. 217.

In general, where there is a devise to a person for life, and after his death to A and B, and "the survivor,"—the term "survivor" is held to refer, in point of time, to the death of the testator, and not the death of the person to whom the life interest is given.

Accordingly, devise to A for life, and from and after her decease, to the surviving children of C and D. During the life of A (the tenant for life), the only child of C died: Held, that the period of survivorship referred to the death of the testator, and that the heir-at-law of the deceased child of C was entitled to share with the children of D, who had survived the tenant for life. *Doe d. Long* v. *Prigg*, 6 Law J. K.B. 296, s. c. 8 B. & C. 231, s. c. 2 M. & R. 338.

A testator devises and bequeaths real and personal estate to four children (who were named) of Martha Davies, and who were all illegitimate, and "to every other child born of the body of Martha Davies:" Held,

That no illegitimate child can take under the words "to every other child born of the body of Martha Davies." *Mortimer* v. *West*, 5 Law J. Chanc. 181.

A testator seised in fee devised as follows: to certain persons for lives; and at the termination of those lives, "to the first male heir of the branch of R C."

At the termination of those lives the following was the situation of R C's family:—He had had five daughters; the eldest had issue, but they were all daughters. The second had male issue; but she was herself living. The third had had male issue, and had died, during the continuance of the life estates, but after the next youngest sister. The fourth had had male issue, and had died during the continuance of the life estates, and also before her next eldest sister; and she was therefore the first who died, leaving male issue. The fifth had had male issue, and had died during the continuance of the life estates, but after her next eldest sister. At the time of the will being made, the testator knew

that R C had daughters only: Held, by two Judges, (Mr. Justice Holroyd and Mr. Justice Littledale,) that the son of the fourth daughter was the person who answered the description of "first male heir"; because, by the death of his mother, who died first of all leaving a male, he was the only person filling the character of "male heir" in its legal sense: Held, by one Judge, (Mr. Justice Bayley,) that the son of the second daughter answered the description; and that the testator meant "first male heir," with reference to the proximity of the line; and that the life or death of either of the daughters was foreign from his intention. *Doe d. Winter* v. *Perratt*, 4 Law J. K.B. 246, s. c. 5 B. & C. 48, s. c. 7 D. & R. 733.

A testatrix devises lands to trustees, upon trust for A, during his life; and, after his decease, to his children in fee; but if A dies without leaving any issue, then upon trust for the next of kin of the testatrix's late father and mother, both deceased, his or her heirs or assigns, for ever; if more than one, in equal shares; A died without leaving issue. The father and mother of the testatrix were not related to each other: Held,

That the devise in remainder was a devise to the descendants of the father and mother:

There being no descendants of the father and mother, the heir-at-law of the testatrix was entitled. *Pycroft* v. *Gregory*, 6 Law J. Chanc. 121.

### (C) WHAT PROPERTY PASSES.

Where an estate can be found which will satisfy the description of a devise, no other premises having a distinct name, but sometimes alluded to under the designation used in the will, shall pass to the devisee. *Doe d. Milbourn* v. *Dixon*, 1 Law J. K.B. 80.

A testator devised as follows: "I give to my daughter, M G, all the houses, out-houses, gardens, &c. which I hold, &c.; and also one half-part of my books, to my daughter, M G aforesaid, the other half to my widow, S G, to be equally divided; and if my daughter, M G should happen to die unmarried, then that *her part aforesaid* shall be equally divided amongst all my brothers and sisters, share and share alike." M G dying unmarried, intestate, and under age, it was held, that the words *part aforesaid* applied to the whole of the property given to M G, as well as the books. *Doe d. Gibson* v. *Gell*, 2 B. & C. 680, s. c. 4 D. & R. 387.

A purchased an estate called B, with a mansion-house thereon, on which he resided for many years, and then purchased another estate called C, and removed some of the fences between the estates B and C, and occupied three fields, formerly part of the estate C, along with the estate B. By his will he gave his mansion-house "in which I now live, called B, together with all the buildings and lands thereunto belonging, as now enjoyed by me," to his wife, with the reversion to J S B: Held, that these three fields passed to the wife for life, and afterwards to J S B in fee, and, therefore, the latter could maintain an action for the value of timber which had been felled by the wife. *Bodenham* v. *Pritchard*, 1 Law J. K.B. 131, s. c. 1 B. & C. 350, s. c. 2 D. & R. 508.

A testator devised his freehold messuage, tenement, or dwelling-house, with the yard, stables, and appurtenances, in Cavendish-square, together with the household furniture and effects therein, unto his widow for life; and after her decease, he devised the same messuage or tenement, and premises, with the appurtenances, unto his son, his heirs and assigns: Held, that the household furniture passed to the son. *Sanford* v. *Irby*, 4 Law J. Chanc. 23.

Where the testator in his will recited, that he was seised in fee of *divers* freehold messuages, and of *certain* copyhold or customary lands, in the parish and manor of St. Mary, Islington, and all which freehold and copyhold messuages and lands were subject to a mortgage to S R, and afterwards gave and devised *all and every* his said freehold and copyhold messuages to B P and W A, and their heirs, upon trust for certain purposes declared in his will; and all the rest, residue, and remainder of the testator's freehold, copyhold, and leasehold estates, and also all his goods, chattels, and personal estate, he gave, devised, and bequeathed to his son S P, whom he appointed his executor: and the testator, at the time of making his will, and at his death, was also seised in fee of twenty-one acres of land at Islington, lying separate from the other freehold and copyhold estates comprised in the mortgage to S R, as well as of other leasehold estates elsewhere: Held, that the twenty-one acres, of which the testator was seised at Islington, which were not comprised in the mortgage to S R, did not pass by the devise to B P and W A, the trustees, but to S P, under the residuary clause of the will. *Pullin* v. *Pullin*, 3 Law J. C.P. 193, s. c. 3 Bing. 47.

A testator devised "all my manors, messuages, and lands, tenements, and hereditaments, whether freehold, leasehold or copyhold, situate in the several parishes of Monckton Combe, Lyncombe, and Widcombe, and Walcot, and also in the city of Bath, or elsewhere in the kingdom of England." He had no lands in England, except in the places specified in the will; but he had a large estate in Wales, in the county of Carmarthen.

*Quære*—Whether the devise passed the Carmarthen estate? *Okeder* v. *Clifden*, 2 Russ. 309.

The testatrix was seised of a moiety of several estates, the whole of which had been her father's; but of which she took one part as heiress of her father, and the rest as heiress of a niece who was her father's grand-daughter. She devised in the following words, "all my moiety of and in all my late father's messuages, tenements, &c." Held, that this carried both descriptions of property, as above, composing that moiety. *Doe d. Newton* v. *Taylor*, 6 Law J. K.B. 149, s. c. 7 B. & C. 384.

*Semble*—That by a devise of a West India plantation, the stock, implements, utensils, &c. upon it, will pass. *Lushington* v. *Sewell*, 1 Sim. 435.

The words "worldly estate," held to pass real and personal estate.

The testator, after devising and bequeathing to trustees, and the survivors and survivor of them, all his freehold, copyhold, and leasehold estates, together with his personal effects, in trust to pay certain legacies and annuities, proceeded as follows:—"All the rents, issues, dividends, interests, profits, and produce of all the remainder of my estate and effects whatsoever and wheresoever, as well real as personal, I devise and bequeath unto my three nieces, equally to be divided between them, share and share alike, for and during the term of their natural lives; and

from and after the decease of them, or either of them, it is my will that the lawful issue of them, and each of them, shall have and enjoy his or her mother's share of all such residue of such issues, dividends, and profits, for life, in like manner; and, if either of my nieces shall happen to die in the lifetime of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid, shall go to and be shared and divided equally between the survivors of my nieces, for their respective lives, and afterwards by the lawful issue of the survivors of my nieces in like manner; and if all my nieces and their issue save one, shall die without issue lawfully begotten, then such surviving niece shall have and enjoy the whole of the rents, &c. of such residue of my estate and effects for and during the term of her natural life; from and after her decease, the lawful issue of such surviving niece (if more than one) shall have the whole of the rents, &c. equally between them; and if but one, then such only one shall have and enjoy the whole of such part thereof as is personal, to and for his or her own use and benefit; and if all my nieces shall die without issue, then from and after the decease of the survivor of them, my nieces, without issue as aforesaid, I give the whole such residue to my next male heir of the name of *Murthwaite*, to hold to him, his heirs," &c. Two of the trustees were dead; all the nieces were living; two of them had no issue, the third had one child, a son, G B. On the question, what estate these parties severally and respectively took under the will: Held, 1st, that the surviving trustee had a fee simple in the freehold estates, and an absolute interest in the leasehold; and, 2d, that neither the testator's three nieces, nor G B, took any legal estate under the will; but if G B should survive the nieces, and neither of them should have any other child, he would be tenant in tail of the freehold, but have no interest in the leasehold; and if he should die in the lifetime of the three nieces, he would die seised of no freehold, nor possessed of any leasehold estate. *Murthwaite* v. *Jenkinson*, 2 B. & C. 358, s. c. 3 D. & R. 764, s. c. 6 B. Mo. 13.

### (D) WHAT INTEREST VESTS.

Construction of a will as to the vesting of interests. *Crozier* v. *Fisher*, 6 Law J. Chanc. 118.

It is a settled rule in law, in all cases where it can be done, to construe a remainder as vested, in preference to contingent, in order to prevent the destruction of the estate.

Therefore, where a devise was to trustees, for the use and benefit of them and the testator's daughter, and "from and after her death, unto the heirs of her body, share and share alike, their heirs and assigns for ever:" It was held, that the remainder vested in a son of the devisee, living at the time of the testator's death, immediately on that event, and was subject to open, and let in all children subsequently born;—that all these children took vested remainders, and that these, unless disposed of by them, at their death descended upon their heir-at-law. *Right d. Shortridge* v. *Creber*, 4 Law J. K.B. 324, s. c. 5 B. & C. 866, s. c. 8 D. & R. 718.

A, by her will, devised certain hereditaments to her niece for life, and after her decease, to the uses therein mentioned, subject to a declaration that, notwithstanding such devise, certain trustees, therein nominated, should be receivers of the rents, with power to make distresses, to grant leases, to repair, and pay other out-goings subject thereto, and to pay over the clear net rents to such niece, for her sole use, &c. By a codicil, the trustees in such will having died, A revoked all the devises contained in her will, and devised the same hereditaments to new trustees, their heirs, &c., upon the several trusts, &c. as if they had been originally named as trustees in the will: Held, that the trustees, named in the codicil, took the legal estate. *Tenny* v. *Moody*, 5 Law J. C.P. 122, s. c. 3 Bing. 3.

A testator having directed by his will, that his debts should be discharged, and devised several estates to his widow for life, and after her death, devised his property in the words following, viz.: "I give Mr. W. the income of my four shares in the corn-market for his life, and all the rest of my estates, with all monies in the stocks, and in Mr. M's hands, or any other securities, to be divided in equal shares to E S and others:" Held, that E S and others had a reversionary interest in the said four shares in the corn-market. *Fletcher* v. *Smiton*, 2 Chit. 558.

Under a devise of freeholds to the testator's wife for life, in trust, the trustees to pay the rent issuing therefrom into her hands only; and that her receipt alone should be a good discharge: Held, that she had power of alienating her life interest. *Acton* v. *While*, 1 S. & S. 429.

By lease, dated September 29, 1788, T W demised certain premises to his nephew J W for twenty-one years, (viz. till 29th September 1809). J W entered, and was possessed at the time of making the devise and lease next mentioned. By will, dated January 20, 1799, T W devised the said premises to his said nephew J W for life. By indenture of lease, dated 13th December 1799, T W demised the said premises to his said nephew J W, from Michaelmas day, 1809, for sixty years, at the yearly rent of 60*l.*: Held, that the *interesse termini*, created by the lease of December 1799, was not merged in the life estate devised to the lessee in January 1799, the life estate being conveyed away by the lessee J W before Michaelmas 1809, so that he could not have that estate and the leasehold estate, by way of present interest, at one and the same time; but might, at any one period of time, from T W the testator's death to the time of the alienation, have had both estates in the character of lessee. *Doe d. Rawlings* v. *Walker*, 4 Law J. K.B. 93, s. c. 5 B. & C. 111, s. c. 7 D. & R. 487.

A devise vests the freehold in the devisee without entry. *Doe d. Smyth* v. *Smyth*, 5 Law J.K.B. 13, s. c. 6 B. & C. 112, s. c. 9 D. & R. 136.

A testator devises real estate to his widow for life, and after her death, to six younger children, with a direction, that if any of these children die under twenty-one, his or her share is to go to the survivors. He then adds, that it is his desire, that, as soon as the youngest survivor shall attain his or her age of twenty-one years, the estate may be sold, and the produce divided amongst the survivors, unless they would rather mutually divide the estate amongst themselves: Held, by the Vice Chancellor, that the share of a daughter, who attained twenty-one, and died intestate in the lifetime of the widow, was not transmissible as part of her personal estate,

but descended as realty to her heir-at-law: and also, that the heir-at-law had the option of sale given by the will.

Held, *contra*, by the Lord Chancellor, that the share of that daughter was transmissible as part of her personal estate. *Parish* v. *Parish*, 3 Law J. Chanc. 21.

(E) DEVISES IN TRUST.

On a devise to trustees, in trust to lay out the rents and profits for the maintenance of two nephews, and when they attain twenty-one, to them and their heirs: Held to be an immediate gift vested in the nephews, with a trust to be executed for their benefit during their minority. *Goodtitle* v. *Whitby*, 1 Ken. 506, s. c. 1 Burr. 228.

Devise to C S, in trust for the separate use of S S, and to convey the premises to S S, her heirs and assigns, free from the controul of her present or any future husband, and to permit her to take the rents and profits: Held, that S S had no power of devising the premises. *Doe d. Stevens* v. *Scott*, 6 Law J. C.P. 84, s. c. 4 Bing. 505, s. c. 1 M. & P. 517.

Where a testator, in default of appointment, gave the residue of his estate to his executors, in trust, to be disposed of at their pleasure, either for charitable or public purposes, or to any person or persons as they should think proper: Held, that the trust was too general, and, therefore, could not be executed by the Court, and that the executors could not take, because it was given expressly in trust, and that the next of kin were entitled. *Vesey* v. *Jamson*, 1 S. & S. 69.

Where an estate was devised in trust for two daughters for life, with remainders in each moiety to their children at twenty-one, and a power of sale was vested in trustees: Held, that the power subsisted though one daughter was dead, and her children had attained 21. *Trower* v. *Knightley*, 6 Mad. 134.

Testator gave a copyhold estate to trustees for his wife, until the leases to which it was subject expired, and directed that then it should be sold, and the proceeds be invested for the benefit of his children; but if the wife should die before the leases had expired, that it should be immediately sold, and the proceeds disposed of as before. The wife survived the children, but died before the leases expired. The surviving trustee, who claimed the estate for his own benefit, was decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of either the testator or the children, if any such heirs were in existence. *Burton* v. *Hodsoll*, 2 Sim. 24.

(F) ESTATES IN FEE.

Under a devise to A and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family: Held, that this devise constituted A a tenant in fee. *Wright* v. *Atkins*, 1 Turn. 143.

W C, being seised of property, devises as follows: "I give to my daughters, J C and E C, their executors and administrators, equally between them, all and every my messuages, lands, tenements, and hereditaments, both freehold and leasehold." Also, "I give my said goods and chattels to my said two daughters equally:" Held, that as the words in the will were sufficient to pass all the interest which the testator had in the property, it vested in the daughters in fee. *Doe d. Crump* v. *Sparkes*, 4 D. & R. 246.

*Richard Lowe*, by his will, dated 5th February, 1781, gave all his property, real and personal, to three trustees and executors; he then warned his executors to make early applications, in order to get in his personal property, or it would be lost; then he gave 10,000*l.* to his daughter *Charlotte*, on condition that she married with the consent of two of the trustees; but in case she should marry one of three kinsmen, William, Thomas, or John *Drury*, then *he gave him* certain estates on taking the name of *Lowe;* but in the event of her not marrying either of them, then he gave those estates to any one of the sons of Edward M. *Mundy* on the same condition; then he gave the remainder of his property to *the person*, having a certain property himself, who should marry either of his daughters, for ever on taking the name of *Lowe*.

And in case neither of his daughters married as above described, then he gave all his property to *William Drury*, and his heirs, on taking the name of *Lowe* irrevocably.

At the date of the will the plaintiff, then William Drury, was a bachelor, and *Ann*, the testator's younger daughter, was fourteen years old. Edward M. Mundy had five sons, of whom the eldest was then seven years old.

The testator, on the 25th of May, 1785, made a codicil, reciting the marriage of his daughter, *Charlotte*, and that he had given her 10,000*l.* and provided for her children. He thereupon revoked his will as to her. Then he gave to his younger daughter, *Ann*, the same choice of marrying into the favoured families of Drury and Mundy, or a person with a certain property; and if she did not, then she was to have 10,000*l.* *Ann* came of age in 1788, and in the following year married a gentleman not within the description of the will or codicil. At that time the plaintiff was a married man.

The Court held, that on the marriage of *Ann*, and William Drury taking the name of *Lowe*, he took an *indefeasible* estate in fee simple. *Lowe* v. *Lord Huntingtower*, 2 Law J. K.B. 164; see 5 B. & A. 917.

J H devised to W H, when and so soon as he should attain the age of twenty-one, certain estates, &c. for life, with remainders over in favour of his issue in tail, with a proviso, that in case either or any of them, W H and others, (devisees of other estates for life; with remainders over in favour of their issue in tail,) should die before the age of twenty-one, *or* without leaving any child or children of his or their bodies lawfully begotten, then that it was testator's express will and desire, that the several estates devised to him or them, should go to the survivor or survivors, share and share alike, so soon as he or they should attain to his or their respective age or ages of twenty-one years. W H, as soon as he became of age, and whilst single, made a feoffment of the estate devised to him, and levied a fine, *sur conuzance de droit come ceo, &c.*, with proclamations to his own use in fee.

The Court determined, that under the will, deed of feoffment, and the fine levied in pursuance of the latter, W H acquired an absolute estate of inheritance in fee-simple, discharged from the remainders created by the will of the testator. *Hasker* v. *Sutton*, 2 Law J. C.P. 68, s. c. 1 Bing. 501, s. c. 9 B. Mo. 2.

A testator devised his property to trustees, to the use of his wife and daughter for life, and after their death, to all and every such children of the latter as should be living at the time of the decease of the survivor. He then directed the property to be divided, share and share alike, when and as they should respectively attain twenty-one, and their respective heirs, &c. as tenants in common, and not as joint tenants; and if only one, then to such one, her heirs, &c., upon attaining the said age, &c. The Court held, that the offspring of the daughter (all of whom outlived the tenants for life) took equitable estates in fee as tenants in common. *Farmer* v. *Francis*, 2 Law J. C.P. 143, s. c. 2 Bing. 151, s. c. 9 B. Mo. 310.

A devise by the testator of certain lands to his two daughters, E and A, equally to be divided; and their shares to be divided equally at their deaths between their children; and if A died without issue, her share to go to E for her life, and after her death to her children: but in a subsequent clause, he directed that the shares of some of the grandchildren (not by name, but as a class), in certain events, should become their *absolute property*, or the trustees might pay all or any part of their shares for their advancement: Held, that the other children necessarily also took a fee in the shares devised to them. *Doe d. Orpe* v. *Frost*, 2 D. & R. 378, s. c. 1 B. & C. 638.

Where a testatrix devised her temporal estates and effects, and gave and disposed of the same in the following terms: "I give and bequeath to L C 4*l.*, I give and bequeath to M H 3*l.*, I give, devise, and bequeath to J G all my lands, tenements, and hereditaments, with their appurtenances, particularly those called B and C; and all the rest and residue of my goods and chattels, personal and testamentary effects whatever, I give and bequeath to the said J G, whom I make sole executor of this my will:" Held, that the lands in B and C descended to J G as an estate in fee. *Doe d. Penwarden* v. *Gilbert*, 6 B. Mo. 268, s. c. 3 B. & B. 85.

A devise by the testator to his wife, and his debts to be paid by her, and 15*l.* to A B, if it could be spared, and the rest of the estate at her death to go to A B, gives her the fee and a power of sale. *Dolton* v. *Hewen*, 6 Mad. 9.

Devise by testator of his freehold estates to trustees, in trust to secure an annuity of 60*l.* per annum to his wife for life, and then in trust for two younger sons, and his two daughters, and all children to be begotten on the body of his wife, until they shall severally attain the age of twenty-one years, and to be divided among them, share and share alike, as tenants in common, and not as joint tenants. The will then gave the trustees a power to receive the rents, and to expend the surplus beyond the wife's annuity, and other charges thereon, in valid securities, to grant leases of the estates for a term not exceeding seven years, "and if they should think it advisable, to sell any part thereof *at any time after my death*:" Held, that this latter clause did not controul the express gift of the estates to the children in fee, when they should severally attain the age of twenty-one. *Doe* v. *Harris*, 2 D. & R. 36.

Where a testator, after devising his Clifton estate to his son in fee, gave all his Orchard estate to N S and A G, upon trust to sell the same, and appointed them his executors; and he afterwards sold Clifton estate, and became seised in fee of another, called Allerton Hall; and afterwards signed a codicil to his will, attested by two witnesses only, stating that the money obtained for the Clifton estate, and to be obtained for the Allerton estate, which he directed to be sold, should be divided amongst all his children; and he appointed his wife executrix, jointly with N S and A C: and by a second codicil, attested by two witnesses only, he, after stating that one half of Orchard estate was sold, and giving directions as to the sale of the other half, appointed E L and I F his executors in the place of N S and A G; and afterwards made a third codicil, duly attested for passing real estate, but merely appointing B G to be his executor in the room of E L; and all the codicils were written on the back sheet of the will: Held, that the third codicil operated as a republication of the will and second codicil; and that the legal fee in the Allerton estate passed, by the will so republished, to N S and A G, the devisees therein named. *Guest* v. *Willasey*, 3 Law J. C.P. 114, s. c. 2 Bing. 429.

A, at the time of making his will, was seised in fee of certain freehold and leasehold premises, and, amongst the rest, of a dwelling-house which he inhabited, in the parish of D; and six acres of land, situate in the parish of S, a mile distant from the village of B; and seventy acres of leasehold land, in and near the village of B; and fifty-eight acres of freehold land, and some leasehold land in the parish of W. A, at the time of making his will, resided in the dwelling-house, and had in his own occupation all the land in the parish of W, the freehold lands in the parish of S, and leasehold lands near the village of B; but the freehold lands in the parish of D were in the occupation of tenants. Before the making of the will, A had contracted to sell all the lands in the parish of S, and the leaseholds near the village of B. The amount of A's debts at the time of his death exceeded his personal property. A, shortly before his death, made a will as follows: "I direct my debts, legacies, and funeral expenses, to be paid; with the due payment whereof I charge my real estates. I give to my nephew T G 700*l.*, to be paid by my executor; and to my nephew J G, (the heir-at-law) 20*l.* to be paid by my executor; and, lastly, I constitute R G my sole executor of all my lands for ever, and all my leasehold property here or at B, or money that shall become due for the same, paying certain annuities thereout by half-yearly payment:" Held, that by this will the executors took a fee in the freehold lands in the parish of W. *Doe d. John Gillard* v. *Richard Gillard*, 5 B. & A. 785; and see *Bartlett* v. *Gillard*, 3 Russ. 149.

Under a devise of freehold lands to trustees and their heirs, in trust for certain tenants for life, and after their decease for other persons in remainder, the trustees take an estate in fee, unless a contrary intent is clearly manifested on the face of the will; and, therefore, where A, being seised in fee of freehold and copyhold lands, and having also leaseholds for lives and for years, and other personal property, devised and bequeathed to trustees, their heirs and assigns, all his lands, &c., freehold, copyhold, and leasehold, and all his personal estate, in trust to hold the copyhold and freehold, and all such other of his estates as were less than freehold,

unto the trustees, their heirs, &c. for and during all his the testator's right, title, and estate therein, upon trust, first to pay debts and funeral expenses, and then to apply the annual income to the use of his two nieces for their lives; and after their decease there were devises to their children and grandchildren, male and female, in terms so ambiguous and contradictory, as to make it doubtful what equitable interest the children or grandchildren took: It was held, that the trustees took an estate in fee in the freehold and copyhold lands, and an absolute interest in the leaseholds for life and years. *Houston* v. *Hughes*, 5 Law J. K.B. 315, s. c. 6 B. & C. 403.

A testator, after giving his wife an annuity for her life, to be issuing out of "all his real estate, lands, and hereditaments in P," devised "the said estate, lands, and hereditaments" to his daughter and her heirs; but in case his daughter died under twenty-one, and without issue, he devised "the said estate, lands, and hereditaments" to his wife for her life, and after her decease, to the children of A, share and share alike: Held, that, subject to the previous interests given to the daughter and to the wife, the children of A, living at the testator's death, took an estate in fee in the lands in P. *Wilkinson* v. *Chapman*, 3 Russ. 145.

The devisor, after making various bequests, directing part of his estate to be sold for the payment of his debts, and charging the remainder with an annuity to his widow, devised as follows: "All the rest and residue of my goods and chattels, lands and *tenements*, not before given and bequeathed, my debts being paid, I give and bequeath, subject and charged as aforesaid, to my brother R S, if living at the time of my death; if not living, to his children, to be divided between them:" Held, that the fee passed to the devisees. *Gully* v. *the Bishop of Exeter*, 5 Law J. C.P. 178, s. c. 4 Bing. 290.

## (G) ESTATES TAIL.

A testator possessed in fee of an estate called Hamels, in his will gave a statement of all his property, and one item was "Hamels 43,000*l.*" and afterwards these words, "Hamels to go to my daughter Catherine Mellish, as follows: in case she marries and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter or no child at that time, I desire it may go to my brother William Mellish.

The Court held that Catherine Mellish took an estate in tail male, with reversion in fee, subject to the other estates created by the will. *Mellish* v. *Mellish*, 2 Law J. K.B. 45, s. c. 2 B. & C. 520, s. c. 3 D. & R. 804.

A devise of a *trust* was held an estate tail, from the apparent intent of the testator and the general words of the will, though there was a limitation to trustees to preserve contingent remainders. *Wright* v. *Pearson*, 2 Ken. 361, s. c. Amb. 358.

A testator, after devising to his eldest son and other children certain estates, devised to his youngest son "all his messuage, lands, and tenements at A," and "also all that his messuage and tenements at S, in the occupation of J S as farmer thereof," for his natural life, without impeachment of waste, and then to his issue, and to the issue of their issue: Held, that under this devise an estate in tail passed to the youngest son. *Hodgson* v. *Merest*, 9 Price, 557.

The term *legacy* will pass *real* as well as personal property: therefore where the testator, after disposing of his real estate, said, "if either of the persons before named die without issue lawfully begotten, the *legacy* shall be equally divided between them that are left alive:" Held, that these words created an estate in tail. *Hope* v. *Taylor*, 2 Ken. 9, s. c. 1 Burr. 268.

Under a devise of real estates to A B for life and no longer, provided he take the name of the testator, and live at his house: and after his decease, to such son as he shall have lawfully begotten, taking the testator's name, and for default of such issue to C D in fee: Held, that A B took an estate in tail. *Robinson* v. *Robinson*, 1 Ken. 298, s. c. 1 Burr. 38.

The words "for life, and to his heirs male," constitute the devisee tenant in tail. *Lister* v. *Lister*, 2 Ken. Chanc. 1.

A, by his will, devised an estate to trustees, in trust to permit and suffer his six children, viz. B, C (wife of W), D, E, F, and G, to take one sixth share each of the rents during their natural life and lives; and after their respective deceases, in trust, to permit all and singular the child or children of such of his five sons or daughters so dying, to take the rents of the share of him, her, or them so dying, in equal shares, and so in like manner from children to children; and in case any or either of his said children should die without leaving issue, then the rents belonging to such of his sons or daughters so dying, to go to and be received by the survivor or survivors: Held, on the deaths of B, D, F, and G, without issue, and of C, leaving a son and two daughters, that B, C, D, E, F, and G, took estates tail; that the shares of those who died without issue, accrued to F as the survivor; and that C's son took only one sixth share. *Woollen* v. *Andrews*, 2 Law J. C.P. 145, s. c. 2 Bing. 126. s. c. 8 B. Mo. 248.

The words "for want of such issue," are far from being sufficient to overrule the words "heirs of the body." They have almost constantly been construed to mean an indefinite failure of issue; and, of themselves, have frequently been held to give an estate tail. *Jesson* v. *Wright*, 2 Bligh, 54.

Devise to W (a natural son of the testator's sister) for life, and after his decease to the heirs of his body, in such shares and proportions as W by deed &c. shall appoint, and for want of such appointment to the heirs of the body of W, share and share alike, *as tenants in common*; and if but *one child*, the whole to such only child, and for want of *such issue*, to the heirs of the devisor: Held, that an *estate tail* vested in W by this devise. *Jesson* v. *Wright*, 2 Bligh, 2.

Although the words "heirs of the body" in a legal construction, can apply to one person only, it may be contended, where a power is given to appoint to heirs of the body, that they mean a class of persons. The ulterior limitation to one child, in default of appointment, may operate as a description of the person, and does not conclusively prove that no estate tail was intended to be given. *Jesson* v. *Wright*, 2 Bligh, 10.

A devise to "J F, &c. and to the *issue of his body* lawfully to be begotten, and *to the heirs* of such issue for ever, &c. But if J F shall *die without leaving any issue* of his body lawfully begotten, then

&c. unto W B and to his heirs for ever." Held to be an estate tail in J F. *Franklin* v. *Lay*, 2 Bligh, 59, n.

A devise of lands to S S to hold the same unto S S and heirs of his body, and their heirs, for ever, chargeable with a legacy; but in case the said S S should die without leaving issue of his body, then a devise of the land unto W S to hold unto the said W S and his heirs for ever, also chargeable with legacy, creates only an estate tail in S S with a vested remainder over. *Doe ex dem. Gsering* v. *Shenton*, 2 Chit. 662.

Where a devise was as follows:—"And as touching my real estates, both freehold and leasehold, situate &c., I devise the rents and profits thereof to my executors hereafter named, until my daughters attain their several ages of twenty-one years, in trust that they, my executors, improve the same in like manner and purpose as I have hereby directed my personal estate for the advantage and education of my daughters; and as to the freehold and inheritance of my real estate, I devise the same to my said daughters, when and as they attain their several ages of twenty-one years, equally between them and their heirs for ever, to take as tenants in common; provided that if both my daughters die without lawful issue, then I devise my real estates unto and amongst my said two brothers, T S and R S, and my nephew J S, son of my late brother J, their heirs and assigns, for ever, to take as tenants in common." The Court determined that the daughters only took an estate tail, with remainder over. *Chapman dem. Scholes* v. *Scholes*, 2 Chit. 643.

A testatrix devised to B F for life, with remainder to the second, third, fourth, and other sons of B F, except the first or eldest son in tail male successively, remainder to F S; B F had no issue at the period of the testatrix's death, but, subsequently, had four sons, out of which four sons the second and third were living at the same period, and the second and fourth were also living at that time; but at the death of B F, the fourth son only was living: It was determined, that the remainder to the second and other sons of B F, except the first or eldest son, was vested upon B F having two sons living at the same period, and was not subject to be divested by subsequent events, and, therefore, that the fourth and only surviving son of B F took an estate tail under the devise. By four judges against Graham, B. and Wood, B. dissentientes. *Driver d. Frank* v. *Frank*, 8 Taunt 468.

A testator devises lands to his niece for life, and to her heirs, the issue of her body, for ever; he then wills, that each heir shall be only tenant for life, and adds a variety of directions, proceeding upon the scheme of a succession of tenancies for life; and he devises the lands over, if his niece should leave no issue, or they should become extinct: Held, that the niece took an estate tail. *Reece* v. *Steel*, 6 Law J. Chanc. 120.

A man seised in fee of lands *in gavelkind*, devised all his real estate whatsoever unto his nephew T C for life, and then to trustees to preserve contingent remainders; and after the decease of the nephew T C, to the *heirs of the body* of T C, as well female as male, to take as tenants in common, and not as joint tenants; and for default of such issue, to trustees for a term upon certain trusts; and after the determination of that estate, to his nephews J C and C C, for their respective natural lives, as tenants in common, and not as joint tenants; and after their respective deceases, unto the heirs of the respective bodies of J C and C C, as well female as male, to take as tenants in common, and not as joint tenants; and in default of such issue, to his own right heirs for ever: The Court held, that it was the *general intent* of the testator, that the estate should remain in the family of T C; and that therefore he took an estate in tail general. *Doe d. Bagnal* v. *Harvey*, 4 Law J. K.B. 18, s. c. 4 B. & C. 610, s. c. 7 D. & R. 78.

A testator, by his will, devised freeholds and leaseholds to trustees, their heirs, executors and administrators, upon trust to pay the rents and profits to his widow during her life, or for so long as she should continue unmarried; and from and after the decease of his wife, or her intermarriage with any other husband, to permit his son, Thomas Edoe, to receive the rents and profits during his life; and from and immediately after the death of his son Thomas Edoe, he gave and devised the said premises unto the heirs of the body of his said son, their heirs, executors, administrators and assigns for ever; but in case his said son, Thomas Edoe, should die without issue, then he gave the premises to his trustees upon trust for his second son, William Edoe, and the heirs of his body, in like manner as he had before devised the same for the benefit of his son Thomas, and the heirs of his body; and for default of issue of the body of both his sons, he gave the premises over unto his two daughters, and their respective heirs, executors, administrators and assigns, as tenants in common: Held, that Thomas Edoe took a *quasi* estate tail in the leaseholds. *Kinch* v. *Ward*, 4 Law J. Chanc. 28, s. c. 2 S. & S. 409.

A testator devised the residue of his real and personal estate to trustees, their heirs, executors, and administrators, upon certain trusts: these trusts were, to pay the rents, interest and profits, to his wife for life; then to his daughter for life; and after the decease of his wife and daughter, upon trust for all and every child or children of his daughter as should be living at the time of the decease of his wife and daughter, equally among them: if more than one, to be divided, share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators, and assigns for ever; and if only one, then the whole thereof to such only surviving child of his daughter Mary Francis, his or her heirs, executors, administrators, and assigns for ever, upon attaining the said age: but, in case there should be no child or children of his daughter living at the time of the decease of the survivor of his wife and daughter, or, being such, all should die without lawful issue, under the said age of twenty-four years, then upon trust for his two sons: Held, that the children, living at the death of the survivor of husband and wife, took vested estates tail in so much of the residue as consisted of real property, and absolute interests in the personalty. *Farmer* v. *Francis*, 4 Law J. Chanc. 154, s. c. 2 S. & S. 505.

Devise to trustees "until some son of G L shall attain his age of twenty-one years, and, on the attainment of the eldest to that age, to that son for

life; remainder to his first and every other son in strict settlement, and so on to every son of the said G L:" Held, that the eldest son took an estate tail in the land in Pembrokeshire, by virtue of the said will. *Le Hunt* v. *Hobson*, 4 Law J. K.B. 183, s. c. 5 B. & C. 903, s. c. 8 D. & R. 582.

(H) ESTATES FOR LIFE.

Testator devised thus: "And for the estate, whereof it hath pleased Almighty God to bless me with, I dispose thereof as followeth." He then gave certain estates, respectively to parties named, "their heirs and assigns for ever;" then an estate to his daughter, "during her natural life, and after her decease, if she hath no son, then to my grand-daughter:" Held, that the grand-daughter took, under this devise, an estate for life only. *Doe d. Eden* v. *Gross*, 5 Law J. K.B. 295.

Testator gave a life estate in certain houses, &c. to his wife; he then bequeathed certain personal property to his son, and also devised the said houses &c. to such son after the wife's death; adding these words—"and every other office or out-office that I now have or enjoy by lawful right or inheritance to my said son, and my said son I do also appoint to pay or cause to be paid out of the said above-named *effects*," several legacies thereinafter mentioned: Held, that the son, under this devise, took only an estate for life; as the legacies were not charged upon the real but personal property, and there were no words to shew that the testator intended to give an estate in fee. *Doe d. Wallace* v. *Etherington*, 5 Law J. K.B. 314.

Where the testator having previously, by settlement, charged certain estates with portions, devised the same, subject to debts and further charges, and directed the rents and profits to accumulate and form a fund for satisfying those charges, with a limitation over for life after such charges should have been satisfied: Held, that such remainder-man took a vested estate for life, subject to the debts and charges; as if the testator had created a time for payment of his debts, it was not an accumulation for the purpose of suspension. *Bacon* v. *Proctor*, 1 Turn. 31.

The words in a devise, "I do give to my son R the perpetual advowson of H B in L, and my manor of S, and all my lands in it," were held by three judges, (Park, J. dissentiente), to give an estate for life in the advowson, although at the period of making the devise R was incumbent of the living. *Pocock* v. *the Bishop of London*, 6 B. Mo. 159, s. c. 3 B. & B. 27, s. c. 1 Price, 353.

A testator devised as follows:—"*Item*, I give and bequeath unto M W, all that my messuage and tenement wherein I now dwell, with the garden, and all the appurtenances thereto belonging; *and I also give* to the said M W all my household goods and chattels, and implements of household, within doors and without, all for her own disposing, free will, and pleasure, immediately after my decease." The testator made several other bequests, beginning each of them with the word "*Item*." The Court held, that M W took only an estate for life in the premises. *Doe d. Ellam* v. *Westley*, 4 Law J. K.B. 26, s. c. 4 B. & C. 667, s. c. 7 D. & R. 112.

Devisor directed that his rents should be applied in paying M D and F D the interests of sums charged on his freehold property, and subject thereto in paying A D, widow of his son R, 10*l.* a year till death or second marriage; that the remainder of the rents should be applied to the maintenance and education of J D his grandson, till he was twenty-one; and if he should die before, to the maintenance and education of his grand-daughter, M F D; that after J D and M F D should have attained twenty-one, W D, his son, should have an annuity of 20*l.* out of the rents for the term of his life, subject as aforesaid; the remainder of the rents were devised to A D for the life of W D or till her second marriage: after the death of W D devisor gave all his lands to the use of J D and his heirs; and if J D should die before the period aforesaid, without lawful issue living at his death, he gave the rents to W D for his life, subject as aforesaid; and after the death of W D the premises were to go to his children, share and share alike; and, in default of such issue, to A D and her heirs. Devisor died, leaving A D, J D, M F D, and W D; W D being his heir-at-law. A D next died, intestate and unmarried; J D afterwards attained twenty-one, and died unmarried, in the lifetime of W D: Held, that on the death of J D, W D became entitled to an estate for life in the lands. *Mason* v. *Robinson*, 5 Law J. C.P. 104, s. c. 3 Bing. 126.

A testator seised of estate in fee, and holding certain lands and tithes in the county of H under church leases for lives, devised all his lands and hereditaments in the counties of H and G and all other his real estate, to his daughter and the heirs of her body; and for default of such issue, to F and his heirs. The daughter at the testator's death and ever afterwards was of unsound mind. Her husband having taken out administration to the testator, with the will annexed, procured from time to time renewals of leases. She survived him, as well as all the *cestuis qui vie* named in the testator's leases, and died without issue, and without having done any act to bar such interest as F had under the devise: Held, that the leaseholds for lives passed by the will, and that F was entitled to the benefit of the subsisting leases, which had been obtained by way of renewal of the old leases. *Fitzroy* v. *Howard*, 3 Russ. 225.

A testator gave all his real and personal estate to trustees, in trust, as to one moiety, for A for life, with remainder to her children; and, as to the other moiety, for B and her children in like manner. By a codicil he declared that his estates should not be divided equally between A and B, but in proportion to the number of their children; and he left A and B jointly his residuary legatees. By another codicil, in order to prevent disputes, he gave one of his estates to A and her heirs, and the other to B and her heirs, the number of their children equalizing the value of the two estates. In a subsequent codicil he mentioned that he had bequeathed the first estate to A and her children, and the second to B and her children: Held, that A and B were entitled to these estates for their lives only, with remainders to their children; and that they were not entitled to the personal estate absolutely, but for their lives only, with remainders to their children, and in shares proportioned to the number of their children. *Lushington* v. *Sewell*, 1 Sim. 435.

(I) COPYHOLD ESTATES AND CUSTOMARY LANDS.

Where a proportion of the estates devised being copyhold, or what was called in the manor of S tenant-right land, which could not be transferred but by bargain and sale, and admittance; nor devised, unless by a conveyance, and declaring uses by will. On a suit by the daughters and heiresses of the devisee against parties claiming under the heir-at-law of the testator, who had been admitted: Held, as the formalities had not been observed by the testator in conveying to the uses of his will, that the copyholds, or what was called tenant-right lands, did not pass under the above devise. *Hodgson* v. *Merest*, 9 Price, 556.

A person possessed of copyhold property, after surrendering it to the use of his will, made a will, in which he gave all his lands to trustees for the use of his son, "the same to be transferred to him as soon as he should attain twenty-one years of age," and one of the trustees was admitted. After the death of that trustee, and after the infant became of age, and died, his heir brought an action of ejectment: *Held*, that the trustees took only an estate determinable on the son attaining the age of twenty-one years, and that no actual transfer was necessary to pass the estate to the heir-at-law of the first proprietor. *Doe d. Player* v. *Nicholls*, 1 Law J. K.B. 124, s. c. 2 D. & R. 480, s. c. 1 B. & C. 336.

The word "effects," in a testamentary paper, will not of itself pass an equitable interest in a copyhold. *Henderson* v. *Farbridge*, 4 Law J. Chanc. 209, s. c. 1 Russ. 479.

A devises all his freehold, copyhold, &c. lands, &c., and adds, "the copyhold parts having been surrendered to the use of my will:" in fact, only part of the copyholds had been so surrendered: Held, that the devise would pass the copyholds which had not been surrendered, as well as those which were surrendered. *Oxenforth* v. *Cawkwell*, 4 Law J. C.P. 193, s. c. 2 S. & S. 558.

A testator devised all his manors, lands, and tenements, to trustees and their heirs, and his copyholds for lives, and all his personal estate, to the same trustees, their executors, administrators, and assigns, upon the following trust: "That they shall, with the money I shall be possessed of or entitled unto at the time of my decease, and by the sale of the personal estate bequeathed, (except the lease of Barton,) and by and with the rents and profits of the said copyhold and customary tenements, and by the absolute sale or mortgage of my manors, messuages, lands, tenements, and hereditaments, or so much and such part thereof as shall be necessary for the performance of this my will, and by and with the rents and profits of my said manors, messuages, lands, tenements, and hereditaments, in the mean time raise money, and pay and discharge all and every my debts, funeral expenses, legacies, and sums of money, by this my will directed to be paid;" and any surplus money, which might remain in the hands of the trustees after these payments were made, he gives to his son; he then, by way of further trust, directs that his trustees should convey his said manors, messuages, lands, and hereditaments, or such parts thereof as should not have been sold, to his son for life, with remainders over: and afterwards, he declares his meaning to be, that after payment of all his debts, funeral expenses, and the several legacies thereinbefore given to his wife, and of such other sums of money as were by his will directed to be paid as aforesaid, the rest and residue of the monies arising out of the sale of his goods and chattels and personal estate, and of the rents and profits of Barton, and the rents and profits of the copyhold estates, and the rents and profits of the other real estates, should be applied by his trustees in the discharge and payment of the legacies and portions thereinbefore given and provided for his younger children in the first place, and before they raised any sum or sums of money for that purpose, by sale or mortgage of his real estate: Held, first, that the copyholds were not included in the property over which the trustees had a power of sale: secondly, that the beneficial interest in the copyholds was not disposed of by the will. *Fitzroy* v. *Fitzroy*, 2 Law J. Chanc. 185.

Testator having surrendered some of his copyholds to the use of his will, and left others unsurrendered, devised all his copyhold messuages, lands, &c. whatsoever and wheresoever, and which he had surrendered, to the use of his will: Held, that the unsurrendered as well as the surrendered estates passed by the will. *Strutt* v. *Finch*, 2 S. & S. 229.

By the custom of the manor of Shap, the legal interest in lands of customary tenure, parcel of the manor, is not devisable, but is transferred by a deed of bargain and sale, having the effect of a surrender, in which the operating words are, "bargain, sell, and surrender," and on the presentment or production of which admittance is granted to the alienee; but an equitable interest in such customary lands is capable of being passed by devise without regard to the custom. A tenant of this manor, who was seised of customary lands, conveyed them by a deed of bargain, sale, and surrender, to a trustee, upon trust for such person as the tenant by any deed or instrument in writing, or by his last will or any codicil thereto, or any instrument in the nature of a last will or codicil, to be by him legally executed, should appoint or devise the same; and under this conveyance the trustee was admitted: Held, that the equitable interest in the lands would not pass by an unattested codicil of the tenant. *Willan* v. *Lancaster*, 3 Russ. 108.

(K) ESTATES IN MORTGAGE.

Mortgaged property does not pass under a general devise of all the rest, residue, and remainder, of and in all and singular the property and effects which the testator should be possessed of, or entitled to, or over which he should have a disposing power at his decease, of whatsoever nature or kind the same may be. *In re Horsfall*, 1 M'Clel. & Y. 293.

(L) JOINT TENANCY AND TENANCY IN COMMON.

A devise to three persons and their heirs, may be held to be a devise in joint tenancy, although the testator directs the estate to be sold, and the produce to be *divided* among the three devisees.

And, in such a case, the devisees will be joint tenants as to the legal estate, though they will be tenants in common as to the produce, when the sale shall afterwards take place. *Goodtitle d. Roebuck* v. *Oxley*, 4 Law J. K.B. 91, s. c. 7 D. & R. 535.

Devise "unto A B my wife, the whole of my

effects during her life also the freehold estate which I now enjoy I bequeath as follows A B my daughter, I B and J B my sons, likewise B B, all the last-mentioned names to be all equal sums whatever it may amount to, except any of the afore-mentioned should die or be deceased, then their shares to be equally divided among the other that is surviving:" The Court held, that the four persons last named took, under this devise, as tenants in common; and that B B, the lessor of the plaintiff, was entitled to recover in ejectment, after ouster by A B, another of those devisees. *Roe and wife* v. *Burn*, 5 Law J. K.B. 131, s. c. 6 B. & C. 289.

A testator, after giving some legacies, uses the following words: "My son J and my daughter E, I do make, constitute and appoint, to be my joint executor and executrix, of this my last will and testament, of all that I possess in any way belonging to me, by them freely to be enjoyed or possessed, of whatsoever nature or manner it may be, only my household furniture which I give to my daughter who lives the longest single, and after her decease or marriage, to be sold, and equally divided between my remaining children:" Held, that J and E took the freeholds of the testator as joint tenants in fee. *Thomas* v. *Phelps*, 6 Law J. Chanc. 110.

(M) CONDITIONAL AND CONTINGENT DEVISES, AND LIMITATIONS OVER.

Devise of copyhold and land in fee, upon condition that the devisee, within one month, pay £2000 to the executor, to be applied for charitable purposes; the testator having left no customary heir, and no next-of-kin: Held, that the devisee took the land subject to the payment of the £2000, and that the Crown (and not the lord of the manor) was entitled to the £2000 by prerogative, if personal estate, because there was no next of kin, and if real estate, because there was no customary heir. *Henchman* v. *the Attorney General*, 2 S. & S. 498.

A testator devised to trustees, all his real and personal estates, in trust, after payment of legacies and annuities, to pay rents, profits, &c. of the residue of his estate to his three nieces for their lives, their issue to have their parent's share of such rents, &c. for their lives; and if either of the nieces should die in the lifetime of the others or other of them leaving no issue, the share of her or them so dying to be equally divided between the survivors of his nieces for their respective lives, and afterwards by the issue of the survivors of such nieces; and in like manner, if all his nieces, and their issue, save one, should die without issue, then such one to have the whole for her life; and after her decease, the issue of such niece, if more than one, to enjoy the whole, share and share alike, and if but one, such one to enjoy the whole alone; to hold such parts as were freehold to them and each of them, their heirs and assigns, as tenants in common, and not as joint tenants, and if but one, to such only one, his or her heirs and assigns for ever; and in case of all the nieces dying without issue, the whole to go to the devisor's next male heir of his name, to hold to him, his heirs and assigns, in like manner. The niece M married G B, who died, leaving his wife and one son surviving; C also married, but had no issue. Two of the trustees died, and a considerable surplus of the testator's personal estate remained after paying debts, legacies, and annuities: Held, 1st, That the surviving trustee had the legal estate in fee-simple devised to the three trustees. 2ndly, That the nieces took no legal estate in the freehold tenements. 3dly, That the son of G B took no legal estate therein, nor would he at the death of the survivor of the three nieces. 4thly, That if the devise had commenced with the words, "all the rents, issues, and profits," and the passage before these words had been omitted, the three nieces would respectively have taken estates for life in the freehold tenements under the will, with cross remainders between them for life, in the event of one or two of them dying without issue; and, lastly, that G B would, in the events as they then stood, have an estate in tail in remainder in his mother's one undivided third part of the said freehold tenements, subject to be divested in part by the birth of other children of his mother, whether sons or daughters, and that he would have an estate in tail in the whole of the freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born. *Murthwaite* v. *Jenkinson*, 6 B. Mo. 13, s. c. 2 B. & C. 357, s. c. 3 D. & R. 765.

A testator having devised his property in trust for his wife during widowhood, on condition that she should, neither directly nor indirectly, keep or have any concern or interest in a public or licensed victualling house, or any other kind of business: Held, that the keeping and taking care of a public house belonging to other persons, as their servant, and at regular wages, and in the profits or emoluments of which she had no interest, was not such a breach of the condition as to create a forfeiture. *Jones* v. *Bromley*, 6 Mad. 137.

A testator devises all his real and personal property to his wife for life, if she so long continued his widow, provided a child, she was then enceinte with, should not be born alive, or should die under twenty-one; but, in case such child should be born alive and attain twenty-one, then his wife was to enjoy his real and personal estate for the maintenance of herself and the child during the child's minority; and, after the child should have attained twenty-one, his wife was to have a moiety of the annual produce of his real and personal estate, if she so long continued his widow: he also directed that his wife, in cases he so long continued his widow, should have the power of letting his real estate during the minority of his child: Held, that upon the widow's marrying again, during the minority of her child, her interest in the real and personal property of the testator ceased entirely. *Lancaster* v. *Varty*, 5 Law J. Chanc. 41.

Under a devise of a copyhold estate to testator's wife, during her life, provided she continued single; but in case she did not, then unto A B when he should attain the age of 23 years;—it was held, that though the widow married before A B attained that age, she was entitled to the estate until that event; and that the heirs-at-law were not entitled to it. *Doe d. Dean and Chapter of Westminster* v. *Freeman*, 2 Chit. 498.

Testator appoints executors in trust to pay the interest of £1000 to his son, for life, then to his son's children; and if he left none, or they should die unmarried, and under age, bequeaths a moiety of the

principal unto G W and his wife, or their children and representatives: Held, that the estate, which passed on the death of the testator under the second disposition, was consonant to that limited under the first, not absolute or vested, but remained in contingency till the event of the son dying, or his issue failing, &c. determined to whom it belonged; the parents, if then living, being entitled; if not, in the next place, their children; or, finally, their representatives. *Fenoulet* v. *Passavant*, 2 Ken. 109, Chanc.

A testator devised his estates to his son G, to hold for his natural life, and, after his death, unto the children of G and their heirs for ever, to hold as tenants in common, and not as joint tenants, with this proviso, that if G should die without issue, or leaving issue, and such child or children should die before attaining the age of 21 years, or without lawful issue, then he devised the estate to T D and A, and their heirs, for ever, to hold as tenants in common, and not as joint tenants. Upon the testator's death, G suffered a recovery, and died unmarried and without issue: Held, that the devise over was a contingent remainder, and consequently defeated by the destruction of the particular estate by the recovery. *Doe d. Herbert* v. *Selby*, 2 B. & C. 926, s. c. 4 D. & R. 608.

Devise to trustees and their heirs until J W should attain twenty-one, and, in case of his death, until another nephew should attain twenty-one, with like limitations over, with powers, by sale or otherwise, to discharge debts, legacies, &c., and to apply the rents and profits to the maintenance, &c. of such nephews, and upon the eldest nephew's attaining twenty-one, to pay him the residue of the rents and profits; and, after his arriving at that age, testator devised the said lands, &c. to the said trustees, their heirs, &c. to the use of the testator's said eldest nephew for life, remainder to the use of his first and other sons successively in tail male, remainder to daughters in like manner as to the sons; and in default of their issue, with like remainder to his second nephew and niece, remainder in fee to testator's sister. The events were, that the eldest nephew survived the testator, but died under twenty-one, leaving issue, a daughter; the second nephew attained twenty-one: Held, 1st, That the trustees took only a chattel interest in the lands devised to them. 2dly, That the eldest nephew, J W, took a vested estate for life. 3dly, That his daughter took an estate in tail male on the death of her father; and, 4thly, That the second nephew took, at the testator's death, a vested estate for life in remainder, expectant on the death of J W, and failure of sons and daughters to be born to J W, and issue male of such sons and daughters. *Warter* v. *Hutchinson*, 1 B. & C. 721, s. c. 3 D. & R. 58, s. c. 5 B. Mo. 143.

Where premises were devised to a party for life, provided he chose to reside therein, and then to A B in fee, it is not necessary, to complete A B's right to the premises on the death of the devisee for life, that such devisee should have actually resided therein; and, therefore, the intention to reside is sufficient, if that intention would have been carried into effect, had circumstances permitted. *Roe d. Sampson* v. *Down*, 2 Chit. 529.

A testator devises lands, if there shall be only one son of D who shall attain twenty-one, upon trust for that son in fee; but if there shall be two or more sons of D who shall attain twenty-one, then for the second of such sons in fee. At the death of the testator, D had only one son; but she subsequently had another son: Held, that, at the testator's death, the then only son took a vested fee in the lands, and that his interest was divested by the birth of a second son.

The same testator devises other lands to the son of D who shall first attain the age of twenty-one, and change his name to E, on his attaining that age, and also changing his name: Held, that this devise gave a vested interest to D's eldest son, subject to be divested by his dying before he attained twenty-one. *Duffield* v. *Elwes*, 4 Law J. Chanc. 189, s. c. 2 S. & S. 544.

A direction, in a devise for charitable purposes, that the rents, &c. should not be raised, is void. *Attorney General* v. *Master of Catherine Hall*, 1 Jac. 381.

Devise of an estate to trustees, upon trust to pay the rents and profits to the testator's son A B while unmarried, and to convey to him, in case of his marriage with the consent of the trustees; but in case he should marry against their consent, then to sell the estate and divide the proceeds among other persons. The son having married without the consent of the trustees, it was holden, that A B took nothing under the devise, the consent of the trustees being a condition precedent. *Long* v. *Ricketts*, 2 S. & S. 179.

Where an estate was given by will to the use of a devisee, with certain limitations over, and the testator directed his heir-at-law (to whom he had devised other estates by previous devises in the same will,) in case it should be necessary that he should confirm that devise, to do so; but in case he should decline to do so, the testator then devised one of the estates so before given to his heir, to the same uses as he had given the estate which he had devised to the devisee: Held, on a bill filed by persons claiming under the devisee, that the equity on which this suit was founded, was not matter making it necessary for them to apply to a Court for its interference to compel the heir to elect upon the equitable construction of the devises in the will; because the will itself, being clear and explicit in the terms of the devises, had marked out an express course to be pursued in the event which had occurred, sufficiently pointing out the occasion, time, manner, and subject-matter of the substitution of one estate for the other, in the case of a breach of the conditional limitation upon which that substitution was to take place, with respect to the estates devised. *Tucker* v. *Sanger*, M'Clel. 424, s. c. 13 Price, 607.

Limitations, at the end of an absolute term of twenty years, commencing from the death of the survivor of a great number of persons *in esse*, are not too remote, and are not objectionable as tending to a perpetuity. *Bengough* v. *Edridge*, 5 Law J. Chanc. 113, s. c. 1 Sim. 173.

A B devised his estate to his daughter in strict settlement, and if she should die without issue living at her death, limitations over to C D: Held, that the contingency related merely to the trust estate during the minority of C D, and that the remainders were all vested. *Lethieulier* v. *Tracy*, 2 Ken. 40, Chanc.

Under a devise to A B in fee, after two prior limi-

tations in tail, on condition that he pay a certain sum to C D, at or soon after his coming to possession of the estate; and for non-payment, the estate to go to C D: Held, to be a conditional limitation of the estate. *Embry* v. *Marlyn*, 1 Ken. 77, s. c. Amb. 230.

Where a testator devised a messuage, forming part of his real estate, to his nephew H W, and then devised as follows:—"*Item*, I give further unto my nephew H W, half part of my garden, and 100*l*. stock in the four per cent. bank annuities; *I give further my yard, stable, cow-house, and all other out-houses in the said yard to my sister M W*, to have the interest and profits during her natural life:" Held, (Best J. diss.) that H W, after the death of M W, took an estate in fee in the yard, &c. to the exclusion of the testator's heir-at-law. *Doe* v. *Turner*, 1 Law J. K.B. 104, s. c. 2 D. & R. 398.

A testator devises certain messuages to his daughter A during her life, and after her death unto her children, in equal shares; and in case she shall die without leaving lawful issue, he devises the same premises to the children of two other daughters: Held, that A took an estate for life; remainder to her children for life, as tenants in common; remainder to A in tail. *Parr* v. *Swindells*, 6 Law J. Chanc. 99.

A devise to A for ninety-nine years, if he should so long live, with remainder to his first son, then unborn, for ninety-nine years, if he should so long live, and so on in tail male to such first son lawfully issuing for ever, and for want and in default of such issue of such first son, to the second and other sons successively for ninety-nine years only, in case he should so long live, and that such elder son, or the issue of such elder son, should have no greater estate than for ninety-nine years, determinable at his death, and if there should be no issue male of A at the time of his (A's) decease, or in case there should be such issue male at that time, and they should all die before they attain the age of twenty-one without issue male, then to B for ninety-nine years, if he should so long live, remainder to the first son of B for ninety-nine years, if he should so long live, &c.: Held, that A took under the will an estate for ninety-nine years in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue, and that, upon his death, his first son would take an estate for ninety-nine years in the freehold, determinable with his life, and the remainder of the term in the leasehold; but that the limitations to the second and other unborn son of A were void, as tending to perpetuity, and the limitations over to B, &c. after these void limitations, were not accelerated, but void also. *Beard* v. *Westcott*, 1 Turn. 25.

Testator devised his real estate to H L, and her assigns, for life, and if she should continue unmarried, and after her death, to such persons as she should appoint, and in default of such appointment, then over to other persons; the testator declared, that if H L should marry in the lifetime of his wife, with her consent, or after the death of his wife, with the consent of two certain persons named in his will, or the survivor of them, H L, and her assigns, should hold the same real estate, in such manner as she should have done if she had continued unmarried. After the death, as well of the testator's wife, as also of the two persons so named in his will, after the expiration of about twenty years, H L married R A, who also died in her lifetime: Held, that the estate for life in H L was become absolute, and that she could then execute the power of appointment. *Aislabie* v. *Rice*, 8 Taunt. 459.

Where a testator devised all his real and personal estates to trustees and their heirs, upon trust, that they should out of the rents, issues, and produce of all or any part of the said real or personal estates, pay yearly 250*l*. towards the maintenance of the testator's daughter, until she should attain the age of twenty-one, or marry with the consent of the trustees; and upon further trust, that they should pay and apply so much of the residue of the rents, &c. of the said estates as they should think necessary for the maintenance of the testator's son, until he should attain the age of twenty-one, or his sister's marriage; and that as soon as he had attained twenty-one, or his sister should be married, then, that the trustees should raise 5,000*l*. by mortgage, sale, or other disposition of all or any part of testator's said real or personal estates, and stand possessed thereof upon trust to pay the same, and the interest thereon, to the testator's daughter, when she should arrive at twenty-one, or marry; and subject to the payment of such sum, that the trustees should stand seised of the residue of the said real and personal estates, in trust for the testator's son, until he should attain the age of twenty-one, and then to the use of, and in trust for the son, his heirs, executors, administrators, and assigns for ever: but in case the son should not live to attain the age of twenty-one, and the daughter should be living at the time of his decease, or in case the son should live to attain twenty-one, and afterwards die without lawful issue;—then the testator, as to his real estates, devised them to the use of the said trustees until the daughter should attain the age of twenty-one, or marry, and then to the use of his daughter for life, remainder to trustees to support contingent remainders, with divers remainders over. The daughter attained twenty-one, but the 5000*l*. had not been paid or raised out of the real estate; and the son had also attained the age of 21: Held, that the legal estate in the testator's real estates was in the trustees, and would so continue until the 5000*l*. should be raised as directed by the will; and that the son would have taken an estate in fee in such estates, with an executory devise over, in the event of his dying without issue living at his death, in case the devise to him had been made without the intervention of trustees, he having attained the age of twenty-one. *Glover* v. *Monckton*, 3 Law J. C.P. 189, s. c. 3 Bing. 13.

### (M) EXECUTORY DEVISES.

An executory devise of residue of real and personal estate, passes the intermediate rents and profits of the realty as well as the personalty. *Genery* v. *Fitzgerald*, 1 Jac. 468.

### (N) DEVISES BY IMPLICATION.

The mere words "in default of such issue," do not give an estate tail by implication. *Lethieulier* v. *Tracy*, 1 Ken. 56, s. c. Amb. 204, s. c. 3 Atk. 774.

A testator gives real estates to trustees upon trust to pay a moiety of the rents to his wife during her life, and the other moiety to his son, and after the

wife's death, to convey the estates to his son in fee; but if the son should die without issue in the lifetime of the wife, to his own nephew in fee. The son died, without issue and intestate, during the life of the wife, whereby the nephew became heir-at-law both of the son and of the testator: Held, that the wife did not take by implication a life interest in the moiety of the rents which had been devised to the son. *Aspinall* v. *Petvin*, 2 Law J. Chanc. 121, s. c. 1 S. & S. 544.

(O) Devises for Payment of Debts.

[See Executor and Administrator, and Legacy.]

A will began as follows:—"In the first place, I will and that all my debts and charges be paid and discharged by executors hereinafter named. Then I give and bequeath unto my eldest son, Richard William, my estate at Shap, on condition that he make up the deficiency in the payment of the two legacies which I have left to my younger son and daughter:" Held, that the testator's debts were not charged on the estate at Shap. *Willan* v. *Lancaster*, 3 Russ. 108.

A testator directs all his debts to be paid by his executor thereinafter named: then, after giving some legacies and an annuity, he devises all his real, personal, and copyhold estates to A B, and appoints him his executor; the testator's debts are a charge on all the property which A B takes under the will. *Hewill* v. *Witaker*, 5 Law J. Chanc. 158.

(P) Lapsed or void Devises.

On the question being raised, whether the heir on the father or mother's side of the devisor should inherit a lapsed devise, the Court directed it to be tried by an ejectment. *Battiscombe* v. *Syndercombe*, 2 Ken. 13. Chanc.

A testatrix, born in Scotland, but domiciled in England, executes, during an occasional residence in Edinburgh, a disposition, or will, in the Scotch form, by which she gives her personal estate to A, his heirs and assignees; A dies in her lifetime; and afterwards, the testatrix dies domiciled in England, leaving personal estate here: Held, that though the meaning of the will must be construed according to the import of the terms in the Scotch law, yet the rule of English law must prevail, and the gift to A is lapsed. *Anstruther* v. *Chalmer*, 4 Law J. Chanc. 123.

By a marriage settlement, lands are settled on the first and other sons of the marriage successively in tail-male; remainder to daughters of the marriage as tenants in common in tail-general, with cross remainders between them, and the ultimate reversion in fee is limited to the husband, who afterwards, by a will, reciting that he was seised of the reversion in fee simple, expectant upon the contingency of there being no child of the marriage, or of the death of all the children of the marriage without issue, devises his said reversion in case he should die without any child or children, or, there being such, all of them should die without issue: Held, that the devise of the reversion is void. *Bankes* v. *Holme*, 1 Russ. 394. (in note).

## DIEM CLAUSIT EXTREMUM.

*Semble*—That an affidavit of danger is not necessary to obtain a *fiat* for a writ of *diem clausit extremum*.

A *diem clausit extremum* comprehends all lands devised before descent. And to ground such a writ, a *scire facias* is not necessary, where the debt is of record.

On the Court refusing a writ of *diem clausit extremum*, they will give the Crown their costs. *Rex* v. *Hassell*, 13 Price, 379, s. c. M'Clel. 105.

## DIGNITY.

*Quære*—Whether the Court will entertain a bill to perpetuate testimony to support a dignity.

Where a dignity had been entailed on A, who died, leaving two sons B and C, and a bill was filed in the lifetime of B, by his eldest son, for perpetuating evidence of his father's marriage: The bill was held, on demurrer, to be unsustainable. *Belfast* v. *Chichester*, 2 J. & W. 439.

*Quære*—Whether the Court of Chancery, when deciding on a plea, has jurisdiction to determine to which party a dignity belongs. *Strathmore* v. *Strathmore*, 2 J. & W. 541.

## DILAPIDATIONS.

An action was brought for dilapidations by a vicar against his predecessor. The plaintiff declared that the defendant was seised of the premises in question in right of his vicarage; and it appeared that the premises were copyhold, and were devised to the Master and senior Fellows of Trinity College, Cambridge, in trust, to allow the vicar for the time being, to receive the rents and profits, (the charges to the lord, and expenses for necessary reparations, being first deducted): Held, that the plaintiff could not maintain this action, as there was no seisin in the vicar. *Browne* v. *Ramsden*, 8 Taunt. 559.

The repairs which the executors of a deceased incumbent are bound to do, are those only which are absolutely necessary for the preservation of the premises, and not those which are denominated finishing repairs. And if the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber, in the estimate of dilapidations due from them. *Percival* v. *Cooke*, 2 C. & P. 460. [Best]

A sequestration for dilapidations is in general one-fifth of the incumbent's income. *North* v. *Barker*, 3 Phil. 307.

## DISCLAIMER.

A disclaimer may be, and generally is, a species of answer, and will satisfy the word *answer*, in an order of the Court. *Anon.* 3 Law J. Chanc. 94.

*Quære*—Whether a disclaimer of estate devised must be by deed.

But, at all events, it is no disclaimer for a person to refuse taking under a devise, he giving as a reason, that he claims the property in question under some other title. The disclaimer (whether it should be by deed or not,) must be of the property devised. *Doe*

*d. Smyth* v. *Smyth*, 5 Law J. K.B. 13, s. c. 6 B. & C. 112, s. c. 9 D. & R. 136.

## DISCONTINUANCE.

[See INDICTMENT.]

As a marriage settlement, the parents of the husband granted an estate to certain trustees, their heirs and assigns, for the use of themselves during their lives, and the survivor of them, with a remainder in the same manner to the husband and wife; then a remainder to the trustees, to preserve contingent remainders during the lives of the intended husband and wife, and the lifetime of the survivor, with remainder over to the heirs of the husband by the wife; and the Court held, that, inasmuch as the husband took an estate for life, with an estate tail in remainder, he did not make a discontinuance by granting a lease for three lives, with livery of seisin, because a discontinuance can only be made by tenant in tail in possession. *Doe d. Jones* v. *Jones*, 1 Law J. K.B. 100, s. c. 2 D. & R. 373, s. c. 1 B. & C. 238.

If a declaration aver, that in pursuance of an agreement, an action was *discontinued*, evidence that, since the agreement, no steps had been taken in the cause, is not sufficient to support the allegation. *Fanshawe* v. *Heard*, 3 C. & P. 190. [Burrough]

An indictment can only be legally discontinued, by the Attorney General entering up a *nolle prosequi*.

*Semble*—That a contract to discontinue an indictment is illegal, and cannot be enforced. *Elworthy* v. *Bird*, 3 Law J. C.P. 260, s. c. 2 Bing. 258, s. c. 13 Price, 222.

## DISCOVERY.

A common informer, suing for penalties incurred by gaming, under the 9th Anne, c. 11, s. 3, is not entitled to a bill for discovery. *Orme* v. *Crockford*, 13 Price, 376, s. c. M'Clel. 185.

A plaintiff at law may be forced, in equity, to make a full discovery, with respect to the different items that make up the sum, for which he brings his action at law. *Lampridge* v. *Rutt*, 1 Law J. Chanc. 13.

*Primâ facie* discovery is incidental to relief. *Angell* v. *Angell*, 1 Law J. Chanc. 6, s. c. 1 S. & S. 83.

Where an estate is in lease, A enters and receives the rent during the continuance of the lease, and afterwards remains in possession, up to a period more than twenty years distant from the time of his original entry, but within twenty years after the expiration of the lease. B brings an ejectment, and files a bill for a discovery; a demurrer to the bill of discovery is good, although the ejectment might be maintainable at law. Wherever there has been an adverse possession not accounted for by some disability, as coverture or infancy for twenty years, a court of equity ought not to interfere. *Cholmondeley* v. *Clinton*, 1 Turn. 187.

A plaintiff claiming as heir-at-law of her mother, files a bill for discovery, and for an injunction to restrain the defendant from setting up outstanding terms.—A plea, of a fine levied by the mother and her husband; of a deed, declaring the uses of the fine to the husband in fee; and of a conveyance for valuable consideration by the husband to the person under whom the defendants are stated in the bill to derive their alleged title, is a good defence, both to the discovery and to the relief. *Gait* v. *Osbaldeston*, 1 Russ. 158.

France, in pursuance of treaties, places in the hands of an agent, appointed by the Spanish government, certain monies, which are appropriated by the treaties, to the satisfaction of certain claims of Spanish subjects upon France: Held, that a court of equity will not grant a discovery and commissions to examine witnesses abroad, in aid of an action brought by a plaintiff, who, though he has no claim under the treaties, demands a portion of the funds as belonging to him under the authority of the Spanish government, directing them to be applied to the general exigencies of the state. *Mendizabel* v. *Machado*, 5 Law J. Chanc. 20, s. c. 1 Sim. 68.

A broker, in the city of London, must answer a bill of discovery, in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation, on his admission. *Green* v. *Weaver*, 6 Law J. Chanc. 1, s. c. 1 Sim. 404.

A seisor cannot avail himself of discoveries produced by his own unlawful act of seizing. *Le Louis*, 2 Dods. 242.

A bill of discovery had been generally demurred to for want of equity, the bill being in aid of an action at law, interrogating to certain facts, and whether the plaintiff had not brought an action against the defendant, in respect of the subject-matter of his demand, overruled by the defendant putting in an answer to that last question, merely in compliance with the terms of an order previously obtained by him, for time to demur, plead, or answer, undertaking not to demur alone. If any relaxation of the rule become necessary, the defendant should apply by special motion to the Court; therefore, such an application must be made before the demurrer be filed and argued, or it will be too late. *Sherwood* v. *Clark*, 9 Price, 259.

## DISTRESS.

[See LANDLORD AND TENANT.]

(A) WHO MAY DISTRAIN.
(B) WHAT MAY BE TAKEN.
(C) WHEN, WHERE, AND HOW TO BE MADE.
(D) HOW DISPOSED OF.
(E) DISTRESS FOR DAMAGE FEASANT.
(F) DISTRESS FOR POOR-RATES.
(G) ACTION FOR AN EXCESSIVE DISTRESS.
(H) ACTION FOR A RESCUE.
(I) FRAUDULENT REMOVALS.

### (A) WHO MAY DISTRAIN.

One of several co-heirs in gavelkind may distrain for rent due to him and the rest, without an express authority from his co-heirs; and, therefore, an avowry in his own right, and a cognizance as their bailiff, is sufficient. *Leigh* v. *Shepherd*, 5 B. Mo. 297, s. c. 2 B. & B. 465.

Where a lessee, by an agreement, granted the whole of the interest he had in the remainder of two

terms: Held, that he could not distrain for the rent, though it appeared that he had been paid one year's rent under the agreement, and it was expressed that the assignee should remain tenant to him during the leases. *Parmenter* v. *Webber*, 8 Taunt. 593, s. c. 2 B. Mo. 656.

By an inclosure act, the commissioners were directed to ascertain what was a fair corn-rent for the persons occupying the lands to pay to the lay impropriator or vicar in lieu of tithes. After the inclosure had taken place, a part of the lands remained uncultivated for several years. Subsequently the owner of them put in a tenant, upon whom the impropriators levied a distress for the arrears of the corn-rents, which accrued during the time the lands lay unproductive: Held, that the distress was legally made. *Newling* v. *Pearse*, 1 Law J. K.B. 140, s. c. 2 D. & R. 607, s. c. 1 B. & C. 437.

A plaintiff, by waiving his execution, entitles the landlord to distrain upon the property. *Seven* v. *Mihill*, 1 Ken. 370.

Stat. 8 Ann. c. 14, ss. 6 and 7, empowering a landlord to distrain for arrears of rent, after the expiration of the tenancy, is not confined to a holding over tortiously, or of the whole farm;—therefore, where a tenant, by agreement with a landlord, remains in possession of part of a farm, after expiration of his tenancy, the latter may distrain on that part within six months after such expiration. *Nuttall* v. *Staunton*, 3 Law J. K.B. 135, s. c. 4 B. & C. 51, s. c. 6 D. & R. 155.

A distress may be taken for arrears of a rent-charge, created by will; although the testator does not in terms give a power to distrain. That power is a consequence drawn by law from the rent-charge. *Rodham* v. *Berry*, 4 Law J. K.B. 202.

A distress for double rent cannot be made upon a weekly tenant, who holds over, after notice to quit. *Sullivan* v. *Bishop*, 2 C. & P. 359. [Best]

The right of a landlord to distrain for rent in arrear, is not superseded by his entering into an agreement to accept interest upon the arrears. *Sherrey* v. *Preston*, 2 Chit. 245.

Where a tenant took possession of a farm, under an agreement for a lease for ten years, at a yearly rent, payable at Lady-day and Michaelmas, but no precise sum was fixed on for the rent, and he occupied three years, and paid rent for two, according to the terms of the proposed lease: Held, that the landlord might distrain, although no lease was drawn up or executed.

A *custom* for a tenant to have the use of the barns and gate-rooms, for the purpose of threshing out his corn, and foddering his cattle, is a prolongation of the original term: where, therefore, a tenancy expired at Michaelmas, and the tenant was allowed till May-day following, and a rick of corn was left on the premises, the landlord having obtained an injunction restraining the tenant from carrying it off: Held, that the former might distrain at any time between Michaelmas and May-day, for the rent due at Michaelmas preceding. *Knight* v. *Bennett*, 4 Law J. C.P. 95, s. c. 3 Bing. 364.

A testator *devised* lands to his wife for life, remainder to his sons in fee, but subject to, and charged and chargeable with the payment of the yearly rent or sum of 20*l*. to the defendant during her life, to be paid by testator's wife so long as she should live, and after her decease to be paid by his sons: Held, to be a charge on land, for which the defendant might distrain; and that an avowry for the arrears of such charge might be supported. *Buttery* v. *Robinson*, 4 Law J. C.P. 108, s. c. 3 Bing. 392.

### (B) WHAT MAY BE TAKEN.

Trees, shrubs, and plants, growing in a nursery ground, are exempt from the landlord's distress. *Clark* v. *Gaskarth*, 8 Taunt. 431: s. p. *Clark* v. *Calvert*, 8 Taunt. 742.

In the 11 Geo. 2, c. 19, s. 8, the word "product" applies only to such products of the land as are subject to the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe. *Clark* v. *Gaskarth*, 8 Taunt. 431.

The goods of a principal in the hands of his factor, are not liable to be distrained. *Gilman* v. *Elton*, 6 B. Mo. 243, s. c. 3 B. & B. 75.

Goods deposited by a factor in a warehouse on a public wharf, are not distrainable for rent due in respect of the wharf. *Thompson* v. *Mashiter*, 1 Law J. C.P. 104, s. c. 1 Bing. 283, s. c. 8 B. Mo. 254.

Corn sent to a factor for sale, and deposited by him in the warehouse of a granary-keeper, is not liable to be distrained for rent. *Matthias* v. *Mesnard*, 2 C. & P. 353. [Best]

The property of an under-tenant may be distrained by the original landlord. *Brosier* v. *Tomkinson*, 2 Ken. 39.

### (C) WHEN, WHERE, AND HOW TO BE MADE.

In trover for taking a lathe under a distress for rent, it appeared that the lathe in question was in the shop of one S; that the defendant (the landlord of S), to whom a certain sum was due for rent, being in the house, and seeing the plaintiff in the act of removing the lathe, interposed, and said that he would not suffer that, or any of the other things, to go off the premises until his rent was paid; and that, afterwards, in the absence of the landlord, the plaintiff removed the lathe, and the defendant sent in a broker to distrain, and, finding that the lathe had been taken away, followed and brought it back: Held, that the act of the landlord in the first instance was the commencement of the distress, and that he had a right to follow the lathe; and, consequently, that the action was not maintainable. *Wood* v. *Nunn*, 6 Law J. C.P. 198, s. c. 5 Bing. 10, s. c. 2 M. & P. 27.

*Semble*—That, as between the landlord and the tenant, it is not necessary for a person to be left in possession of goods distrained for rent, and left on the premises. The tenant meddling with such goods would be liable to punishment for pound breach, provided the facts did not shew any intention on the part of the distrainor to abandon the distress.

But *quære*, whether such a distress would be effectual against an execution creditor, or a purchaser for valuable consideration. *Swan* v. *the Earl of Falmouth*, 6 Law J. K.B. 374, s. c. 8 B. & C. 456.

A distress cannot be made for land and assessed taxes, until there has been a demand, and a refusal or neglect to pay. And, if the demand be made, not of the person who is to pay, but on the premises charged, a reasonable interval must be allowed between the demand and a distress. *Gibbs* v. *Stead*, 6 Law J. K.B. 378.

A distress at common law must be made in a place which is part of the premises actually demised, and out of which the rent issues; and not in a place wherein the tenant has a privilege, or an easement, but which is not actually demised.

Accordingly, where a wharf was demised, with the exclusive use of a barge-way or space between high and low water-mark in a navigable river: Held, that the landlord was not entitled to distrain a barge moored to the wharf by a rope, the barge itself being over the space between high and low water-mark. *Bussard* v. *Capel*, 6 Law J. K.B. 267, s. c. 8 B. & C. 141, s. c. 2 M. & R. 197.

But held, in C. P., that where a wharf on the side of a navigable river is demised, all passes with it which is necessary to its enjoyment: And, therefore, that barges attached to the wharf by ropes, might be distrained for rent due in respect of the premises demised, as the right to attach such vessels to the wharf was absolutely necessary for its enjoyment. *Bussard* v. *Capel*, 5 Law J. C.P. 123, s. c. 4 Bing. 101, s. c. 2 C. & P. 541.

(D) HOW DISPOSED OF.

Being unable to find the tenant, is a sufficient excuse for not paying over the surplus to the tenant, after a levy and sale of his goods under distress. Notwithstanding the words in the stat. 2 W. & M. c. 5, s. 2, it is the practice to pay over such surplus to the tenant and not to the sheriff. *Stubbs* v. *May*, 1 Law J. C.P. 12.

The statute 27 Geo. 2, c. 20, s. 2, requires that a demand should be made before an action is brought against parish officers for the overplus after a distress has been made by them. The bringing of the action is not a sufficient demand, and a tender does not dispense with proof of it. *Simpson* v. *Routh*, 2 Law J. K.B. 162, s. c. 2 B. & C. 682, s. c. 4 D. & R. 161.

Where the goods of a lodger were distrained, together with the tenant's,—it was holden, that the request of the tenant justified the landlord in detaining the goods on the premises beyond the proper time of selling. *Fisher* v. *Algar*, 2 C. & P. 374. [Best]

(E) DISTRESS FOR DAMAGE FEASANT.

Sheep distrained, damage feasant, were put into an out-house, the wife of the party distraining saying, that they were going to be sent to a public pound. The owner tendered amends to the wife, who had acted for her husband on similar occasions before: Held, that the tender was made in time, and properly. *Browne* v. *Powell*, 5 Law J. C.P. 159, s. c. 4. Bing. 230.

(F) FOR POOR-RATES.

Beasts of the plough are distrainable for the poor-rates. *Hutchins* v. *Whittaker*, 2 Ken. 204, s. c. 1 Burr. 579.

A parcel of land was demised by four persons at one entire rent, to be divided and paid separately, in equal portions; and one of the four distrained upon the tenant for her own share of the rent. While her bailiff was in possession, a churchwarden and overseer of the poor, having notice of the existing distress, distrained for a poor's rate; carried away, and sold, within four days, part of the property distrained upon, not leaving sufficient to satisfy the first distrainor's demand, under a warrant of magistrates commanding him to make a distress upon the goods of the tenant, and to sell the same, unless the rate and charges were paid within four days, and return the overplus on demand: Held, first, that the first distress was regular; for, whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant, they were tenants in common, and entitled each to a separate distress. Secondly, that the defendant was not within the protection of the 24 Geo. 3, c. 44, s. 6, which requires a previous demand of the perusal and copy of the warrant; for although the strict right of property of the terre-tenant in the goods had not been altered by the first distress, and, therefore, the mere seizure of them was in obedience to the warrant, yet that seizure should have been made, subject to the pre-existing burthen upon the goods; but, not having been so made, all the overseer's subsequent acts exceeded his authority: and therefore an action on the case was maintainable by the landlady to recover from him the portion of rent left unsatisfied. *Whitley* v. *Roberts*, 1 M. & Y. 107.

The goods of the servant of an ambassador who does not reside with his master, but rents and lives in a distant house, and takes lodgers, are liable to be distrained for poor-rates. *Novello* v. *Toogood*, 1 Law J. K.B. 181, s. c. 1 B. & C. 554, s. c. 2 D. & R. 833.

(G) ACTION FOR AN EXCESSIVE DISTRESS.

An action for an excessive distress lies at the instance of a lodger against the landlord of the person under whom he occupies. *Fisher* v. *Algar*, 2 C. & P. 374. [Best]

An action on the case lies for an excessive distress, when the tenant has tendered the rent to his landlord prior to the distress being levied. *Branscomb* v. *Bridges*, 1 Law J. K.B. 64, s. c. 1 B. & C. 145, s. c. 2 D. & R. 256.

A landlord made an excessive distress. The tenant immediately entered into an agreement, authorizing the landlord to hold possession for a length of time after the five days should be expired, to sell the property by private contract, and to dispense with an appraisement. The Court held, that such an agreement did not deprive the tenant of his remedy by action for damages for the excessive distress. *Willoughby* v. *Backhouse*, 2 Law J. K.B. 174, s. c. 2 B. & C. 821, s. c. 4 D. & R. 539.

Two weeks' rent being in arrear from a weekly tenant, his landlord gave him notice to quit, and on his refusal to do so, distrained an article of furniture worth the amount of three weeks' rent, when there was one of a like description, but of less value, and sufficient to cover the rent actually due: Held, that the tenant was entitled to recover in an action on the case, for an excessive distress. *Sullivan* v. *Bishop*, 5 Law J. C.P. 8, s. c. 2 C. & P. 359.

(H) FOR A RESCUE.

*Semble*—That, in an action on the case for the rescue of goods taken under distress for rent in arrear, it is not necessary for the plaintiff to set out the deed creating the demise from himself to the tenant. *Dordey* v. *Scott*, 4 Law J. K.B. 60.

(I) FRAUDULENT REMOVALS.

The 4th section of 11 Geo. 2, c. 19, which gives the landlord a right to apply for a warrant to two Justices of the Peace in matters under 50*l.*, does not render it compulsory on the landlord to have recourse to the summary remedy, and, therefore, does not oust the superior courts from interfering.—*Semble*, that removing cattle from the premises, to a place where they are not likely to be found, although turned into an open field, is a concealment within the meaning of the act: Held, also, that this is a remedial and not a penal act. *Stanley* v. *Wharton*, 9 Price, 301.

In an action founded on the statute 11 Geo. 2, c. 19, s. 3, against a party for aiding and assisting the tenant in the fraudulent removal of his goods, with intent to prevent the landlord from distraining them, it is incumbent on the landlord not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant.

*Semble*—That the statute is so far penal, that it is incumbent in an action by the landlord against a third party, for assisting the tenant in such fraudulent removal, to bring the case by strict proof within the words of the first section. *Brooker* v. *Noakes*, 6 Law J. K.B. 375, s. c. 8 B. & C. 537.

The remedy given by stat. 11 Geo. 2, c. 19, s. 4, is cumulative; and, therefore, does not oust the courts of law of their jurisdiction.

In an action on the 11 Geo. 2, c. 19, it need not be proved that a distress was in contemplation: shewing that rent was in arrear at the period of the removal, will suffice.

In an action on the 11 Geo. 2, c. 19, for aiding in a fraudulent removal and concealment, the acts and orders of the tenant are admissible evidence of the fraud. *Stanley* v. *Wharton*, 10 Price, 138.

To support an action on the 11 Geo. 2, c. 19, against a tenant for a fraudulent removal, it is sufficient to prove that the property was removed with his privity and consent. *Lister* v. *Brown*, 3 D. & R. 501, s. c. 1 C. & P. 121.

And, *semble*, it need not be proved, that the removal took place in the night: s. c. 1 C. & P. 121. [Park]

For the goods of a tenant may be fraudulently, when not clandestinely removed; and, therefore, if they are taken away in the daytime, and with the knowledge of the landlord, yet he may give evidence of being deceived, and of having a fraud committed on him, and consequently may follow them. *Opperman* v. *Smith*, 2 Law J. K.B. 108, s. c. 4 D. & R. 33.

The order and adjudication of two justices, made on 11 Geo. 2, c. 19, s. 4, for fraudulently and clandestinely removing the goods of a tenant, not exceeding 50*l.* in value, in order to avoid a distress for rent, need not enumerate or specify the particular goods alleged to have been removed, but must find the value of them. *Rex* v. *Rabbitts*, 3 Law J. K.B. 230, s. c. 6 D. & R. 341.

A tenant, being in insolvent circumstances, sold his stock and effects by auction, at which sale his son was the principal purchaser. The son permitted the things which he bought to remain on the farm nearly two years, during which time, the receipts for rent were still given in the name of the father. To avoid a distress, the son removed the goods from the farm to his own house: the landlord followed and took them.

The Court held, in an action for trespass, for entering the house and taking the goods, that it lay in the son to shew his property in the goods, and under such circumstances, possession alone was not sufficient to maintain an action of trespass. *Whitehead* v. *Fisher*, 3 Law J. K.B. 45.

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## DISTRIBUTION.

[See EXECUTOR AND ADMINISTRATOR.]

The custom of the province of York is excluded wherever an executor is named. When a share of the residuary personal estate of a testator, who dies domiciled within the custom of the province of York, becomes lapsed by the death of one of the residuary legatees in the testator's lifetime, this lapsed residuary share will be distributed, not according to the custom, but according to the Statute of Distributions. *Wilkinson* v. *Atkinson*, 1 Law J. Chanc. 222, s. c. 1 Turn. 255—257.

The distribution of the personal property of a British domiciled subject, who dies intestate, is to be governed by the law of that part of the British empire in which he was domiciled at the time of his decease. *Curling* v. *Thornton*, 2 Add. 14.

Property distributable under a certain law, in case of intestacy, does not apply where the party is a domicile. *Curtis* v. *Thornton*, 2 Add. 21.

A testator, domiciled and resident at the time of his death in the province of York, makes a will, by which he appoints his executors, who do not take the residue of his personal estate beneficially; but makes no disposition of the beneficial interest in that residue: Held, that the residue is to be distributed according to the statute of distributions, and not according to the custom. *Fitzgerald* v. *Field*, 4 Law J. Chanc. 170, s. c. 1 Russ. 416.

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## DIVORCE.

[See BARON AND FEME, and MARRIAGE.]

A divorce is not barred by the non-establishment of the consummation of the marriage. *Patrick* v. *Patrick*, 3 Phil. 496.

A divorce bill, charging the husband with adultery and unnatural practices, admitted to proof. *Mogg* v. *Mogg*, 2 Add. 292.

Ill-treatment of the wife by the husband, or the husband by the wife, can only be remedied by divorce, on the ground of cruelty. *Orme* v. *Orme*, 2 Add. 382.

If the wife's adultery be proved, a divorce, at the instance of the husband, is not barred by shewing his improper conduct. *Sullivan* v. *Sullivan*, 2 Add. 299.

Where a deed of separation between husband and wife is so worded as to be found a presumption, that adultery will be recognized,—a divorce cannot be obtained on the ground of adultery, unless that presumption be rebutted. *Barker* v. *Barker*, 2 Add. 285.

Pending a divorce, on the ground of illegality in a marriage, parties interested in the event may be

allowed "to see proceedings in the cause, so far as relates to the marriage." *Montague* v. *Montague*, 2 Add. 372.

A husband may be barred from his right of divorce, if his forgiveness of his wife's adultery can be collected from facts and circumstances.

Where a wife institutes a suit for a divorce on the ground of her husband's cruelty, she is bound to prove his ill treatment to her, and that such ill treatment had been experienced by her without her having provoked it by her own misconduct. *Best* v. *Best*, 1 Add. 411.

Proof of incident familiarities between a wife and a medical attendant in the family of the husband—Held, to afford a presumption of adultery, and a sufficient ground for a divorce.

After sentence of divorce in the Commissaries' Court, affirmed by the Court of Session, a verdict and judgment subsequently obtained in an action for damages, finding the adultery not proven, is not admissible evidence upon an appeal to the House of Lords, to affect the sentence on the judgment of affirmance. *Boyes* v. *Baillie*, 3 Bligh, 491.

## DOCKS.

[See STATUTE.]

Under a clause in an act of parliament, exempting ships from the payment of the same port or toll duties "more than once for the same voyage out and home, notwithstanding such ship or vessel might go out and return with a loading of goods or merchandizes:" Held, that a vessel having cleared out of port at Hull, with a cargo of goods for Mogadore, on the coast of Africa, which she discharged, and there took in another cargo for London; discharged the same at London, and took in a cargo for Hull, with which she arrived at Hull, constituted two distinct voyages, and was not within the exemption. *The Dock Company at Kingston-upon-Hull* v. *Huntingdon*, 2 Chit. 597.

A monopoly, or exclusive right, cannot be inferred from doubtful words in an act of parliament; it must be given in express terms.

The Dock Company at Kingston-upon-Hull have not the right of insisting that all goods landed at their wharfs shall be carried and conveyed by their labourers; but each merchant may employ his own labourers at the wharfs. *Hull Dock Company* v. *La Marche*, 3 Law J. K.B. 10.

The limitation in the Dock Act, 39 and 40 Geo. 3, which requires that actions for anything done in pursuance, or under colour thereof, shall be brought within three months, in the name of the treasurer, applies to trover against the treasurer of the West India Dock Company, for refusing to deliver articles deposited in the West India Docks. *Sellick* v. *Smith*, 2 C. & P. 284. [Best]

## DONATIO MORTIS CAUSA.

[See DEED.]

Money due on mortgage will not pass as a *donatio mortis causâ* by a delivery of the mortgage-deed and the bond. *Duffield* v. *Elwes*, 1 S. & S. 239, s. c. 1 Law J. Chanc. 239.

E, having by his will made a certain provision for his daughter, an only child—with whom he had been offended, on account of a clandestine-marriage, (but was reconciled to her and her husband,) declared to a common friend his purpose to make a further provision for his daughter. Being on his death-bed and unable to write, he was urged by that friend to make a gift to his daughter of certain monies, secured by mortgage and bond, and expressly assented to that proposal. In the evening of the same day, being then unable to speak, he was reminded by the same friend of the transaction of the morning, and the deeds of mortgage and bond securing the monies being produced, he was informed that it was necessary to confirm the gift by a delivery of the deeds; and the friend proposed, with the father's permission, to hand over the deeds to his daughter. Upon this proposal the father made an inclination of his head, and the friend then handed the deeds across the bed, where the father was lying, to the daughter on the opposite side; whereupon the father placed the hand of the daughter upon the deeds and pressed it with his own hand for some minutes, and appeared satisfied with what he had done. The deeds in question consisted of—

1. A conveyance in fee of lands to secure £2927, with the usual covenant for payment of the money lent, and a bond by way of collateral security.

2. An assignment of a mortgage debt of £30,000, and of a judgment for that sum, recovered on a bond, with a conveyance of the land, and the usual covenant for payment of the money.

Held, that this was a valid *donatio mortis causâ*; that the property in the deeds, and the right to recover the money secured by them, passed by the delivery followed by the death of the donor, and that the real and personal representatives of the donor were trustees for the donee, to make the gift effectual. *Duffield* v. *Elwes*, 1 Bligh. N.S. 497.

## DOWER.

A, previous to his marriage with an infant, who had no fortune, by an indenture, to which her father was a party, granted a rent-charge of 100*l.* a year to trustees, for her during her life; after his decease, to be in bar of dower, and issuing out of certain lands. At the time of the execution of the indenture, he had no power of charging any jointure on those lands, but it was during his life confirmed by the remainder-man, who, A not having any sons, became entitled in possession to the lands upon A's death: Held, that the widow was barred of all claim to dower. *Corbet* v. *Corbet*, 2 Law J. Chanc. 108, s. c. 1 S. & S. 612.

An attendant term having become vested in the wife of the owner of the inheritance, as the administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for a specific performance of the agreement, pending which suit the husband dies: Held, that the widow was not entitled to dower, that she was bound to assign the term to the purchaser, and that he was bound to accept the title. *Mole* v. *Smith*, 1 Jac. 490.

Under a devise of houses and lands to the testator's son A B, in fee, charged with an annuity to his

wife, and if A B should have no children, child, or issue, the said estate, on the death of A B, to become the property of the heir-at-law, subject to legacies, &c.: It was holden, that the wife of A B was entitled to dower out of the devised premises. *Moody* v. *King*, 2 Bing. 447.

It is for the widow to elect whether she will have her dower, or take under the will. *Dickson* v. *Robinson*, 1 Jac. 503.

A bill for dowry must shew, either that the husband was seised, or that he was prevented from being seised by a fraud committed on him.

If it shew that he was not seised, and allege that his want of seisin was occasioned by a fraud committed, not on him directly, but on an ancestor, from whom he claims as heir, a demurrer to the bill will hold. *Baker* v. *Bond*, 1 Law J. Chanc. 194.

If on claim of dower by husband and wife, the husband dies, it seems the suit may proceed without a supplemental bill. *Mole* v. *Smith*, 1 Jac. 495.

## DRIVING.

In an action on the case for negligent driving, the following general rules were laid down: 1st, That, in meeting, each party shall bear to the left. 2dly, That, in passing, the foremost person, bearing to the left, the other shall pass on the off-side. But the driver of a carriage is not bound, under all circumstances, to pass another carriage on the off-side; he may, if the street be very broad, go on the near side. 3dly, That, in crossing, the driver should bear to the left hand, and pass behind the other carriage. *Wayte* v. *Carr*, 1 Law J. K.B. 63, s. c. 2 D. & R. 255.

## EASEMENT.

A right to an easement, (as a drain, a watercourse, or the like,) through the land of another, is a freehold right, and can be created only by deed. But a mere licence for such an easement may be by parol; because, until it be acted upon, it may be countermanded. *Hewlins* v. *Shipham*, 4 Law J. K.B. 241, s. c. 5 B. & C. 221, s. c. 7 D. & R. 783.

## ECCLESIASTICAL COURT.

[See SIMONY and PRACTICE].

The warrant under which a person is imprisoned, for not obeying the sentence of an ecclesiastical court, for having spoken slander of a woman, must set forth that it was slander ecclesiastical, that the Court of King's Bench may be satisfied that he is not imprisoned for having uttered slander of some other species. *Rex* v. *Maby*, 2 Law J. K.B. 34, s. c. 3 D. & R. 570.

No jurisdiction is vested in an ecclesiastical judge over the trustee under a will. Therefore, a trustee who had been committed upon a *de contumace capiendo*, under the 53 Geo. 3, c. 127, for not exhibiting an inventory of the testator's goods, was released out of custody by the Court of King's Bench. *Rex* v. *Jenkins*, 3 D. & R. 41.

The statute 27 Geo. 3, c. 44, for restraining ecclesiastical suits, in respect of fornication or incontinence, to a commencement within eight months from the time of the offence committed, applies to such offences when committed by the clergy as well as the laity, and restrains such suits accordingly, when brought for the reformation of the manners or the health of the soul of the offender.

But when a suit be brought in the ecclesiastical court against a clergyman, for the purpose of deprivation, or any other purpose merely clerical, such offences may make a part of the charge, although they may have been committed more than eight months before the commencement of the suit. *Fres* v. *Burgoyne*, 4 Law J. K.B. 266, s. c. 5 B. & C. 400, s. c. 8 D. & R. 179.

*Quære*—Whether, under the 122d Canon, the Arches Court has in any case authority to pronounce a sentence of deposition or deprivation. *Saunder* v. *Davies*, 1 Add. 291.

## EDICT.

If a modern edict does not appear, it cannot be presumed. *Le Louis*, 2 Dods, 263.

## EJECTMENT.

[See LANDLORD AND TENANT, LEASE, and MESNE PROFITS.]

(A) WHERE MAINTAINABLE.
(B) BETWEEN LANDLORD AND TENANT.
(C) DECLARATION AND SERVICE.
(D) NOTICE TO APPEAR, AND APPEARANCE.
(E) CONSENT RULE.
(F) PLEADINGS AND EVIDENCE.
(G) JUDGMENT.
(H) EXECUTION.
(I) COSTS.

### (A) WHERE MAINTAINABLE.

The owner of the soil may maintain an ejectment for land which is part of the highway, because, though the public have a right to pass over it, yet the freehold and all the profits belong to the owner; and in such an action, it is sufficient if he bring the ejectment for the land, without mentioning the building, except where the building is a messuage, and then perhaps it ought to be particularly named. *Goodtitle* v. *Alker*, 1 Ken. 427, s. c. 1 Burr. 133.

An incumbent may sustain an ejectment to recover the immediate possession of glebe lands, notwithstanding any tenancy recognized by his predecessor. *Doe d. Kerby* v. *Carter*, 1 R. & M. 237. [Littledale]

The assignee of an insolvent debtor may maintain an action of ejectment, under the 1 Geo. 4, c. 119, s. 4, without producing the original order for the discharge of the insolvent. *Doe d. Ibbetson* v. *Land*, 3 D. & R. 509.

Under the 1 Geo. 4, c. 119, and 3 Geo. 4, c. 123, the provisional assignee of the Insolvent Debtors Court may sustain ejectment. *Doe d. Clark* v. *Spencer*, 2 C. & P. 79.

To enable the visitors and feoffees of a free grammar-school to bring an ejectment for the recovery of the possession of the school-house, &c. against a schoolmaster dismissed for misconduct, his interest must be shewn to have been terminated in a regular manner. In order to effect this, he should, before dismissal, be summoned and heard in answer to the charges forming the ground of such dismissal. *Doe*

*d. Thanet* v. *Gartham*, 2 Law J. C.P. 17, s. c. 1, Bing. 351, s. c. 8 B. Mo. 360.

No ejectment can be brought by a plaintiff in a bill to restrain the setting up of outstanding terms, before the hearing of the cause, unless by leave of the Court. *Beer* v. *Ward*, 1 Jac. 194.

To support ejectment for dower, it must have been assigned. *Doe d. Nutt* v. *Nutt*, 2 C. & P. 430. [Garrow]

Possession for many years, under a deed declaratory of a beneficial interest, in which a covenant to convey the legal estate is inserted, will not raise a presumption that such estate has been conveyed to the possessors, nor entitle them to bring an ejectment. *Goodright* v. *Swymmer*, 1 Ken. 385.

The devisees of the heir-at-law may maintain an action of ejectment against the descendant of the vendee, where the tenant for life has sold the estate, notwithstanding there has been a possession of upwards of twenty years; for, after the death of the tenant for life, the *vendee* is a tenant at *sufferance* to the heir-at-law, and, therefore, no disseisin of the heir-at-law having taken place, there is not a descent cast so as to bar him or his devisees. *Doe* v. *Hall*, 1 Law J. K.B. 37, s. c. 2 D. & R. 38.

A B, seised in fee of an undivided moiety of an estate, by her will, made many years before her death, devised the same to her nephew and two nieces, as tenants in common. One of her nieces having died in her lifetime, leaving an infant daughter, A B, by another will, but which she never executed, devised the estate to her nephew, her surviving niece, and that infant. Upon the death of A B, her nephew and surviving niece by deed covenanted to carry her unexecuted will into effect, and to convey one third of the estate to a trustee, for the infant when she attained twenty-one years, or to her issue if she should die before twenty-one, leaving any; or otherwise to themselves again: but no conveyance was ever executed in pursuance of the deed. The infant died under age and without issue; but the rents were received by her trustee for her use during her life. In ejectment by the devisee of the nephew, brought above twenty years after the death of the nephew, but within twenty years after the death of the infant,—it was holden, that the adverse possession began only after the latter event, and therefore that the action was maintainable. *Doe d. Colclough* v. *Hulse*, 3 B. & C. 757, s. c. 5 D. & R. 650.

Where a person devised certain lands, and afterwards conveyed the same by lease and release, for the purpose of a marriage settlement, to trustees, in trust for the term of ninety-nine years, to pay the rents to his intended wife, for her life; and subject thereto to such uses as he, the settlor, should appoint; and for want of such appointment, to the use of himself, his heirs, and assigns for ever; it being at the same time provided, that, after the decease of his said wife, such term was to cease, determine, and be utterly void, or otherwise be assigned, as he, his heirs, or assigns, should direct: it was held, that the devise of the property was revoked by the subsequent conveyance; that on the death of the settlor's wife, in default of any appointment by the settlor, the trust ceased, and the land vested immediately in the heir, who was consequently entitled to maintain ejectment against the party in possession under the devise. *Doe d. Smith* v. *Smith*, 6 Law J. K.B. 64.

A and B entered into an agreement, that A should sell certain premises to B, if it appeared that he had a title to them, and that B should have possession from the date of the agreement: Held, that A could not maintain an ejectment against B, without a demand of possession, although the object of the action was to try the title to the premises. *Doe d. Neary* v. *Jackson*, 1 B. & C. 448, s. c. 2 D. & R. 514.

Land being proved to be copyhold, the lord is entitled to maintain ejectment for the possession, even against those who came in under the last tenant; unless they shew a right to the possession by a continuance of the tenancy, according to the custom of the manor. No demand of possession is necessary in such a case before bringing the ejectment.

Where a tenant of copyholds held for lives, and it was proved that certain persons occupied the premises after that tenant, it was presumed that they held under the title of that tenant, so that the possession was not considered adverse until the dropping of the lives. Consequently, until they dropped, the Statute of Limitations did not begin to run; and the lord, bringing ejectment within twenty years from that time, was held entitled to recover. *Doe d. Southwood* v. *Blake*, 6 Law J. K.B. 141.

### (B) BETWEEN LANDLORD AND TENANT.

Where lands have been demised until Michaelmas, and no longer, the tenant to have the use of a part of the premises until the following Lady-day, the lessor may maintain ejectment for the other part, during the period between Michaelmas and Lady-day. *Doe d. Waters* v. *Houghton*, 6 Law J. K.B. 86, s. c. 1 M. & R. 208.

A tenant died intestate, in possession of certain premises. The intestate's widow having continued to occupy the premises for several years, paying rent to the landlord, marries a second time; the other husband enters into possession, and pays rent for several years to the landlord; and upon the death of the wife, the personal representative of the first husband obtains administration of his estate and effects, and brings ejectment to oust the second husband: Held, that this action was maintainable, and no notice to quit was necessary. *Doe* v. *Bradbury*, 1 D. & R. 706.

An agreement to let certain pieces of land, containing a clause, that in case the lessor should require any part for building, the lessee upon request should give up the same, on being allowed a proportionate reduction in the rent, but comprising no clause of re-entry, only operates as a covenant, and not as a condition in defeasance of the estate, so as to enable the lessor to support an ejectment. *Doe d. Wilson* v. *Phillips*, 2 Law J. C.P. 103, s. c. 2 Bing. 13, s. c. 9 B. Mo. 46.

Where a spiritual person, by virtue of his office of chaplain of a college, held a curacy with a dwelling-house attached; and although he had ceased to hold the office of chaplain, yet retained possession of the premises: Held not to be a curate within the meaning of the 57 Geo. 3, c. 99, s. 67, and that he might be evicted by notice to quit, and was not entitled to three months' notice required to be given by that act, with the consent of the bishop. *Goodtitle* v. *Lee*, 2 D. & R. 718.

The defendant held, under one M H, certain premises, which had been devised to the latter for life.

On the death of M H, the tenant for life, possession was claimed, and rent demanded, by the heir-at-law of the devisor. The defendant, for answer, alleged, that he held as tenant to S (the husband of M H); that he had never considered the plaintiff as his landlord; that he would be at all times ready to pay the arrears to any person who should be proved to be heir-at-law, or otherwise entitled to receive it; but that he must decline taking upon himself to decide upon the plaintiff's claim without more satisfactory proof in a legal manner: Held, that this was such a disclaimer of the title of the plaintiff, as to dispense with the necessity of a notice to quit. *Doe d. Calvert* v. *Frowd*, 6 Law J. C.P. 114, s. c. 4 Bing. 557, s. c. 1 M. & P. 480.

A tenant of glebe lands under one incumbent, who holds as tenant under the successor, cannot be ejected without a notice to quit. *Doe d. Cates* v. *Somerville*, 5 Law J. K.B. 28, s. c. 6 B. & C. 126, s. c. 9 D. & R. 100.

Where A has been tenant of premises, and upon his quitting them, B takes possession, the legal presumption, until the contrary appears, is that B came in as the assignee of A; and a notice to quit, served upon B, will sustain an ejectment against A. *Doe d. Morris* v. *Williams*, 6 B. & C. 41, s. c. 9 D. & R. 30.

If a notice to a tenant, to quit a farm, be signed by a person who is not the usual agent or attorney of the landlord, and his authority to sign it is recognized by the landlord bringing an action of ejectment, it is a valid notice, especially if the tenant does any act afterwards in consequence of that notice. *Goodtitle d. Prince Eustace Sapieha and ux.* v. *Jackson*, 2 Law J. K.B. 3.

A notice to quit, dated the 27th, and served on the 28th of September, 1822, desiring the lessee to deliver up possession of, &c. at Lady-day next, or at the end of the current year,—was holden sufficient, although it was contended to be insufficient, inasmuch as, it being dated the 27th, it applied to the *then current year* on the 29th, in which case the defendant has only two days' notice. *Doe d. Huntingtower* v. *Culliford*, 4 D. & R. 248.

Service of a notice to quit on a servant at the tenant's dwelling-house, is sufficient, although the tenant be not informed of it till within half a year of its expiration. *Doe d. Neville* v. *Dunbar*, 1 M. & M. 10. [Abbott]

Where lands were devised to the rector and churchwardens of a parish, and their successors in trust,—it was holden that a notice to quit, requiring the tenant to deliver up the premises *to the rector and churchwardens for the time being*, was insufficient. *Doe d. Brooks* v. *Fairclough*, 6 M. & S. 40.

A lease contained the usual covenant to keep the premises in repair. There was also a covenant, that the landlord might go on the premises to examine their state and condition, and to leave a notice of the want of reparation, for the tenant to do the same within three months. There was a proviso for a forfeiture, if the covenants were not performed.

The landlord left such a notice; but before the expiration of the three months he brought an action of ejectment:—the Court held, that giving the notice was a waiver of the forfeiture, and that an action of ejectment would not lie until the three months had expired. *Doe d. Morecroft* v. *Meux*, 4 Law J.K.B. 4, s. c. 4 B. & C. 606, s. c. 7 D. & R. 98.

Pending a notice to quit, an action of ejectment, to recover premises for the breach of the covenants to pay rent and repair, cannot be maintained, as the notice seems to be a waiver of the forfeiture, and a continuation of the tenancy. *Doe d. Scott* v. *Miller*, 2 C. & P. 348. [Best]

Where the owner of premises gave notice, which required that the party in possession should quit the premises he then occupied at *Lady-day* next, it was held not to be conclusive evidence of a demise from the testator to the party in possession. *Doe d. Wilcockson* v. *Lynch*, 2 Chit. 683.

A landlord entered into an agreement with a tenant, to grant a lease of some premises then occupied by him, for a term, to commence at a day then past. A lease was never executed. The tenant paid the rent, according to the agreement; more than six months prior to the expiration of the term, the tenant was served with a notice to quit. He held over, and then he was served with notice that an action of ejectment would be brought:—the Court held, that the holding was such as came within the meaning of 1 Geo. 4, and that the notice to quit was a sufficient notice to give up the possession, and, therefore, that the tenant was bound to give the undertaking and the security required by that statute. *Doe d. Anglesey* v. *Roe*, 1 Law J. K.B. 137, s. c. 2 D. & R. 655.

Where the landlord, after notice to quit and verdict obtained in ejectment, the tenant still continuing in possession, distrained for rent: Held, that this afforded no ground for disturbing the verdict or staying the execution; the tenant should have disputed the distress. *Doe d. Holmes* v. *Darby*, 8 Taunt. 538, s. c. 2 B. Mo. 581.

When the Master is directed to ascertain what security ought to be given by a tenant, pursuant to 1 Geo. 4, c. 87, s. 1, the Court at that time ought to fix the period at which the recognizances are to be entered into, and if it be not then done, the Master cannot appoint a time. *Doe d. Anglesea* v. *Brown*, 1 Law J. K.B. 150, s. c. 2 D. & R. 688.

A rule was granted against a tenant, under 1 Geo. 4. c. 87, and it was entitled *Doe d. &c.* v. *Roe*. On default, judgment was entered up, and that rule was entitled *Doe d. &c.* v. *A.*, the name of the tenant; and the Court held that it was regular. *Doe d. Anglesey* v. *Brown*, 1 Law J. K.B. 245, s. c. 3 D. & R. 320.

A tenancy for years, determinable on lives, is not a holding for "any term or number of years certain" within the 1 Geo. 4, c. 87, s. 1. *Doe d. Pemberton* v. *Roe*, 5 Law J. K.B. 289, s. c. 7 B. & C. 2.

A husband, by a marriage settlement, was empowered to grant leases for twenty-one years, but no longer, and he granted a lease to A for ninety-nine years, determinable upon lives; the wife survived him, and conveyed the fee to B, and the conveyance recited the lease to A, who was recognized as then being tenant in possession of the estate, at the yearly rent reserved. In an action of ejectment by B, against the assignees of the lease, the Court held, that, the lease being void, and the rental being only matter of description, no demand of possession was necessary. *Doe d. Biggs* v. *White*, 1 Law J. K.B. 170.

A lease contained a proviso, that if the rent should be in arrear for twenty-one days after due, the landlord might re-enter without making any demand

of the rent: The Court held, that if the rent were in arrear, then the landlord could maintain an action of ejectment, without making any demand or entering on the land, although there were sufficient goods on the premises to satisfy the rent. *Doe d. Harris* v. *Masters*, 2 Law J. K.B. 117, s. c. 4 D. & R. 45.

Where the lessor went upon the land, and addressing himself to an under-tenant said, "I am come to demand rent," it was adjudged a sufficient demand to sustain an ejectment for a forfeiture for non-payment of rent. *Doe d. Brook* v. *Bridges*, 1 Law J. K.B. 9, s. c. 2 D. & R. 29.

In ejectment on a clause of re-entry for non-payment of rent, if the landlord shews that he was prevented by the defendant from entering on the premises to distrain, he is entitled to recover, under the stat. 4 Geo. 2, c. 28, s. 2, without shewing that there was actually no sufficient distress on the premises. *Doe d. Chippendale* v. *Dyson*, 1 M. & M. 77. [Tenterden]

In a lease from lessee to under-lessee, it was provided, that, if under-lessee were guilty of a breach of covenant, lessee and lessor might enter: Held, that on breach of covenant in the lease to under-lessee, ejectment might be maintained by lessee alone. *Doe d. Bedford and Wheeler* v. *White*, 5 Law J. C.P. 173, s. c. 4 Bing. 276.

### (C) DECLARATION AND SERVICE.

The copy of a declaration in ejectment was written on both sides of the paper. The Court treated it as a nullity, and set aside the judgment against the casual ejector. *Doe d. Morris* v. *Bowdler*, 1 Law J. K.B. 145.

A declaration of ejectment may be served on a labourer, if he be the tenant in possession, though he pays no rent. *Gulliver* v. *Swift*, 2 Ken. 511.

Service of declaration in ejectment on one of two joint tenants, is good; but if the notice to appear be addressed to one only by name, it is irregular, and will not entitle the lessor of the plaintiff to move for judgment against the casual ejector. *Doe d. Williamson* v. *Roe*, 3 Law J. C.P. 202, s. c. 10 B. Mo. 493.

A declaration, addressed to a person who was not the tenant in possession, but served upon him who really was the tenant, is not sufficient. *Doe d. Chambers* v. *Roe*, 6 Law J. K.B. 324.

A declaration in ejectment served on the wife of the tenant in possession, without stating that it was served at the husband's house, or on the premises, is insufficient, and, therefore, cannot support a rule for judgment against the casual ejector. *Right d. Bensall* v. *Wrong*, 2 D. & R. 84.

The service of a declaration in ejectment on the wife of the tenant in possession, her husband having absconded, was holden insufficient to found judgment against the casual ejector. *Doe d. Harrison* v. *Roe*, 10 Price, 30.

Service on the daughter of the tenant on the premises is sufficient, if she afterwards says, that she delivered it to her father before the essoign day of the term. *Doe* v. *Jones*, 1 Law J. K.B. 117.

Where the tenant in possession was confined to her bed-room, service of a declaration in ejectment on her daughter held sufficient, for a *rule nisi*, where the daughter, before the essoign day of the term, read it to her mother. *Doe* v. *Roe*, 1 Law J. K.B. 26, s. c. 2 D. & R. 12.

An acknowledgment of the receipt of a declaration in ejectment, must be express that the party received it before the essoign day of the term. *Doe* v. *Roe*, 4 Law J. K.B. 37, s. c. 5 B. & C. 764, s. c. 8 D. & R. 593.

A declaration in ejectment being served on the servant of the tenant in possession, with a subsequent acknowledgment from the attorney of the latter, that the declaration had been received, is sufficient for a rule *nisi*. *Doe d. Teverell* v. *Snee*, 2 D. & R. 5.

A declaration in ejectment served on the servant on a Saturday, coupled with an acknowledgment by the tenant on a Sunday, insufficient for judgment against the casual ejector. *Goodtitle d. Mortimer* v. *Notitle*, 2 D. & R. 232.

Motion for judgment against the casual ejectors in two ejectments. In the first, the service was on the wife and every one on the premises. In the second, the service was on the servant.

The tenant acknowledged that he had received the first ejectment before the essoign day.

In the second case, the notice was directed to a particular person, viz. *Joseph* Jackson instead of *John* Jackson, which *Joseph* Jackson was, however, designated as tenant in possession. John Jackson acknowledged the service before the essoign day: *Rule absolute* in the first ejectment: *Rule nisi* in the second. *Doe* v. *Roe*, 3 Law J. K.B. 244.

Service of the declaration in ejectment for a wharf is sufficiently good if a copy is left with a servant at the wharf, and another at the house of the tenant, which is at some distance from the wharf. *Doe* v. *Roe*, 1 Law J. K.B. 89.

The declaration in ejectment was pushed through a hole in the shutter into the house, because the tenant, although he would talk through an aperture in the shutter, kept the house baricadoed, and would not take it. The Court granted a rule to shew cause why that should not be deemed good service, and allowed the rule to be served in the same manner. *Doe* v. *Roe*, 1 Law J. K.B. 157.

In ejectment for premises which had been demised on lease to one person, who had underlet to others: it was holden to be necessary to serve all the under-tenants with a copy of the declaration. Where the tenant of a house locked it up and quitted it, and the landlord three months afterwards fixed a copy of a declaration in ejectment to the door: It was holden, that the service was not sufficient, but that the landlord should have treated it as a vacant possession. *Doe d. Darlington* v. *Cock*, 4 B. & C. 259.

On an affidavit that the house was shut up, and that three or four separate applications had been made there to serve a declaration in ejectment, but that the tenant kept out of the way, a rule *nisi* was granted, to shew why the sticking the declaration on the principal doors should not be deemed good service. *Anon.* 3 Law J. K.B. 237.

On an application that a person might be compelled to appear and plead to an action, brought to recover possession of premises claimed by the lessor of the plaintiff, as heir-at-law, the affidavit stated that no person was in possession, and that a copy of the declaration had been affixed on the outer door: Held, that the heir-at-law must take possession, and

serve the above person with a copy of the declaration. *Doe d. Younghusband* v. *Roe*, 6 B. Mo. 480.

On motion for judgment against the casual ejector, the affidavit stated, that the premises were *apparently* deserted, and that there were not any tenants or tenant in possession: Held sufficient. *Anon.* 6 Law J. C.P. 48.

On an affidavit for judgment against the casual ejector, it was sworn that the lessee had got possession of land under an agreement for a building lease, and that he had assigned houses built thereon, and that he (the assignee) and the occupiers had been served with a copy of the declaration, and that copies had also been stuck on the doors of the house unoccupied: The Court ordered the rule to be confined to the persons in the possession of the premises, and who had been actually served. *Doe d.* —— v. —— 5 Law J. C.P. 107.

The 4 Geo. 2, c. 28, s. 8, substitutes the service of a declaration in ejectment, in lieu of a formal demand of rent, to work a forfeiture. And it is no ground of nonsuit in an action of ejectment, that the service of the declaration is on a day subsequent to that of the demise to John Doe, if it appears that there is rent in arrear, and no distress on the premises at the time the declaration is served. *Doe d. Lawrence* v. *Shawcross*, 3 B. & C. 752, s. c. 5 D. & R. 711.

### (D) NOTICE TO APPEAR, AND APPEARANCE.

A notice to appear in ejectment, directed the tenant's appearance *in eight days of St. Hilary*, instead of *in Hilary term generally*: Held, that the notice was a nullity, and therefore final judgment could not be signed, but the party must bring a fresh ejectment. *Lackland d. Dowling* v. *Badland*, 8 B. Mo. 79.

In all country ejectments which shall be served before the essoign day, either of Michaelmas or Easter term, the time for the appearance of the tenant in possession must be within four days after the end of such Michaelmas or Easter term, and must not be postponed until the fourth day after the end of Hilary or Trinity term next respectively following. *Reg. Gen.* 5 B. Mo. 637, 2 B. & B. 705. 4 B. & A. 539.

Tenants in possession in country ejectments, served before the essoign of Michaelmas or Easter term, must appear within four days after the end of such term. *Reg. Gen.* 9 Price, 299.

### (E) CONSENT RULE.

In actions of ejectment, the common consent rule extends to compel the defendant to specify for what premises he intends to defend, and to admit possession by himself, or tenant, at the time of service of the declaration in ejectment. *Reg. Gen.* 9 Price, 299.

It being contrary to the meaning of the common consent rule, to put the plaintiff to proof of the defendant being in possession, it is ordered, that from henceforth the defendant shall specify in the consent rule for what premises he intends to defend, and shall confess upon the trial that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff. *Reg. Gen.* 5 B. Mo. 310, 2 B. & B. 470, 4 B. & A. 19.

Where, upon an ejectment against the tenant in possession, who came into possession as tenant of the lessor of the plaintiff, a third person, having an adverse title, entered into a consent rule, to defend as landlord, the Court discharged the consent rule with costs. *Doe d. Horton* v. *Rhys*, 2 Y. & J. 88.

### (F) PLEADINGS AND EVIDENCE.

It is enacted, by the 59 Geo. 3, c. 12, s. 17, "that in all actions and indictments respecting parish lands, it shall be sufficient to name the churchwardens and overseers of the poor for the time being, describing them as the churchwardens and overseers of the parish for which they act, and naming such parish." In an action of ejectment, the demises were laid in one set of counts, in general words, by the churchwardens and overseers; and in another set, by several persons by name, without any description of their offices: Held, after verdict, the objection, if any, was cured. *Doe* v. *Harper*, 1 Law J. K.B. 171, s. c. 2 D. & R. 708.

In ejectment by the lessor of the plaintiff, as heir-at-law of the person last seised: Held, that it was not necessary for him to prove that he was born in wedlock; and that general reputation of the marriage of his parents was sufficient, although his father was still alive. *Doe d. Fleming* v. *Fleming*, 5 Law J. C.P. 169, s. c. 4 Bing. 266.

Where an incumbent was presented upon the cession of the former incumbent,—it was holden, that the recital of the cession in the letters of institution was *primâ facie* evidence of the cession having been duly made, without other proof of formal resignation, and therefore sufficient to support an ejectment. *Doe d. Kerby* v. *Carter*, 1 R. & M. 237. [Littledale]

The presumption of law, that waste land on the side of the highway is the property of the owner of the adjoining soil, is applicable to copyholders as well as freeholders; and is good *primâ facie* evidence of the title of such owner, in an action of ejectment for the recovery of that land. *Doe* v. *Pearsy*, 5 Law J. K.B. 310, s. c. 7 B. & C. 304.

A lessee who refuses to take as tenant under a lease, cannot set up that lease to defeat the lessor in an action of ejectment. *Doe d. Fentiman* v. *Virgo*, 4 Law J. K.B. 283.

A tenant may shew that his landlord's title has terminated, where an action of ejectment is brought by the latter against the former; but where an action of ejectment was brought by the reversioner, whose interest was the same as that of the tenant for life, and the tenant for life had paid rent to the reversioner: Held, that he could not shew that the reversioner's interest had terminated, but he might shew some antecedent title in the person under whom he claimed to hold. *Doe d. Colmere* v. *Whitroe*, 1 D. & R. N.P.C. 1. [Abbott]

Where a trustee has possession of the counterpart of a lease, and refuses to produce it, the Court will grant a rule to shew cause why an attested copy, being annexed to the notice, under 1 Geo. 4. c. 87,

should not be sufficient. *Doe d. Tidd* v. *Roe*, 1 Law J. K.B. 6.

In ejectment on a forfeiture, occasioned by the non-performance of a covenant in a lease, evidence of the omission to comply with that covenant should be given; as, if it be for the non-payment of rent, a demand must be shewn. *Doe d. Chandless* v. *Robson*, 2 C. & P. 245. [Abbott]

The attorney for the lessor of the plaintiff in ejectment, obtained from the defendant an existing lease to him, of the premises in question, for the purpose of preventing the defendant from setting it up as a defence to the action, and afterwards produced it at the trial, pursuant to notice from the defendant: Held, that he had thereby admitted the validity of the lease, and that it might be read in evidence on the part of the defendant, without proof of its execution. *Doe d. Tyndall* v. *Hemming*, 6 B. & C. 28, s. c. 9 D. & R. 15.

Under a power to lease, reserving the ancient and accustomed duties, &c., and so as there be contained a power of re-entry for non-payment of rent, &c., a lease having been executed, reserving a re-entry in case the rent should be in arrear for fifteen days, and there should be no sufficient distress on the premises. Held, that upon a trial in ejectment by the reversioner against the lessees, evidence was properly admitted, and introduced into the special verdict, that the usual form of leases of the lands, subject to the power before and after the date of the settlement creating the power, was similar as to the reservation of rent, and the proviso for re-entry in case of non-payment to the lease in question. *Smith* v. *Earl of Jersey*, 3 Bligh, 290.

Where the defendant inclosed and built a cottage on land which was parcel of the waste, and after enjoying the same for thirty years without payment of rent, paid 6*l.* rent to the owner of the adjoining land on three several occasions,—in ejectment it was holden, that the three successive payments of rent were conclusive of an acknowledgment that he was tenant by permission.—*Semble aliter*, if the defendant had only made one payment of 6*l.*, for it might be considered that he paid it in ignorance of his right. *Doe d. Jackson* v. *Wilkinson*, 3 B. & C. 413, s. c. 5 D. & R. 273.

Where the vendee of a term, under an execution, brought an ejectment,—it was holden sufficient to produce the *fi. fa.* without producing a copy of the judgment. *Doe d. Batten* v. *Murless*, 6 M. & S. 110.

In an action of ejectment, touching the freehold of a testator, his executor, who takes a pecuniary benefit under the will in respect of the personalty, is nevertheless a competent witness to support the will as to the freehold. *Doe d. Wood* v. *Teague*, 4 Law J. K.B. 261, s. c. 5 B. & C. 335, s. c. 8 D. & R. 63.

In ejectment, the collector of taxes having charged himself with having received a certain sum of J Y, is evidence to shew that J Y is tenant. *Doe d. Smith* v. *Cartwright*, 1 C. & P. 218. [Abbott]

### (G) JUDGMENT.

Where in ejectment A was admitted to defend alone as landlord, and died before the termination of the action, having devised all his real estates to B, and the Statute of Limitations prevented the lessor of the plaintiffs from bringing a fresh ejectment, the Court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution thereon, unless B would appear and defend the action as landlord. *Doe d. Grubb* v. *Grubb*, 5 B. & C. 457.

A tenant in possession in ejectment, having undertaken to appear and take short notice of trial, did not do so, nor offer any defence, on which final judgment was signed, and the lessor of the plaintiff was afterwards served with a writ of error, the Court allowed him to take out execution on his judgment against the casual ejector. *Doe d. Morgan* v. *Frisby*, 3 Law J. C.P. 222, s. c. 3 Bing. 169.

An interlocutory judgment signed in an action of ejectment, will be set aside, so as to defeat a writ of possession, on the ground that the attorney had made an affidavit, stating that the landlord and tenant had instructed him to enter an appearance, which he had omitted to do, owing to circumstances which had personally affected him; and stating that he believed the parties had a good defence without adding "on the merits." *Doe d. Shaw* v. *Roe*, 13 Price, 260.

In ejectment after judgment against the casual ejector, the Court set it aside on payment of costs, where there had been no trial, in order to let the landlord in to try his right on the merits, he having had no notice given by the tenant in possession of the proceedings, and therefore, no trial on the merits. *Doe d. Ingram* v. *Roe*, 11 Price, 507.

If judgment be signed against the casual ejector, in consequence of the tenant not having given the landlord notice of the proceedings; and the Court set it aside on payment of costs;—they will not entertain a rule obtained by the landlord, calling on the tenant to shew cause why he should not pay the costs of signing the judgment, the proper remedy, it seems, being by action. *Doe d. Ingram* v. *Roe*, 11 Price, 507.

Judgment against the casual ejector cannot be obtained in a subsequent term. *Anon.* 2 Ken. 272.

The Court set aside a judgment in ejectment, which had been signed through the mistake of an attorney, on payment of costs. *Doe* v. *Roe*, 1 Ken. 380.

The Court will set aside a judgment on an action of ejectment, where it has been prematurely signed. *Doe* v. *Hedges*, 4 D. & R. 393.

In an action of ejectment it is unnecessary to produce the *postea* at the period of signing judgment of nonsuit; and it seems, that if the defendant in ejectment does not appear to confess lease, entry, and ouster, and is in consequence nonsuited, judgment may be signed on the first day of the following term, and that a writ of possession may be sued out on the same day. *Doe d. Davies and Wife* v. *Roe*, 1 Law J. K.B. 57, s. c. 1 B. & C. 118, s. c. 2 D. & R. 229.

Where judgment was given in ejectment for a messuage "and tenement," it was held to be good, as, although ejectment lay not for a "tenement" by name; yet the objectionable phrase being in a count in which there was a good description, the judgment was held to refer to the good description. *Doe d. Lawrie* v. *Dyball*, 6 Law J. K.B. 317, s. c. 8 B. & C. 70.

### (H) EXECUTION.

Where landlord defends, and a verdict and judgment are obtained against him in ejectment, there

is no necessity for any further order of the Court, to enable the plaintiff to sue out execution. *Doe d. Lucy* v. *Bennett*, 4 B. & C. 897, s. c. 7 D. & R. 261.

(I) Costs.

The Court will not stay proceedings in a writ of right, until the costs of a former action of ejectment between the same parties, and for the recovery of the same premises, are paid. *Chatfield and wife, demandants; Souter, tenant*, 3 Law J. C.P. 221, s. c. 3 Bing. 167.

If the Court see that injustice has been done to a poor man in an action of ejectment, they will not order him to pay the costs before he proceeds in another action of ejectment. *Doe d. Rees* v. *Thomas*, 2 Law J. K.B. 94, s. c. 4 D. & R. 145, s. c. 2 B. & C. 622.

Where in an action of ejectment the lessor having died after the commission day of the assizes, but antecedent to the trial, at which the Judge directed a nonsuit: Held, that under the consent rule the executor of the lessor was not liable to pay costs. *Doe d. Pain* v. *Grundy*, 1 Law J. K.B. 117, s. c. 1 B. & C. 284, s. c. 2 D. & R. 437.

A reference will not be ordered to be made to the prothonotary, for him to take an account of monies receivable by the lessor of the plaintiff, in respect of annuities, or to ascertain the costs in an action of ejectment. *Doe d. Johnson* v. *Roe*, 6 B. Mo. 331.

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## ELECTION.

[See Devise, Legacy, and Parliament.]

The right of election vests where a person has an interest independent of the testator, who gives to such person a benefit on condition of the former right being relinquished, in which case the party is entitled to know the precise value previous to electing. *Pigott* v. *Bagley*, 1 M. & Y. 569.

An actual election, and a duty to elect, are not synonymous, and a party can never be held to have actually elected unless it can be collected from the circumstances that there was a distinct apprehension in his mind that he was bound to elect, and that his particular acts, alleged to constitute the election, were intended by him to have that effect. *Edwards* v. *Morgan*, M'Clel. 541.

Where a testator had directed his executors to sell whatever real estates he might die possessed of, and having given benefits to his heir-at-law, afterwards acquired other lands,—it was holden, that the heir was not bound to elect. *Back* v. *Kett*, 1 Jac. 534.

It is for the widow to elect whether she will have her dower, or take under the will. *Dickson* v. *Robinson*, 1 Jac. 503.

If a moiety of gavelkind lands be devised by a testator to his wife, and to A and B in trust, for and during her widowhood, and the other moiety be devised to his children:—the wife must elect whether she will take under the devise, or claim her dower. *Roberts* v. *Smith*, 1 S. & S. 513.

A testator bequeaths to his wife an annuity charged on his lands at S, with power of distress and entry; and, subject to annuities and legacies, he devises and bequeaths all his real and personal estate to trustees, upon trust to manage the farm then in his possession, (which consisted of the greater part of his estate at S,) and to manage and let the residue of the real estate, and apply the rents as therein mentioned: Held, that the widow must elect between the benefits given her by the will, and her dower. *Roadley* v. *Dixon*, 5 Law J. Chanc. 170.

A testator bequeathed to his wife during her life, four-sevenths of the income of his general residuary estate, in which he intended to include a Scotch heritable bond, but the infant heir having elected, under the order of the Court, to claim against the will, took that bond by his legal title, subject to the widow's right to terce: Held, that the widow must elect, and that although disappointed of the four-sevenths of the interest of the bond debt, which the testator meant her to enjoy, she must, if she claimed what he had effectually bequeathed to her, bring in her part to increase the general residuary estate. *Reynolds* v. *Torin*, 1 Russ. 129.

Previous to marriage, the intended wife settles freeholds and leaseholds in such a manner that the husband takes nothing beyond an equitable life-estate in them, except in the event of her dying in his lifetime without making any appointment; he, by another deed of the same date, gives her a life interest in his estates; afterwards, by his will, having devised to her his estates for her life, and bequeathed to her other benefits, he directs, that what he has thus devised and bequeathed to her, shall be in satisfaction of all claims upon his estates and property that she may have under the settlement made by him previous to marriage, or in any other manner: Held, that this proviso does not raise a case of election against the wife with respect to what was originally her own property; and that she may take all the benefits given her by the will, and retain a leasehold, part of her own estate, which her husband was bound to renew, but had renewed in his own name. *Coleman* v. *James*, 6 Law J. Chanc. 16.

A testatrix having under her marriage settlement a power to appoint among children, appoints by her will a part of the fund to grandchildren, and gives benefits to those who would take in default of appointment: Held, that those who can defeat this undue appointment must elect between their claims under the marriage settlement, and the benefits given them by the will. *Prescott* v. *Edmunds*, 4 Law J. Chanc. 111.

Where parties having a right to elect between two titles, under one of which they are tenants for life, and under the other tenants in fee simple, continued in possession for forty-three years, and executed deeds reciting that they held under the former title: Held, that their heir-at-law was precluded from claiming the fee under the latter. *Dillon* v. *Parker*, 1 Jac. 505.

The principle of election does not apply, where a testator has not in form given property which belongs to others, but only alludes to it as devoted to a purpose to which he had appropriated it, but to which he had no power to appropriate it. *Attorney General* v. *the Earl of Lonsdale*, 5 Law J. Chanc. 99, s. c. 1 Sim. 105.

A testatrix directed all the copyholds which were then, or might thereafter be vested in her, to be sold, and distributed a fund, of which the proceeds of this sale were to form part, among her three

children: during her life, she was in the possession of some copyholds, which it was erroneously supposed had passed to her under her husband's will: after her death, the eldest son recovered them in ejectment, as customary heir of his father: Held, that he was not to be put to elect between his legal right, as customary heir, and the benefits given him by the testatrix's will. *Blomart* v. *Player*, 5 Law J. C.P. 74.

## ELEGIT.

An elegit does not include copyhold lands. *Morris* v. *Jones*, 3 D. & R. 603, s. c. 2 B. & C. 242.

Under a second elegit, the residue of the lands cannot be extended, but only a moiety; and if the residue be extended, it is void, and an application to set the same aside is unnecessary. *Morris* v. *Jones*, 2 B. & C. 242, s. c. 3 D. & R. 603.

Possession was taken of lands under an elegit. It was alleged that more money had been received than the amount of the judgment.

The Court referred it to the Master, to ascertain the amount of the money received; and ordered the plaintiff to restore the lands, if he had received all that was due to him. *Price* v. *Varney*, 3 Law J. K.B. 107, s. c. 3 B. & C. 733, s. c. 5 D. & R. 612.

The testator devised lands to M J for life; then to the use of Lord Ducie and T E, in trust for W J for life; and, after the death of W J, for R E C for life, remainders over; with a declaration that the testator had so limited the estate to the use of the trustees, to the intent that the legal estate so vested in them might support the several contingent limitations subsequent to the estate limited in trust for W J. In Easter term 1815, the plaintiff recovered a judgment against R E C, which judgment was revived by *sci. fa.* in Hilary term 1826, and execution by *elegit* issued thereon in April following. In December 1825 the trustees made a conveyance of R E C's interest for the benefit of his creditors: Held, that, the legal estate being in the trustees at the time of the judgment, and they having conveyed it before execution sued, it could not be taken by virtue of the elegit. *Harris* v. *Pugh*, 5 Law J. C.P. 159, s. c. 4 Bing. 335.

Where an elegit is not awarded within a year and a day after judgment has been obtained, a *scire facias* is necessary. *Rutland* v. *Newnham*, 2 Chit. 384.

## EMBEZZLEMENT.

[See stat. 7 & 8 Geo. 4, c. 29, ss. 47, 49.]

A journeyman who is in the habit of receiving money on his master's account, is as such within the embezzlement act, 39 Geo. 3, c. 85. *Rex* v. *Barker*, 1 D. & R. N.P.C. 19.

If a servant generally employed by his master to receive sums of one description and at one place only, is employed by him in a particular instance to receive a sum of a different description, and at a different place, this latter sum is to be considered as received by him by virtue of his employment. He fills the character of servant; and it is by being employed as servant that he receives the money. *Rex* v. *Smith*, 1 R. & R. C.C.R. 516.

The servant to several partners, is the servant to each, as well as to them all; therefore, if he embezzle the property belonging to one of them, he may be charged as his servant. *Rex* v. *Leach*, 3 Stark. 70. [Bayley]

If a clerk, on receiving money on his master's account, fraudulently secretes, makes away with, or converts notes to his own use, he is guilty of an embezzlement, though he afterwards places them to his master's account, to supply another deficiency. *Rex* v. *Hall*, 3 Stark. 67. [Bayley]

It is unsettled, whether the offence of embezzlement is constituted by a clerk receiving money, and appropriating it to his own use, where receiving money is no part of his employment. *Rex* v. *Wellings*, 1 C. & P. 315. [Park]

The statute of 52 Geo. 3, c. 63, for preventing the embezzlement of securities, by agents &c., applies only to persons to whom such securities, &c. are entrusted, in the exercise of their function or business. *Rex* v. *Prince*, 2 C. & P. 517, s. c. 1 M. & M. 21. [Abbott]

Where a saving bank had been formed by the defendant, consisting of 130 members, each of whom paid a weekly subscription, and the defendant, after receiving from the subscribers their deposits, absconded. Held, not to be "an agency," or "keeping for safe custody," within 52 Geo. 3, c. 63. The indictment having charged the prisoner with embezzling the total amount paid by the prosecutrix; whereas it appeared that she never had more than one weekly payment in her hands at a time—this was held a fatal variance. *Rex* v. *Mason*, 1 D. & R. N.P.C. 22.

The articles specifically embezzled ought to be set out in the indictment: hence, where an indictment on the 39 Geo. 3, c. 85, against a servant for embezzlement, stated, that he "took and received, on account of his master, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 10*l.* and afterwards embezzled the same," —it was holden, too uncertain. *Rex* v. *Flower*, 5 B. & C. 736, s. c. 8 D. & R. 512.

If a prisoner, indicted for embezzlement, does not know the specific acts of embezzlement intended to be charged against him, he should apply to the prosecutor for a particular of the charges; and if it be refused, the Judge will, on motion, supported by proper affidavits, grant an order for such particular to be given, and postpone the trial, if necessary.

Such particular ought, at least, to state the names of the persons from whom the money is alleged to have been received.

It was the duty of a clerk to receive monies daily at N, to enter all such monies so received in a book, and to remit the amount weekly to L. His entries were all correct, and admitted the receipt of all the monies; but he did not remit them to L, as was his duty. Held, no embezzlement. *Rex* v. *Edward Hodgson*, 3 C. & P. 422. [Vaughan]

To support an indictment for embezzlement, a receipt on unstamped paper is not admissible. *Rex* v. *Hall*, 3 Stark. 67. [Bayley]

On an indictment against a steward for embezzlement, proof of his acting as such is established by

evidence that he received the money in that capacity. *Rex* v. *Beacall*, 1 C. & P. 310. [Park]

Where an indictment for embezzling corporation money, laid the offence to be against "the directors of the poor of the said parishes," and it appeared that the act of incorporation named them "the guardians of the poor of those parishes:"—it was holden, that the former description was incorrect. *Rex* v. *Beacall*, 1 R. & M. C.C.R. 15.

## ENGINEER.

A, an engineer, employed by B, is liable to C for any injury done to him, by the works which he has constructed on the premises of B, as long as they are under his management or controul. *Witte* v. *Hague*, 1 Law J. K.B. 9, s. c. 2 D. & R. 33.

It seems, that although the maps &c. of an engineer may be incorrect, yet he is entitled to a remuneration for journies made respecting them. *Taylor* v. *Higgins*, 1 Law J. K.B. 19.

An engineer is not to be influenced by the result of the experiments of others given to him by his employer, since it is his duty to ascertain the end required by his own experiments. *Moneypenny* v. *Hartland*, 2 C. & P. 378. [Best]

If an engineer, employed to make an estimate of the expense of intended works, makes a very low calculation, and thereby induces persons to subscribe who would not otherwise do it; upon this estimate turning out to be incorrect, either from negligence or want of skill, he is not entitled to any compensation. *Moneypenny* v. *Hartland*, 2 C. & P. 378. [Best]

## ENTAIL.

A pursuer asserting in an action of *declaratur* a right unlimited-fiar of lands has power to execute, and is bound by a deed of entail restricting his estate to a life-rent. *Hotchkis* v. *Dickson*, 2 Bligh, 303.

## EQUITY.

[See PRACTICE.]

If a party loses, by his own negligence, the benefit of his legal remedy, that does not entitle him to the assistance of equity. *Drewry* v. *Barnes*, 5 Law J. Chanc. 47.

The Court will not interfere on behalf of a plaintiff, who claims relief, not through direct equities of his own, but indirectly through the equities of other parties, on which equities those parties themselves do not insist. *Roberts* v. *Bryen*, 3 Law J. Chanc. 130.

A bill will not lie tocompel a rector to resign in favour of another in compliance with a covenant for that purpose. *Newdigate* v. *Helps*, 6 Mad. 133.

The reference by a court of equity to a court of law, is according to the course of a court of equity, and ought not to be impeached. *Lansdowne* v. *Lansdowne*, 2 Bligh, 97.

## ERROR.

(A) WHERE A WRIT OF ERROR LIES.
(B) EFFECT OF.
(C) PROCEEDINGS.
(D) BAIL IN ERROR.

### (A) WHERE A WRIT OF ERROR LIES.

A writ of error is grantable *ex debito justitiæ*. *Bleasdale* v. *Darby*, 11 Price, 606.

A writ of error does not lie to the Exchequer Chamber from the King's Bench, in a cause in prohibition. It must be brought returnable at once in parliament. *Free* v. *Burgoyne*, 4 Law J. K.B. 300, s. c. 5 B. & C. 765, s. c. 8 D. & R. 587.

The record stated a verdict for the plaintiff on twelve counts, and that the jury were discharged on eight others. The issues on these latter counts being immaterial, the Court refused to reverse, on error, the judgment for the plaintiff, on the ground that the discharge of the jury was not stated on the record to be with the consent of the parties. *Powell* v. *Sonnett*, 3 Bing. 381.

### (B) EFFECT OF.

A writ of error brought for delay is no stay of execution. *Bridge* v. *Bloomfield*, 6 D. & R. 509.

An admission that a writ of error is brought for delay, to prevent the writ from operating as a stay of execution, must come from either the party in the cause or the attorney, and not from a clerk who may know nothing of the matter. *Bygrove* v. *Bolland*, 2 Chit. 193.

A mere declaration by a defendant, that he would so arrange his affairs that the plaintiff should never get anything, will not entitle the plaintiff to sue out execution, notwithstanding a writ of error. *Bobbitt* v. *Board*, 3 Law J. K.B. 223.

Where one of several defendants, who has severed in defence, sues out a writ of error, the admission of one of the other defendants, that the writ was sued out for delay, will not authorize the plaintiff's proceeding to execution pending such writ of error. *Aarons* v. *Williams*, 3 Law J. C.P. 270, s. c. 2 Bing. 304.

Where, in an action on three bills of exchange, the defendant had suffered judgment by default, and after a rule to compute principal and interest, had sued out a writ of error: Held, that execution could not be taken out against him, unless there was some express declaration by the defendant or his attorney, that it was brought for the purpose of delay, although the defendant had acknowledged the debt to be due, prior and subsequent to the action being commenced. *Hamilton* v. *Schofield*, 6 B. Mo. 45.

A writ of error does not stay proceedings, unless the party bringing it positively states in his affidavit that there is error. *Mee* v. *Hopkins*, 2 D. & R. 208.

The Court will not set aside an execution for the costs of a nonsuit sued out after notice of allowance of a writ of error, unless some real or specific error be pointed out. An affidavit of the plaintiff's attorney, stating that he was advised that there was real error, is not sufficient. *Evans* v. *Sweet*, 3 Law J. C.P. 21, s. c. 2 Bing. 326.

An error, apparent on the record, will not be overlooked by a court of error, though the parties

may have bound themselves to waive the objection. *Giles* v. *the King*, 11 Price, 594.

Where, on a judgment for the Court, in an action for penalties, an extent was issued, and a levy made by the sheriff, and whilst the money levied was in the sheriff's hands, the defendant brought a writ of error; the Court, on application, ordered the money to be paid by the sheriff to the officer of the crown, notwithstanding it was objected that if the judgment were reversed, the party would not be able to obtain a writ of restitution, but would be driven to a petition of right: the Court holding that the crown could not be placed in a worse situation than a subject under similar circumstances; and that the Court could not take notice that greater difficulties existed in obtaining restitution from the crown than from the subject. *Rex* v. *Burns*, 1 Y. & J. 579.

### (C) PROCEEDINGS.

An assignment of error, in fact, if not repugnant to the record, is confessed by the general plea of *in nullo est erratum*. *Nicholson* v. *Wilkins*, 1 Ken. 350.

If, in the assignment of errors, it is alleged, that it appears by public acts of parliament that there are two parishes of St. I. in the county of M, the plea of *in nullo est erratum* is not an admission of the truth of the allegation. *Taylor* v. *Willans*, 1 Bligh, N.S. 425.

A party in error can only avail himself of the same defence as he insisted on in the court below. *Anon.* 2 Ken. 286.

Errors in fact, and not errors in law, can only be confessed. *Rex* v. *Davies*, 2 Ken. 304.

A motion to *non pros.* a writ of error, is not answered by shewing that the judgment roll has not been perfected by the defendant in error, so that the plaintiff might transcribe the record, since the latter might, by application to the Court below, have compelled the former to have completed the record.

The plaintiff in error, having it in his own power by application to the Court below, to compel the defendant in error to complete the record, so as to enable the plaintiff in error to have a perfect record to transcribe: it was holden, that it was no objection to a motion to *non pros.* the writ of error, that the judgment roll had not been perfected. *Dunbar* v. *Parker*, 9 Price, 592.

There need not be fifteen days between the teste and return of writs of error. *Laidler* v. *Foster*, 4 B. & C. 116, s. c. 6 D. & R. 174.

Errors in law, and errors in fact, cannot be properly assigned in the same assignment of errors; but if the errors in law are well assigned, the Court cannot affirm the judgment on account of the assignment of errors being multifarious. *Doe d. Laurie* v. *Dyball*, 6 Law J. K.B. 103, s. c. 8 B. & C. 70.

A *sci. fa.* may be tested before the return of a writ of error. *Breach* v. *Dickson*, 2 Chit. 193.

A rule to shew cause why a writ of error, brought upon a judgment of the Common Pleas of the county palatine of Durham, should not be quashed, on the ground that it was brought against good faith, was discharged, the Court holding that they had neither authority to quash the writ, nor to issue execution upon the judgment of an inferior court. *Creswell* v. *Thompson*, 4 D. & R. 153.

The defendant obtained time to plead on the terms giving judgment of the term; but he afterwards brought a writ of error. The Court quashed the writ of error. *Cave* v. *Masey*, 3 Law J. K.B. 107, s. c. 3 B. & C. 735, s. c. 5 D. & R. 624.

A writ of error being demandable of right, will not be superseded in the absence of strong grounds. *Bleasdale* v. *Darby*, 9 Price, 606.

The Court will not set aside the allowance of a writ of error, although it did not appear to have been issued by the authority, or at the instance of the defendant; and although the sheriff had taken no bail-bond on his arrest. *Jones* v. *De Lisle*, 3 Law J. C.P. 197, s. c. 3 Bing. 125.

### (D) BAIL IN ERROR.

A writ of error is no supersedeas of execution, unless bail in error be put in, and notice thereof given within the time limited by the rules of the Court. *Attenbury* v. *Smith*, 2 D. & R. 85. *Smith* v. *Howard*, ib. n.; s. c. 1 Law J. K.B. 7.

If sham or hired bail be put in on a writ of error, the plaintiff may treat them as a nullity, and issue execution. *Ward* v. *Levi*, 1 Law J. K.B. 84, s. c. 1 B. & C. 268, s. c. 2 D. & R. 421: s. p. *Brown* v. *Brown*, 4 Bing. 38: s. p. *Yates* v. *Clarke*, 5 Law J. C.P. 37.

But the party who so acts must do so at his own risk, and on the responsibility of afterwards satisfying the Court, beyond all question, that the bail are sham bail. *Bradley* v. *Gomperts*, 6 Law J. K.B. 132, s. c. 1 M. & R. 567.

Where the condition of a bond was, to keep the plaintiff harmless from the payment of an annuity, and from all actions, suits, damages, and costs, which should be brought against him, or that he might sustain by reason of the non-payment of the annuity; it is not a bond for payment of money only within the statute 3 Jac. 1. c. 8; and, therefore, upon error brought to reverse a judgment obtained in an action on such bond, bail in error are not required. *Flanagan* v. *Watkins*, 1 Law J. K.B. 146, s. c. 1 B. & C. 316, s. c. 2 D. & R. 659.

Where a judgment (after verdict) has been recovered in Ireland, and an action of debt brought in this country upon it, bail in error is not necessary when the defendant has suffered judgment by default in the action on the judgment. *Parkins* v. *Stewart*, 9 Price, 1.

In debt on bond, conditioned for re-investing stock, and paying the dividends in the meantime, bail in error is not necessary under the 3 Jac. 1. c. 8, and 3 Car. 1. c. 4. *Gillingham* v. *Waskett*, 1 M'Clel. & Y. 147.

Bail in error must be put in upon a judgment in debt, on a bond given by a third person as a collateral security. *Chauvet* v. *Alferd*, 2 Ken. 437, s. c. 2 Burr. 746.

Bail in error, by the stat. 6 Geo. 4. c. 96. s. 1, (which was passed to prevent frivolous writs of error), cannot be dispensed with, although there be error in form on the face of the record. *Wadsworth* v. *Gibson*, 6 Law J. C.P. 121, s. c. 4 Bing. 572, s. c. 1 M. & P. 501.

A writ of error, although bail thereto do not justify, is good cause for not charging the defendant in execution. *Muitland* v. *Mazaredo*, 6 M. & S. 139.

Bail in error are not entitled to be relieved on account of the plaintiff in the action taking out a rule for better bail, if that rule is not answered by an

actual justification of other persons. *Adnam* v. *Wilkes*, 5 Law J. K.B. 90, s. c. 6 B. & C. 237.

Bail in error having been regularly put in and excepted to, and a notice of justification, by the bail already put in, having been given. Such notice held sufficient, and a particular description of the bail not necessary to be added. *Richardson* v. *Mellish*, 3 Law J. C.P. 1.

## ESCAPE.

(A) WHAT SHALL BE.
(B) LIABILITY OF SHERIFF AND OTHER OFFICERS FOR.
(C) ACTION FOR.
(D) PLEADINGS AND EVIDENCE.

### (A) WHAT SHALL BE.

An attorney was confined in the King's Bench prison on an attachment for non-payment of money. A surgeon certified, that if he was not removed into a more open situation his life would be in danger. The marshal allowed him the rules of the prison, until he was a little recovered, and then brought him within the walls again: The Court held, that the marshal was not liable as for an escape. *Hall* v. *Arnold*, 1 Law J. K.B. 187, s. c. 1 D. & R. 709.

A prisoner in the Fleet prison had obtained a day-rule in the usual form, permitting him to go abroad to transact his affairs and advise with his counsel, and to return the same day. He went to Sadler's Wells Theatre, where he was seen as late as half past eleven in the evening: Held, that if he returned within the ambit of the prison before twelve at night, the Warden could not be liable in an action for an escape, notwithstanding the abuse and misapplication of the rule. *Ruthven* v. *Brown*, 2 C. & P. 535, s. c. 5 Law J. C.P. 54.

A, a Sheriff's officer, went with B to the house of C, to arrest him upon a *ca. sa.* A read the warrant to C, whereupon C rushed out against A, who caught C round the waist, but was unable to hold him, and C escaped: Held, that the sheriff was liable to an action of debt for the escape. *Nicholl* v. *Darley*, 2 Y. & J. 399.

### (B) LIABILITY OF SHERIFF AND OTHER OFFICERS FOR.

A party has a strict legal right to an attachment against the sheriff for not bringing in the body, after he has been served with a rule for that purpose; therefore, where the sheriff had returned *cepi corpus* to a *ca. sa.*, and that the defendant remained in his custody—the defendant having escaped; and the plaintiff served a rule upon the sheriff to bring in the body, and obtained an attachment against him: Held, that the proceedings were regular, and the Court refused to leave the party to his action for the escape. *Ibbotson* v. *Tindall*, 1 Law J. C.P. 31, s. c. 1 Bing. 156.

A gaoler covenanted with the sheriff to keep prisoners until legally discharged; to attend the quarter sessions, and to convey prisoners, when ordered to be removed by *habeas corpus*, safely and without escape; and the gaoler, and the sureties for him, gave bond for the due performance of such covenant. The gaoler being in attendance at the quarter sessions, the sheriff, upon receiving a writ of *habeas corpus* for the removal of a prisoner, directed a warrant "to the gaoler, and A B, for this time thereto by me specially appointed." While under removal by A B, the prisoner escaped. By the sheriff directing the warrant specially to A B, and giving him co-equal control over the party removed: Held, that both the gaoler and his sureties were exempt *quoad hoc* from all liability upon the bond and covenant. *Ryland* v. *Lavender*, 2 Law J. C.P. 116, s. c. 2 Bing. 65, s. c. 9 B. Mo. 71.

A mandate from the Lord Mayor's Court was directed to the defendant, requiring him to arrest A and B, at the suit of the plaintiffs; A was accordingly arrested by the defendant's deputy, and taken to a lock-up house, from which he was suffered to escape. Bail were tendered shortly afterwards to the clerk of the bails of the Lord Mayor's Court, but were rejected, because they refused to become bail for B also (who was out of the country), it being the practice of that court to require bail, in joint actions, for all the defendants, although only one be arrested: Held, in an action for the escape of A, that the serjeant-at-mace was liable, notwithstanding the refusal of the officer of the court to take the proffered bail. *De Vaux* v. *Sewell*, 6 Law J. C.P. 58, s. c. 1 M. & P. 216, s. c. 3 C. & P. 182.

An indictment lies against a constable for voluntarily suffering a street-walker to escape out of custody. *Rex* v. *Booty*, 2 Ken. 575, s. c. 2 Burr. 864.

### (C) ACTION FOR.

In an action for an escape of a person in execution, the jury must give a verdict for the whole debt. *Robertson* v. *Taylor*, 2 Chit. 454.

Where actual render had been made before the commencement of the action for an escape, though no notice of render had been given, the Court stayed the proceedings upon payment of costs up to the time when the notice of render was given, and the costs of the motion. *Brookhouse* v. *Sheriff of Derby*, 5 B. & C. 244.

In an action against the Warden of the Fleet for an escape of a prisoner, it was proved that he was out on a day rule; and the jury found that he did not return within the rules before twelve at night of the day on which he obtained such rule: The Court refused to disturb the verdict, or grant a new trial. *Ruthven* v. *Brown*, 5 Law J. C.P. 54, s. c. 2 C. & P. 535.

### (D) PLEADINGS AND EVIDENCE.

In an action against a sheriff for an escape, the declaration stated that the writ was duly marked or indorsed for bail; without saying that it was "by virtue of an affidavit:" Held, on demurrer, that this latter allegation was not necessary. *Wilcoxon* v. *Nightingale*, 6 Law J. C.P. 74, s. c. 4 Bing. 501, s. c. 1 M. & P. 279.

In an action against the marshal for the escape of a prisoner charged in execution in his custody, the entry of the *committitur* on the judgment-roll in the action against the prisoner, is sufficient evidence that the prisoner was committed to the custody of the marshal, and was by him detained in custody in execution until the escape. *Pheney* v. *Jones*, 6 Law J. K.B. 322.

An acknowledgment of a debt, made by a debtor after arrest, but before an escape, is evidence against the marshal in an action for the escape. *Rogers* v. *Jones*, 7 B. & C. 86.

In an action against the marshal for an escape, the allegation in the record in the original action is *primâ facie* evidence that the party was committed to his custody. *Pheney* v. *Jones*, 3 C. & P. 333. [Tenterden]

In an action for an escape, if it be an escape upon mesne process, the plaintiff must allege and prove a debt due from the defendant in the process. If it be an escape upon process in execution, he must allege and prove a judgment against that defendant.

Where the escape is upon process of attachment, for contempt in not performing an award, the plaintiff must either state and prove the mutual submission of the parties, or must state and prove the Rule of Court ordering the attachment to issue.

Accordingly, where, in an action for an escape of the latter description, the plaintiff alleged in his declaration, that there were mutual bonds of submission, but failed in proving this fact, and proved the Rule of Court ordering the attachment, but had not set it out in his declaration,—it was held, that the action could not be maintained; the proof being defective in one case, and the statement defective in the other. *Brazier* v. *Jones*, 6 Law J. K.B. 261, s. c. 8 B. & C. 124, s. c. 2 M. & R. 88.

In an action against the Warden of the Fleet for an escape, the bill alleged, that the prisoner was brought before the Court by *habeas corpus*, and that by the Court, the prisoner was committed to prison until, &c. as by the said commitment more fully and at large appears; upon special demurrer, for want of more special averment, that the commitment was of record: Held, that such recommitment was by order of the Court, and, therefore, not of record. And, *semble*, that on special demurrer, the omission of such averment is fatal. *Barns* v. *Eyles*, 8 Taunt. 512, s. c. 2 B. Mo. 561.

A declaration against the marshal for the escape of S S, who had been rendered in discharge of her bail, stated the arrest, and giving bail below; and that afterwards bail above was put in before Sir J. B., a judge, &c. at chambers, as appeared by the record of the recognizance; that S S surrendered in discharge of her bail, and afterwards escaped: Held, that the mode of putting in bail above was material to be proved as alleged; and therefore, that an examined copy of the entry of the recognizance, stating it to be taken before the Court at Westminster, did not support the averment. Also, that the filazer's book was not evidence to shew that the recognizance was taken before a single judge. *Bevan* v. *Jones*, 3 Law J. K.B. 255, s. c. 4 B. & C. 403, s. c. 6 D. & R. 483.

If a declaration does not profess to describe the writ, but merely to state the substance and effect of it, an immaterial addition or omission is not fatal. As, where, in an action against the sheriff for an escape, the declaration stated the writ to conclude to the damage of the said plaintiff of 30*l.* &c. when the writ did not contain the words "to the damage," &c.—it was holden no variance. *Cousins* v. *Brown*, 1 B. & M. 291. [Best]

In an action against a sheriff for an escape,—it was holden, that an allegation, that a judgment was recovered in Hilary term 2 Geo. 4, was proved by a record of a judgment in Hilary term 1 & 2 Geo. 4. *Bennett* v. *Isaac*, 10 Price, 154.

Action for an escape—averring the original judgment for 79*l.*, in Easter term 5 Geo. 4.—then an award of execution in Trinity term 5 Geo. 4, for the damages aforesaid, (as if on a judgment in *scire facias*,) with a reference to the record—and thereupon, on a day mentioned, the *committitur* of the prisoner to the custody of the marshal—lastly the escape: Held, that it was unnecessary to prove that a *scire facias* had been issued on the judgment, as that allegation was surplusage, which might be struck out of the declaration. *Bromfield* v. *Jones*, 3 Law J. K.B. 232, s. c. 4 B. & C. 380, s. c. 6 D. & R. 500.

To be relieved from the effect of one escape, it seems that a gaoler must shew by his plea—

That the escape was without his knowledge:

That on the return or re-caption of the prisoner, he detained him until action brought.

For, where a gaoler, to an action for an escape, pleaded that the prisoner escaped without his knowledge, returned, was detained, and afterwards again escaped on divers days and times; again returned, and was thereupon detained until action brought: It was held, on demurrer, that the plea was bad, because it did not state what escapes the gaoler intended to admit. *Everest* v. *Jones*, 5 Law J. K.B. 56.

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## ESCROW.

[See DEED.]

*Semble*, that to constitute an escrow, it is not absolutely necessary, at the time of its execution, that it should be expressly declared to be of no operation, until a certain event has taken place.

In an action by an administrator on a bond, the subscribing witness was called, who, after proving the execution of the same, gave evidence to the following effect; that the defendant, being indebted to the intestate by virtue of certain promissory notes, proposed to give him the bond in question, with this proviso, that the bond should remain in the hands of him, (the subscribing witness,) until the death of Lord S; and that it should not even then be delivered up, until he, the defendant, had received the promissory notes; Lord S died, and the witness gave up the bond: Held, that whether the bond was delivered as a deed, to take effect from the instant of such delivery, or whether it was delivered upon the express condition, that it should not operate as a deed until the death of the then Lord S, and then only upon the condition, that the promissory notes should be given up, are questions to be determined by a jury. *Murray* v. *Earl of Stair*, 2 B. & C. 82, s. c. 3 D. & R. 270. See *Doe d. Garnons* v. *Knight*, 4 Law J. K.B. 161, s. c. 5 B. & C. 671, s. c. 8 D. & R. 348. *Ante*, DEEDS. (B.)

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## ESTATE.

Where an estate *pur auter vie*, limited to the grantee, his heirs, and assigns, is devised only for the life of the devisee; and no alienation or devise thereof is made by the devisee, on his death such

estate, under the statutes 29 Car. 2, c. 3, and 14 Geo. 2, c. 20, will pass to the legal representatives of the grantee.

Thus, where the grantee of an estate in lands *pur autre vie*, limited to himself, his heirs and assigns, devised the same "to my daughter E R, and all the rest of my estate both real and personal, to my son," —it was held, that E R, under this devise, took only an interest for her own life, and that after her death, without having made any disposition of the estate, the residue thereof passed to the legal representatives of the testator's son. *Doe d. Jeff* v. *Robinson*, 6 Law J. K.B. 273, s. c. 2 M. & R. 249, s. c. 3 B. & C. 296.

Where an equitable tenant in tail alieus in fee by way of mortgage, a valid equitable recovery may be suffered of the secondary equitable estate, without the concurrence of the mortgagee. *Nouaille* v. *Greenwood*, 1 Turn. 26.

*Semble*, that in a case sent from the Court of Chancery, a court of law will not give any opinion upon the construction of a devise of an equitable estate. *Houston* v. *Hughes*, 5 Law J. K.B. 315, s. c. 6 B. & C. 403.

An estate sold by the mortgagee in the lifetime of the mortgagor, is personal estate; but if after his death, it is a real estate. *Wright* v. *Rose*, 2 S. & S. 323.

## ESTOPPEL.

It is doubtful whether a judgment of the Court of Record of St. Kitts, can be pleaded either in bar or by way of estoppel, and certainly not without stating that the judgment is final and conclusive in that court. *Plummer* v. *Woodburne*, 4 Law J. K.B. 6, s. c. 4 B. & C. 625, s. c. 7 D. & R. 25.

A, by lease and release, reciting that he is entitled to a reversion in fee in certain lands, expectant upon the death of his father, conveys to B that reversion, upon trust to secure an annuity granted by him to C; at that time he had, in fact, no interest in the lands; but afterwards he acquired a life estate in them; which life interest he conveyed to D, who had notice of C's annuity, and the deed charging it on the reversion. Held, that A, and those claiming under him, were estopped by the release: that C and his trustee could, availing themselves of that estoppel, exercise all the rights and remedies given by the release: and therefore, that they were not entitled to equitable relief. *Bensley* v. *Burdon*, 4 Law J. Chanc. 164, s. c. 2 S. & S. 519.

A petitioning creditor, on whose affidavit a commission of bankrupt issues, cannot afterwards dispute the validity of the commission. *Ledbetter* v. *Scott*, 6 Law J. C.P. 147, s. c. 4 Bing. 623, s. c. 1 M. & P. 597.

## EVIDENCE.

(A) IN GENERAL.
(B) RECORDS.
(C) VERDICTS AND JUDGMENTS.
(D) JUDICIAL PROCEEDINGS.
(E) PUBLIC INSTRUMENTS.
(F) PRIVATE WRITINGS.
(G) REPUTATION.
(H) DECLARATIONS.
(I) ADMISSIONS.
(K) CONFESSIONS.
(L) CONFIDENTIAL COMMUNICATIONS.
(M) PRESUMPTION.
(N) SECONDARY AND PAROL EVIDENCE.

### (A) IN GENERAL.

A court of justice cannot delegate its jurisdiction, and ought not to be guided by any foreign opinion, upon a question of law, e. g. the admissibility of evidence. *Dunbar* v. *Harvey*, 2 Bligh, 351.

Even if evidence is read without any objection being taken at the time, its admissibility may be objected to in the course of the argument. *Lee* v. *Harrison*, 5 Law J. Chanc. 62.

Testimony injurious to a person's character is not admissible, unless it be pertinent to the matter in issue. *Bate* v. *Hill*, 1 C. & P. 100. [Park]

Evidence of a specific negligence is not admissible in an action for so negligently conducting a ship, that she was wrecked, and the plaintiff lost his passage; though proof that the captain had often said, that the officer to whom he gave charge of the ship was incompetent, is receivable. So experienced seamen may be called to say, whether gross negligence has been constituted by particular facts. *Malton* v. *Nesbit*, 1 C. & P. 70. [Abbott]

### (B) RECORDS.

It seems that a minute-book in which an entry of the proceedings at Sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record so as to be admissible in evidence as a proof of the fact there stated. *Rex* v. *Bellamy*, 1 R. & M. 171. [Abbott]

### (C) VERDICTS AND JUDGMENTS.

In an action on an indemnity bond, the *postea* was held to be sufficient evidence of money paid for damages and costs recovered, although no judgment had been entered up. *Harrop* v. *Bradshaw*, 9 Price, 359.

In an action against an attorney for negligence, in suffering judgment by default to be signed against the plaintiff in a suit in which he was defendant,—the Court held, that, in order to prove the judgment in the former action, the judgment-roll should have been carried in, or an examined copy of the record produced. *Godefroy* v. *Jay*, 6 Law J. C.P. 62, s. c. 1 M. & P. 236, s. c. 3 C. & P. 192.

A mere copy of a judgment in one of the colonies is not admissible, unless it be authenticated under the seal of the island. *Appleton* v. *Braybrook*, 6 M. & S. 34, s. c. 2 Stark. 6.

If persons unconnected with a trial which took place in 1794, shew that the verdict proceeded on improper evidence, the other party may give evidence of what deceased witnesses proved, to support the validity of the verdict. *Doe d. Lloyd* v. *Passingham*, 2 C. & P. 440. [Burrough]

### (D) JUDICIAL PROCEEDINGS.

Judges' notes are not admissible as evidence of the facts, but the facts must be brought before the

Court by affidavit. *Ex parte Learmouth*, 6 Mad. 113: s. p. *East India Company v. Barett*, 1 Law J. Chanc. 93.

A report finding a particular fact, will not be ordered to be read as evidence in another suit relating to the same matter, but between different parties, though the evidence, by which that fact was formerly proved, has been since lost. *Maule v. Mence*, 3 Law J. Chanc. 42.

On the trial of an issue at law, office copies of the proceedings in Chancery are not evidence. *Burnand v. Nerot*, 1 C. & P. 578. [Best]

If the defendant consents, the Court will permit interrogatories to be read on a trial of an indictment for perjury. *Anon.* 2 Chit. 199.

A plaintiff may give in evidence answers to interrogatories exhibited by the defendant in the cause; but if he does so, he cannot object that some of them are not evidence, on account of their appearing to state the contents of written papers. *M'Intyre v. Layard*, 1 R. & M. 203, s. c. 1 C. & P. 606. [Abbott]

An examined copy of answer in Chancery, is admissible to contradict the evidence of a witness in a civil case. *Ewer v. Ambrose*, 3 Law J. K.B. 128, s. c. 4 B. & C. 25, s. c. 6 D. & R. 127: s. p. *Highfield v. Peake*, 1 M. & M. 109.

An examined copy of an answer in Chancery by a person not party to the action is admissible, without producing the original, or proving the party's handwriting. *Tooth demandant; Bagwell tenant*, 2 C. & P. 271.

But an examined office copy of an affidavit for an injunction is not admissible without proof of identity, or that it has been used. *Rees v. Bowen*, 1 M. & Y. 383.

Where an examined copy of an answer in Chancery was produced in evidence,—it was holden, that a witness who had examined the original, might prove that it was signed by the defendant, to establish the identity of the defendant. *Dartnall v. Howard*, 1 R. & M. 169. [Abbott]

## (E) PUBLIC INSTRUMENTS.

To prove the parties to whom corn has been delivered, the returns made in pursuance of the 1 & 2 Geo. 4. c. 87, are not conclusive evidence. *Woodley v. Brown*, 2 Bing. 527, s. c. 1 C. & P. 592.

Where the French *vice-consul* residing in London produced a printed copy of the "*cinq codes*" of France, purchased at a bookseller's shop in Paris, it was received as evidence of the law of France. *Lacon v. Higgins*, 1 D. & R. N.P.C. 38, s. c. 3 Stark. 178. [Abbott]

The rolls of a manor court are only evidence against the tenants and lord thereof. *Attorney General v. Hotham*, 1 Turn. 217.

The certificate of the secretary of the Board of Excise, as to the accuracy and effect of accounts in the books of the Excise, ought not to be received in evidence.

Whether accounts of stock kept in the Excise books are evidence between third parties, as to the delivery of goods—*Quære.*

Copies of such accounts may be given in evidence, *semb.* on the ground that the originals are public books; but in such case the copies produced must be proved by a witness who had examined them with the originals, and can swear to their accuracy. *Dunbar v. Harvey*, 2 Bligh, 351.

## (F) PRIVATE WRITINGS.

On an indictment against A and B for a conspiracy to commit a fraud; the defence made by A was, that he had been deceived by the representations of B; and part of a written correspondence between A and B having been admitted for the prosecution: It was held, that under such circumstances, the whole of the correspondence between A and B, up to the time of the overt act of the conspiracy, must be received in evidence for the defence. *Rex v. Whitehead*, 1 D. & R. N.P.C. 61. [Abbott]

The date of a letter is evidence against the writer, that the letter was written where dated. *Anon.* 2 Chit. 194.

Although the post-mark upon a letter is *primâ facie* evidence that it existed at the time of the date denoted thereby, yet proof that it bears a genuine post-mark is indispensable. *Fletcher v. Braddyll*, 3 Stark. 64. [Holroyd]

It is not necessary that a signature of the writer of a letter above thirty years old should be proved. Where there is no existing direction to such a letter, *primâ facie*, it must be intended to have been written to the party amongst whose papers it is found. *Fenwick v. Reed*, 6 Mad. 7.

A letter written by a party, sought to be charged, is evidence, though it be signed by a third person. *Alexander v. Brown*, 1 C. & P. 288. [Best]

The defendant's card is not admissible in evidence, unless the plaintiff gives him notice to produce his cards, and then proves one to be a copy, or shews that he received the card from the defendant himself. *Clark v. Capp*, 1 C. & P. 199. [Abbott]

Where a deceased person has made an entry, it may be evidence, although he could not in his lifetime have been examined as to the fact.

A book purporting to contain an account of tithes collected seventy years back, cannot be received in evidence without proof that the party in whose handwriting it is, was at the time collector of tithes.

Where the charter of an ecclesiastical corporation required them to appoint tithe proctors, ancient rolls purporting to be accounts rendered by certain members of the corporation, as their tithe proctors, coming out of the proper custody, and appearing to have been approved and settled by the corporation, were deemed admissible evidence. *Short v. Lee*, 2 J. & W. 464.

The minister's accounts and the royal grants are, when they so state, usually considered as sufficient evidence that certain premises were parts of a dissolved monastery. *Governors of Lupton School v. Scarlett*, 2 Y. & J. 330.

Entries made by a collector of taxes in his collecting-book, are admissible in evidence against a surety after the death of the principal. *Goss v. Watlington*, 6 B. Mo. 355, s. c. 3 B. & B. 132.

A Bible, produced by a woman aged sixty-seven, who said that it was given to her when seven years old by her father, who told her that it belonged to her grandfather, is evidence of itself to be left to the jury to say, whether an entry in it, by which it appears that her grandfather was the son of a certain person, is true. *Doe d. Cracknel v. Head*, 1 Law J. K.B. 79.

Where the practice of the defendant's counting-ouse was, that the clerk, after copying a letter into e letter-book, returned it to the defendant to seal, d that he or another clerk carried all letters to the ost-office, but there was no particular place of de-sit in the office for such letters, and neither of the erks had any recollection of the particular letter fered in evidence, though they swore that they iformly carried all letters given them to carry: eld, that the entry in the clerk's writing in the tter-book of a letter to the plaintiff, could not be ad as proof of such letter having been sent to the aintiff. *Toosey* v. *Williams*, 1 M. & M. 129. [Ten-rden]

A banker's ledger, in which the entries are made r several clerks, is admissible in evidence to shew at a customer has no funds in their hands; and it not necessary to call all the parties by whom the tries are made. *Furness* v. *Cope*, 6 Law J. C.P. 42, s. c. 5 Bing. 114, s. c. 2 M. & P. 197.

As by the 55 Geo. 3. c. 155, it is directed, that e number of passengers going on board India ships all be inserted in a book, to be kept at the India ouse, and verified by oath, such book is admissible evidence. *Richardson* v. *Mellish*, 3 Law J. C.P. 55, s. c. 2 Bing. 229, s. c. 1 C. & P. 241.

Documents relating to a company, not kept in eir chest, but at the clerk's house, are inadmissible. *he Wardens, &c. of Shrewsbury* v. *Hart*, 1 C. & P. 14. [Hullock]

Where there is a promise to pay "the debt," but e amount is not mentioned—*semble*, that a pro-issory note, which was originally valid, but would inadmissible in evidence merely on account of erasure, and which was the subject of reference the conversation wherein the promise was made, ay be used in evidence to ascertain the amount of e debt, for payment of which the promise was ade—*sed quære*. *Bishop* v. *Chambre*, 6 Law J. .B. 334.

If a paper be called for by the plaintiff's counsel, d they look at it, they must read it in evidence, if is at all material to the case; but if it be inapplicable, it may be rejected. *Wilson* v. *Bowie*, 1 C. & . 10. [Park]

If the counsel for the defendant, in cross-examination, put a paper into the witness's hand, to re-esh his memory, the opposite counsel has a right look at it, without being bound to read it in evi-nce; and the opposite counsel may also ask the itness when it was written, without being bound to it it in. *Rex* v. *Ramsden*, 2 C. & P. 603. [Ten-rden]

If a cheque, drawn by one of the parties in a cause, proved to be in the hands of the banker of such rty, (having been paid,) the opposite party need t, if he wishes to have it put in evidence, call the nker's clerk to produce it, but may call for it under notice to produce. *Burton* v. *Payne*, 2 C. & P. 520. Bayley]

The same proof of a prisoner's handwriting in a iminal case is allowed, as in a civil. *Rex* v. *Hen-y*, 2 Ken. 368, s. c. 1 Burr. 643.

In the ecclesiastical courts comparison of hand-ritings is admissible evidence. *Lock* v. *Denner*, Add. 360.

Evidence of a rector's handwriting to receipts, by mparison with his signature in the register-books, the entries in which it was his duty to have signed, held to be admissible. *Taylor* v. *Cook*, 8 Price, 650.

An issue having been directed to satisfy the Court as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence satisfactory to the judge who tried the cause, and to the Court upon his report of it. In the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, from his knowledge of handwriting in general, that the signature in question was not genuine, but an imitation; this evidence having been rejected, the Court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight; and that, the issue being to satisfy the Court, a new trial ought not to be granted, unless for the rejection of evidence which might reasonably have altered the verdict. *Quære*, if such evidence be admissible at all. *Gurney* v. *Langlands*, 5 B. & A. 330.

In questions of pedigree a witness called to prove the hand-writing attached to an ancient paper may, previous to giving his opinion, compare it with other authentic documents. *Doe d. Tilman* v. *Tarver*, 1 R. & M. 141. [Abbott]

Receiving letters, and acting upon them, is sufficient to authorise a speaking as to belief of the handwriting. *Tharpe* v. *Gisburne*, 2 C. & P. 21. [Best]

The witness called to prove the defendant's handwriting to certain letters, stated that he had only corresponded with a person of that name at A; and that he had never seen the defendant: Held, on its being proved that there was no other person of that name living at A, that the evidence was sufficient to go to the jury for them to say, whether or not the letters were written by the defendant. *Harrington* v. *Fry*, 1 C. & P. 289, s. c. 1 R. & M. 90. [Best]

If a person prove that he has never seen the defendant write, and has never corresponded with him, but has seen papers in the Master's office, which the attorney of the party admitted to be of his handwriting, and the person has acted on these papers so admitted: this is not such a knowledge of the party's handwriting as will enable the person to prove a written document alleged to be in his handwriting. *Greaves* v. *Hunter*, 2 C. & P. 477. [Abbott]

The signature of a party to a bill of exchange may be proved by a person who has seen him write his surname only. *Lewis* v. *Sapio*, 1 M. & M. 39. [Abbott]

Proof of the handwriting of the subscribing witness to an instrument is sufficient, he being dead, without any further proof of the identity of the parties, except the identity of name and description. *Page* v. *Mann*, 1 M. & M. 79. [Tenterden]

A signed bill, delivered in obedience to the statute 2 Geo. 2. c. 23, is in the nature of a notice before action; and, therefore, a notice to produce that notice on the trial is unnecessary.

A copy of the bill, which has been delivered, duly signed, may be given in evidence, although the signature in the copy be not in the handwriting of the attorney. *Colling* v. *Trewerk*, 5 Law J. K.B. 132, s. c. 6 B. & C. 394.

Under the Scots statute "for making up the tenor of decreets, whereof the extracts are amissing, and

the registers lost in the fire;" whether the defects of an extract not amissing, but obliterated, can be supplied—*Quære.*

The extract having been in possession of the ancestors or authors of the claimant, whose duty it was to have supplied the defects under the statute or by common law: conjectural evidence to supply a word supposed to be effaced is inadmissible. *MakDougall* v. *Hogarth*, 3 Bligh, 41.

(G) REPUTATION.

Evidence of reputation is admissible when the question is, whether a particular place is a parcel of a sheep-walk or not. *Davies* v. *Lewis*, 2 Chit. 535.

(H) DECLARATIONS.

A sued out a writ of *fi. fa.* against the goods of B, and the sheriff executed a bill of sale of certain goods to A. After this, B remained in possession of the goods, and the sheriff again took them, under another execution against B: Held, that in an action brought by A against the sheriff for taking these goods, the declarations of B were evidence for the defendant, to shew that A's execution was merely colourable. *Willies* v. *Farley*, 3 C. & P. 395. [Vaughan]

Observations made by the wife are admissible in evidence, where she acts as the agent of her husband. *Pratt* v. *Baker*, 1 Law J. K.B. 12.

*Quære*, whether, after the death of husband and wife, the declarations of the wife are admissible as evidence to shew, that the husband was not tenant in fee of lands of which he had seisin, and that, upon a certain event, they were to go over to another branch of the family. *Barker* v. *Ray*, 2 Russ. 63.

The declaration of a party is admissible in evidence to prove his intention. *Gale* v. *Halfknight*, 3 Stark. 56. [Abbott]

The dying declarations of a person can only be received in evidence, when the subject of inquiry is the death of the party, and not at the investigation of any collateral circumstances. *Rex* v. *Mead*, 2 B. & C. 605, s. c. 4 D. & R. 120.

Declarations *ante litem motam* are admissible in questions of pedigree, though the plaintiff's title was that which the party making such declarations would have had if living. *Doe d. Tilman* v. *Tarver*, 1 R. & M. 141. [Abbott]

The non-production of a written instrument must be accounted for, in order to admit the party's own declarations against himself. *Blaxam* v. *Elsee*, 1 C. & P. 558, s. c. 1 R. & M. 181. [Abbott]

In general, declarations made by living persons, not parties to an action, though against their own interest, are not admissible as evidence in that action.

Where, therefore, to impeach the consideration for a promissory note, the defendant attempted to give evidence of declarations made by the person on whose account that note had been given to the plaintiff, which person was no party to the action—The Court held such evidence clearly inadmissible. *Hesley* v. *Jacobs*, 5 Law J. K.B. 180, s. c. 2 C. & P. 616.

In a question of pedigree, declarations of a party connected by marriage are receivable in evidence. Therefore, in an action of ejectment, declarations by a woman, that her first husband used to say that the estate would go to J F, and after his death, to his heir (under whom the lessor of the plaintiff claimed), were held to be admissible in evidence to shew the relationship and affinity of J F to the lessor of the plaintiff. *Doe d. Futter* v. *Randall*, 6 Law J. C.P. 196, s. c. 2 M. & P. 20.

(I) ADMISSIONS.

Where the Ecclesiastical Court preserved personal answers of a defendant to a libel in that court: Held, that they were admissible in evidence in a suit for tithes in this court, by a party claiming under the same title as the person whose answer it was. *Taylor* v. *Cook*, 8 Price, 664.

A mere proposal to refer, is not to be protected as a communication for a compromise; the essence of a compromise being an offer to make a concession and sacrifice; therefore, where such a proposal was connected with an admission sustaining a plea of set-off: It was holden, that it ought to have been received in evidence. *Thomson* v. *Austin*, 1 Law J. K.B. 99, s. c. 2 D. & R. 359.

An admission made by a party before an arbitrator, may be used as evidence on the trial of another cause, and is not to be considered as an admission made with a view to a compromise. *Doe d. Lloyd* v. *Evans*, 3 C. & P. 219. [Vaughan]

An agreement for adjusting differences admitted in evidence notwithstanding the rule, that admissions during treaties for compromise of suits cannot be received for the purpose of fixing the party intended to be charged with the debt, that rule not extending to executed agreements. *Froysell* v. *Lewelyn*, 9 Price, 122.

The defendant cannot give in evidence admissions made before action brought by the plaintiff, suing as prochein amy. *Webb* v. *Smith*, 1 R. & M. 106. [Littledale]

On the taxation of costs before the Master, an attorney's clerk admitted, that the suit in which the costs were taxed, was conducted by his employer from motives of charity on behalf of the plaintiff: Held, that the admissions of the clerk were sufficient to bind the master. *Ashbourne* v. *Price*, 1 D. & R. N.P.C. 48. [Abbott]

*Quære*—Whether an admission made by counsel, in his address to the jury, that part of his client's demand had been satisfied, is receivable in evidence, if his client heard it, and made no objection to it at the time. *Colledge* v. *Horn*, 3 Law J. C.P. 184, s. c. 3 Bing. 119.

Where the husband's business was conducted by his wife in his absence, it was held, that admissions made by her, on an application to pay for goods before they were delivered, were admissible in evidence against her husband. *Clifford* v. *Burton*, 1 Law J. C.P. 61, s. c. 1 Bing. 199, s. c. 8 B. Mo. 16.

In a suit instituted against A and B, to have bills of exchange, which have been negotiated from A to B, delivered up, on the ground, that it was a fraud in A to negociate them, and that B was a party to the fraud—the admissions of A, while the bills were in his possession, that he was not entitled to negotiate them, are admissible in evidence. *Lee* v. *Harrison*, 5 Law J. Chanc. 62.

An admission up to a particular day, extends not to any fact prior to that day. *Tindal* v. *Whitrow*, 1 C. & P. 22. [Burrough]

An admission by the defendant, that he cannot pay, but will give a bill, and that he has been arrested, will entitle the plaintiff to a verdict of £10, as there could have been no arrest for a smaller amount. *Brathwaite* v. *Churchill*, 2 C. & P. 341. [Abbott]

The Court will not make an order upon a defendant to pay money, upon an admission in his answer that he has received a large sum of money (specifying the amount) coupled with a claim of lien on it for travelling expenses, postchaise hire, or otherwise. *Law* v. *Hunter*, 1 Law J. Chanc. 222.

To support admissions entered into between town agents, under the sanction of the attornies, their principals in the country, the handwriting of such town agents must be proved at the trial; but the Court will set aside a nonsuit occasioned by the plaintiff not being able to prove the handwriting of the defendant's attorney's agents, where such admissions had been *bonâ fide* entered into. *Truslove* v. *Burton*, 2 Law J. C.P. 105, s. c. 9 B. Mo. 64.

Where a proceeding depends upon the question, whether Justices of the Peace had jurisdiction over the subject matter, their own order reciting a fact which would give them jurisdiction is not sufficient evidence of the fact. *Rex* v. *Gilkes*, 6 Law J. M.C. 118, s. c. 8 B. & C. 439, s. c. 2 M. & R. 454.

### (K) CONFESSIONS.

Confessions made in consequence of a threat or promise, or to an attorney or barrister, are privileged, and no others; therefore, where a prisoner wrote a letter, and the gaoler promised to put it in the post, but instead of so doing took it to the prosecutor,—it was holden to be admissible. *Rex* v. *Derrington*, 2 C. & P. 418. [Garrow]

Though a confession be extracted from a prisoner by an unauthorized person, holding out a chance of pardon, it is admissible in evidence. *Rex* v. *Gibbons*, 1 C. & P. 97. [Park]

If a prisoner, under the impression of obtaining a pardon, confess to the constable, it is evidence. *Rex* v. *Tyler*, 1 C. & P. 129. [Hullock]

Where a magistrate, without threat or promise, questioned a prisoner,—it was holden that his examination was admissible in evidence. *Rex* v. *Ellis*, 1 R. & M. 432. [Littledale]

Where, in the absence of a threat or promise, a boy of the age of fourteen years confessed a felony, it was holden to be admissible. *Rex* v. *Thornton*, 1 R. & M. C.C.R. 27.

The confession of a prisoner before a magistrate, is sufficient ground to warrant a conviction, though there is no positive proof *aliunde*, that the offence was committed; at least, if there is probable evidence that it was committed. *Rex* v. *White*, 1. R. & R. C.C.R. 508. *Rex* v. *Tippet*, ib. 509.

If a confession is improperly obtained, it is a ground for excluding evidence of the confession, and of any act done by the prisoner, in consequence, towards his discovering the property, unless the property is actually discovered thereby. *Rex* v. *Jenkins*, 1 R. & R. C.C.R. 492.

If the declaration of the prisoner, in which she asserts her innocence, be given in evidence on the part of the prosecution, and there be evidence of other statements confessing guilt; the judge will leave the whole of the conflicting statements to the jury for consideration: but if there be in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the judge will direct an acquittal. *Rex* v. *Jones*, 2 C. & P. 629. [Bosanquet]

If a felony be committed jointly by two, and one of them, in the presence of his companion, on his examination before a justice of the peace, admits that he and the other committed the offence jointly, such confession, though not negatived by the latter, is not evidence against him. *Rex* v. *Appleby*, 3 Stark. 33. [Holroyd]

### (L) CONFIDENTIAL COMMUNICATIONS.

The rule, that confidential communications are not to be revealed, does not extend to medical men. *Rex* v. *Gibbons*, 1 C. & P. 97. [Park]

The rule establishing confidential communications, does not apply to a banker's stating the balance a customer had in his bank on a certain day. *Loyd* v. *Freshfield*, 2 C. & P. 325. [Abbott]

Communications made to a steward, by his employer, respecting his affairs, are not privileged from disclosure, like confidential communications made to legal advisers. *Falmouth* v. *Moss*, 11 Price, 455.

Conferences between solicitor and client extend to all communications for professional advice, but not to employment in matters not professional. *Walker* v. *Wildman*, 6 Mad. 47.

The retaining of counsel falls within the rule of confidential communications. *Foote* v. *Hayne*, 1 R. & M. 165, s. c. 1 C. & P. 545. [Abbott]

Confidential communications made to an attorney, being the privilege of the client, may be disclosed if he consents. *Merle* v. *More*, 1 R. & M. 390. [Best]

### (M) PRESUMPTION.

[See BASTARD and GRANT.]

In every case where the child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence, as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when by such intercourse the husband could, according to the laws of nature, be the father of such child.

After proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child, (by which is to be understood proof of sexual intercourse between them,) no evidence can be received except it tend to falsify the proof that such intercourse had taken place. Such proof must be regulated by the same principles as are applicable to the establishment of any other fact.

The presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can be legally resisted only by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife at any time, when by such intercourse the husband could, by the laws of nature, be the father of the child.

Where the legitimacy of a child in such a case is

[illegible]

Where, from the lapse of time, a person must be necessarily presumed to be dead, it may also be presumed that he has died without issue, no fact appearing to lead to a contrary presumption. *Doe d. Oldham* v. *Wolley*, 6 Law J. K.B. 286, s. c. 8 B. & C. 226.

A party cannot rely upon presumption to cast an obligation on another, if, from the nature of the case, he must of necessity be able to shew the obligation (if it really exists) by positive evidence. *Boyle* v. *Tamlyn*, 5 Law J. K.B. 134, s. c. 6 B. & C. 329.

In an action for money had and received, the defendant, as an answer to the action, put in one part of a deed of covenant, executed by the plaintiffs, whereby the defendant covenanted to pay over all monies received by him on account of the plaintiffs; notice having been given to the plaintiffs to produce the counterpart of this deed: Held, that the defendant's having possession of the plaintiffs' part of the deed, was presumptive evidence that he had executed the counterpart, and that this was equally a ground of nonsuit, whether the counterpart had been lost or not. *East India Company* v. *Lewis*, 3 C. & P. 558. [Tenterden]

Where a rectory was granted by the Crown in 22 Edw. 6, with licence to appropriate, and a direction to appoint a vicar, and endow him with a dwelling-house; and on the appropriation, to endow him also with a specified annual pension or portion for his food and sustentation; and it appeared that there had been a vicar through all subsequent time, and that such vicar had for a great number of years back received from the lessees of the rectory for the time being, a larger sum than the pension specified by the grant, but no instrument of endowment, nor evidence of the existence of such, was produced; from the absence of which it was contended, that the terms of the grant had not been complied with, and that the payment by the lessees was a voluntary payment by the impropriators, and determinable at their pleasure: the Court held, that after so long a possession, it might be presumed that an endowment had been made according to the terms of the grant, and that the vicarage had been subsequently augmented. *Inman* v. *Wormby*, 1 Y. & J. 545.

Whether proof *prout de jure* of delivery of goods can be allowed, where, subsequent to the alleged delivery, written statements of account containing partial settlements have been delivered containing no notice of the disputed articles—*Quære.*

*Semble*, that in such a case, where the dealing was between a publican and a distiller, who kept the accounts, it requires strong evidence of delivery of the goods to rebut the presumption arising from the accounts delivered.

Whether the account-books of the distiller in such a case afford a *semi-plena probatio*, and lay a ground for the oath in supplement—*Quære.* *Dunbar* v. *Harvey*, 2 Bligh, 350.

Unity of possession may affect the right to tithes: as, where a rectory impropriate and lands within the rectory are in the same owner, if he, having leased the lands exempt from tithes, conveys the reversion of the lands as he holds them, that would be exempt from tithes. If the rectory and the lands have been in the Crown, and the grant and record have been lost, whether the enjoyment would not furnish a presumption of title—*Quære.*

A rectory and lands being united in the Crown

y different titles, the lands might be occupied by he lessee of the Crown, discharged of the tithes by he unity of possession in the Crown. In such a ase, if a grant of the lands were made by the Crown s the lessee held them, it would operate as a conveyance of the tithes of those lands.

Such a title is capable of a legal beginning, and s different from the case of ecclesiastical rectors nd vicars, in which presumption is excluded, beause there can be no legal beginning of such a tle.

It seems extraordinary that a court of equity hould hold that there may be a presumption in favour of a rectory impropriate, and no presumption gainst such a rectory. There is no difference beween the title of a lay rector impropriate to the ithes of land and the title of the person who holds he lands from which the tithes are claimed: they re both equally fees, both equally capable of alienation. *Semble*, there is no reason why there should e a presumption in favour of a lay rector, and no resumption in favour of the occupier of lands.

A disclaimer on the part of an ecclesiastical recor would not operate much; but a disclaimer by a ay rector ought to operate in the same way as if a an seised of lands had a right of way, or any easement over the lands of another. The cases are not listinguishable. In the case of a right of way, if he owner disclaims, though the previous title may e shewn, a subsequent release of the right may be resumed.

So a lay rector may release the tithes and discharge he lands, and if the tithes of the lands have not een paid for a great length of time, a release ought o be presumed, though no deed is produced.

Reasoning applicable to the case of an ecclesiastical rector, is not necessarily applicable to the case f a lay impropriator. Since the dissolution of the onasteries, lay impropriations vested in the Crown ave become as much lay fees as the lands out of hich the tithes issue. The title is of the same escription, particularly in the case of a person laiming a profit to be taken out of land. If a rofit to be taken out of lands has not been taken r many years, and the lands have been enjoyed ithout yielding that profit to a third person, the tle to that profit is presumed to be discharged, hatever is the nature of the profit. The case of n impropriate rector claiming tithes, is not capable f distinction.

As between two monasteries; the one holding n impropriate rectory, and the other being a lesser onastery holding lands within the rectory; the rmer might convey the tithes to the latter. It is e case of a right of exemption, not as derived from religious house, but by conveyance; and *semble*, at it is a title which admits of proof by presumpon. *Norbury* v. *Meade*, 3 Bligh, 225—261.

### (N) SECONDARY AND PAROL EVIDENCE.

Knowledge that a party is in possession of certain ocuments, and the not calling him as a witness, recludes secondary evidence of the contents of the me. *Freeman* v. *Arkell*, 1 C. & P. 135. [Park]

To admit secondary evidence of a deed, it is not fficient that the attorney, who prepared it, swears, at he delivered it to A and B, and believes it to e lost. *Horlock* v. *Priestley*, 1 Law J. Chanc. 73.

Where an attesting witness to a deed cannot be found, after strict and diligent inquiry, evidence of his handwriting is admissible. In accounting for the absence of an attesting witness, or loss of a written instrument, general answers to inquiries, that nothing is known concerning them, are admissible in evidence, but not declarations as to particular facts, if the party making them is capable of being called. *Doe d. Johnson* v. *Johnson*, 2 Chit. 196.

Where a letter has been traced to be in the hands of A, evidence that the defendant employed B to search in all places where he kept letters, is not sufficient *primâ facie* of loss, so as to let in secondary evidence of its contents. *Parkins* v. *Cobbet*, 1 C. & P. 282. [Best]

A party, in whose possession a deed was, by proving that he had made diligent search, and could not procure it, renders secondary evidence to prove its contents admissible. *Harper* v. *Cook*, 1 C. & P. 139. [Park]

To admit evidence of the contents of letters, it is not enough to shew that the party in whose possession they are, has searched in a particular box in which he thought they were—without having looked into any any other place, although he was of opinion they were in his possession. *Bligh* v. *Wellesley*, 2 C. & P. 400. [Best]

Reasonable diligence in searching after an indenture of apprenticeship thirty-seven years old, and supposed to be lost, is sufficient to let in secondary evidence. *Rex* v. *the Inhabitants of East Farleigh*, 3 Law J. K.B. 174, s. c. 6 D. & R. 147.

In order to let in parol evidence of the contents of a written instrument, it must be shewn that reasonable diligence has been used, but without success, to produce that instrument.

Proof by an apprentice, that after the expiration of his term of apprenticeship he applied to his master to deliver up his indenture, and that his master told him it was with the overseers of the parish, is not sufficient to authorize the admission of parol evidence of the contents of the indenture. If the master be alive, he should be examined, or at all events, an application to him, and a search made thereupon, be clearly made out. *Rex* v. *the Inhabitants of Rhodegeidio*, 6 Law J. M.C. 10, s. c. 7 B. & C. 620, s. c. 1 M. & R. 294.

Proof that an indenture of apprenticeship twenty-five years old, to pay for the stamp of which the overseers of a parish had advanced money, was sent to those overseers, and is not to be found in the parish-chest, is sufficient to raise a presumption of the loss of the indenture, and to entitle such parish, in a settlement case, to give secondary evidence of its execution and contents. *Rex* v. *the Inhabitants of Stourbridge*, 6 Law J. M.C. 65, s. c. 8 B. & C. 96, s. c. 2 M. & R. 43.

Where ineffectual search has been made for a justice's warrant, parol evidence may be given of its contents. *Weatherall* v. *Watson*, 1 Law J. K.B. 2.

The mere circumstance of a witness being too ill to attend the trial, is no sufficient ground for reading his deposition taken in Chancery. *Doe d. Lloyd* v. *Evans*, 3 C. & P. 219. [Vaughan]

A witness, in his deposition taken in a suit in equity, swore to the handwriting of a particular document, and afterwards became blind; his deposition was read in his lifetime, on the trial of an issue

to prove the handwriting. *Lynn* v. *Robson*, 1 Law J. Chanc. 88.

A witness examined on the trial of an issue out of Chancery, died; a new trial was granted, and on the new trial parol evidence was allowed to be given of what this witness had deposed on the former trial, notwithstanding there was the usual order for reading the depositions in equity of such witnesses as had died since the first trial. *Tod* v. *Earl of Winchelsea*, 3 C. & P. 387. [Tenterden]

Where, pursuant to an order of the Court of Chancery, a letter was filed in that court: Held, in an action at law, that secondary evidence of its contents was not admissible, as either party might, on application, obtain permission to produce it. *Williams* v. *Munnings*, 1 R. & M. 18. [Abbott]

On reference to the Prothonotary, he, by accident, having omitted to inspect an account-book, which was material in support of the answers for which the parties had been reported in contempt: Held, that the Prothonotary not having declared himself dissatisfied, or that he required any explanation as to the items contained in the book, parol testimony of the clerk, by whom the entries had been made, was inadmissible. *In re Isaacson*, 1 Bing. 272, s. c. 8 B. Mo. 214.

Where an agreement is created by letters, no evidence *aliunde* is admissible; but otherwise, where the letters are produced only as evidence of the agreement. *Brice* v. *Bletchley*, 6 Mad. 17.

If there be a patent ambiguity in a fine, it renders it invalid; but if it be a latent ambiguity, evidence to explain it is admissible. *Doe d. Bulkeley* v. *Wilford*, 1 C. & P. 284, s. c. 1 R. & M. 88. [Best]

Evidence may be offered to explain, though not to contradict a fine. If a man, therefore, grant twelve messuages in a parish wherein he has nineteen, the question which twelve he intended to pass is properly a question of fact, to be determined by a jury, upon evidence out of the fine. *Denn d. Buckley* v. *Wilford*, 4 Law J. K.B. 295, s. c. 8. D. & R. 549, s. c. 2 C. & P. 173.

A sold to B certain premises, which were conveyed to him by deeds. At the time they were signed and delivered, only a part of the consideration money was paid; but the deeds contained the usual acknowledgments for the receipt of the money; and B agreed to perform work as a plumber to the amount of the sum retained in his hands.

Little or no work was done by B, and A brought an action of assumpsit, that B, being indebted in account, undertook to perform work for him as a plumber, which he had not done. To shew that the consideration money had not been paid, parol testimony had been admitted.

The Court held, that the evidence was inconsistent with the deeds. But that it might, if the pleadings had permitted, have been gone into, to shew that the money was received and returned, by which a new contract had been made. *Baker* v. *Dewey*, 1 Law J. K.B. 193, s. c. 1 B. & C. 704, s. c. 3 D. & R. 99.

Where a memorandum of adjustment was indorsed on a policy of insurance, which stated that a particular average loss of £54 per cent. had been settled between the plaintiff (an underwriter) and defendant, the Court determined that parol evidence might be received, to shew that, by a prior arrangement, it was settled, that if the other underwriters paid a less sum the surplus should be repaid. *Russell* v. *Dunskey*, 6 B. Mo. 233.

No evidence *dehors* deeds can be received in deciding on their effect; but on the question of costs, such evidence may be taken into consideration. *Stewart* v. *Stuart*, 1 Law J. Chanc. 61.

If premises are let by an agreement not under seal from *Lady-day*, parol evidence may be given to shew, that *Old Lady-day* was meant; and a notice to the tenant to quit on the 6th of April, would be good. *Doe d. Peters* v. *Hopkinson*, 2 Law J. K.B. 11, s. c. 3 D. & R. 507.

A written agreement to sell a business may be altered by parol testimony. *Mansfield* v. *Chelyn*, 2 Law J. K.B. 85.

Where, in trespass *quare clausum fregit*, it appeared that plaintiff and defendant, respectively, occupied lands belonging to the same landlord, and abutting on different sides of a lane, and that the defendant held under a lease, which was not produced: Held, that the declaration of the landlord, "that he had let the lane jointly to the plaintiff and the defendant, as much to one as to the other," was properly received in evidence. *Noye* v. *Reed*, 6 Law J. K.B. 5, s. c. 1 M. & R. 63.

Parol evidence of the fact of tenancy is admissible, although the tenant hold under a written agreement. *Rex* v. *the Inhabitants of Holy Trinity*, 6 Law J. M.C. 24, s. c. 7 B. & C. 611, s. c. 1 M. & R. 444.

*Quære*—Whether in an action for an injury done to the reversionary interest of the plaintiff, it can be proved orally, when it appears that the premises are in the possession of a tenant, who holds them under a written agreement, which is not produced—Park J., Gaselee J. *pro*; The Lord Chief Justice, and Burrough J. *con*. *Strother* v. *Barr*, 6 Law J. C.P. 245, s. c. 5 Bing. 136, s. c. 2 M. & P. 207.

The plaintiff wrote a letter to the defendant, which the defendant did not answer. At the trial, the plaintiff's counsel called for it under a notice to produce, and wished to give evidence of its contents: Held, that such evidence was not admissible; but that if, by the letter, the plaintiff demanded a certain sum, so much only of the copy of it might be read as stated the sum demanded. *Fairlie* v. *Denton*, 3 C. & P. 103. [Tenterden]

Evidence that a testatrix, who had bequeathed all her leasehold property, &c. had no leasehold property except that over which she had a power of disposition: Held admissible. *Grant* v. *Lynam*, 6 Law J. Chanc. 129.

If a broker speak of the value of goods from recollection, he need not put in a written appraisement on a stamp. *Stafford* v. *Clark*, 1 C. & P. 24. [Burrough]

*Semble*, that if a letter written by a bankrupt to bring him within Stat. 6 Geo. 4, c. 16, s. 131, be without a date, the time when it was written cannot be proved by parol evidence. *Hubert* v. *Moreau*, 2 C. & P. 528. [Best]

The plaintiff declared on a promise by the defendants to pay over to him the proceeds of a foreign bill, negotiated by them for his account: Held, that he might give parol evidence of its contents; and that he was not bound to produce either the bill itself, or a notarial copy of it. *Hunt* v. *Alewyn*, 6 Law J. C.P. 103, s. c. 1 M. & P. 433.

Where an executor claims the residue, it is sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of the parol evidence. *Lynn* v. *Beaver*, 1 Turn. 66.

As secondary evidence of the contents of a deed, an examined copy of the registry, kept in the county of Middlesex may be received. *Doe d. Ubele* v. *Kilner*, 2 C. & P. 289. [Abbott]

Proving that a letter had been sent to a testatrix some years previous to her death, is not sufficient to charge the executrix with the custody of it four years afterwards. *Drew* v. *Durnborough*, 2 C. & P. 198. [Best]

Serving notice to produce a letter relating to the matter at issue on the attorney of the party, on the next evening previous to the trial, is sufficient to admit secondary evidence, though the party be abroad. *Bryan* v. *Wagstaff*, 2 C. & P. 126, s. c. 1 R. & M. 327. [Abbott]

Notice to produce deeds given to the attorney, although the deed may be in his agent's hands, and although it was alleged to have been delivered by him to the Stamp Office for the purpose of getting certain duties allowed: Held, that being within the control of the party, the other party might give secondary evidence of its contents. *Sinclair* v. *Stevenson*, 2 Bing. 514, s. c. 1 C. & P. 582.

To admit parol evidence of the contents of a letter, the notice for its production must specify the particular letter required--hence, a notice to produce "all letters, papers, and documents concerning or touching," &c. is too general. *France* v. *Lucy*, 1 R. & M. 341. [Best]

So a notice "to produce letters, and copies of letters, also all books relating to the cause," is too uncertain to admit parol evidence. *Jones* v. *Edwards*, 1 M'Clel. & Y. 139.

Where a lease is placed in the hands of an attorney, by a third person, he is not bound to produce it, though the plaintiff may give secondary evidence as to its contents, or an attested copy is admissible, provided it be stamped with a one shilling stamp. *Ditcher* v. *Kenrick*, 1 C. & P. 161. [Abbott]

In an action of covenant on an indenture of apprenticeship, the plaintiff proved that it was in the possession of the defendant, to whom he had given notice to produce it: Held, that parol evidence of its contents was admissible without calling the subscribing witness, as the deed was not produced. *Cooke* v. *Tansell*, 8 Taunt. 450, s. c. 2 B. Mo. 513.

Where in order to connect the sheriff with his officer, the latter was called on at the trial to produce the warrant under which he acted, and he stated that he had returned it to the under-sheriff; and no *subpœna duces tecum* had been served on him to produce it; but the sheriff's attorney had notice to do so: Held, on proof of such notice, that it was sufficient to let in parol evidence of the contents of the warrant, as the sheriff was in office at the time it was returned to the under-sheriff. *Taplin* v. *Atty*, 3 Law J. C.P. 219, s. c. 3 Bing. 164, s. c. 10 B. Mo. 564.

In an action against the defendant as a shareholder in a company for work done for the company, letters addressed by the defendant to one of the directors, and returned to her by him and mentioning her shares, are not so necessarily connected with the subject of the trial as to render a notice served on her attorney too late for her to receive it before the trial, sufficient to let in secondary evidence. *Quære*, whether it would be so in any case, except when the defendant is resident abroad. *Vice* v. *Lady Anson*, 1 M. & M. 97. [Tenterden]

An examined copy of a letter, containing notice of the dishonour of a bill of exchange which is not produced nor the subject-matter of the action, is not admissible without notice to produce the letter sent. *Lanauze* v. *Palmer*, 1 M. & M. 31. [Abbott]

A demurrer or plea to a bill in equity does not so admit the facts charged in it, as to be evidence against the defendant of those facts in a future action between the same parties. *Tomkins* v. *Ashby*, 1 M. & M. 32. [Abbott]

Upon the trial of an appeal, at the quarter sessions, between two parishes, it was held, that the order of sessions, respecting the settlement of A, was not admissible as evidence on the trial of an appeal, touching the settlement of B, notwithstanding a suggestion, that the point at issue was precisely the same in both appeals. *Rex* v. *the Inhabitants of Knaptoft*, 2 B. & C. 883, s. c. 4 D. & R. 469.

The production of one writ, with three declarations, and three rules in the same suit, proves the commencement of three actions by such process. *Jones* v. *Stevens*, 11 Price, 235.

The rules of evidence which govern a court of law, are applicable to arbitrators; therefore, where on reference to arbitration the commissioners under a statute examined witnesses, and took down their depositions in writing, and afterwards communicated the effect of them to the party sought to be affected by the proceedings, but who had had no opportunity of being present at the examination, or of cross-examining the witnesses—it was holden, that the arbitrators could not receive the depositions as evidence; in order to render them evidence against a party, he must have an opportunity of being present at the examination, and the right to cross-examine. *Attorney General* v. *Davison*, 1 M'Clel. & Y. 160.

To prove a decree for alimony, the minute-book of the Consistorial Court is good evidence. *Houliston* v. *Smyth*, 1 C. & P. 25. [Best]

That which is said by a magistrate on an investigation before him, in the presence of the plaintiff and defendant, cannot be received as evidence, unless, it seems, it has drawn any observations from the party against whom it is to be made available. *Child* v. *Grace*, 2 C. & P. 193. [Best]

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## EXECUTION.

(A) In general.
(B) Priority.
(C) Staying and setting aside.
(D) Equitable Executions.

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### (A) In general.

[See Error, Sheriff, and Warrant of Attorney.]

A *ca. sa.* against the person, and a *fi. fa.* against the goods, of the defendant, may both issue at the same

time. *Primrose* v. *Gibson*, 1 Law J. K.B. 53, s. c. 8 D. & R. 193.

*Semble*—That a *ca. sa.* sued out before the return of a *fi. fa.*, and executed before the *fi. fa.* is withdrawn, (under which a levy had been made,) is regular, if a person be already in possession of the defendant's goods under a distress for rent. *Edmund* v. *Ross*, 9 Price, 5.

A writ of *fi. fa.* cannot be issued after a *ca. sa.*, not even where the defendant is allowed to go at liberty, on an agreement that he will pay the money on a certain day. *Anon.* 1 Law J. K.B. 87.

Where an insufficient levy has been made under a *fi. fa.*, a *ca. sa.* for the remainder of the debt cannot be issued until the sheriff has finally returned the *fi. fa.* *Wilson* v. *Kingston*, 2 Chit. 203.

Execution of a *capias*, after notice of an injunction, is bad, even though no diligence of the party, after he received notice of the injunction, could have enabled him to stay the execution. *Payne* v. *Carpenter*, 1 Law J. Chanc. 238.

Issuing a *fi. fa.* upon a judgment which has not been revived, does not, upon the judgment being revived, preclude another *fieri facias* from issuing, though the former be not quashed or returned. *Anon.* Ken. 120.

If the goods of a debtor continue in his possession, after they have been seized under a *fieri facias*, and fairly sold to another person, and the transaction is well known in the neighbourhood, they cannot be seized again by another judgment creditor; for the fact of the possession by the creditor does not render the sale void. *Latimer* v. *Batson*, 4 Law J. K.B. 25, s. c. 4 B. & C. 652, s. c. 7 D. & R. 606.

The goods of a bankrupt were *bonâ fide* sold to a person, who permitted the bankrupt to keep possession of them, and to use them, as his tenant. The goods were seized by the sheriff under an execution against the bankrupt. The vendee gave notice to the sheriff that the goods were his property, but the sheriff disregarded that notice; whereupon he paid the amount of the levy, but gave the sheriff another notice to retain the money: The Court held, that the first notice ought to have set forth the interest of the bankrupt in the goods, as the sheriff was bound to seize and sell that limited interest. *Dean* v. *Whittaker*, 3 Law J. K.B. 67, s. c. 1 C. & P. 347.

Where A assigned his effects to trustees in trust for the benefit of his creditors: the deed empowered the trustees to permit A to remain in possession of any part of the effects, until the remainder should be disposed of and the debts collected. Part of the goods were sold by public sale, which described them as A's property, the trustees having suffered A to remain in possession of the remainder, on the security of which, B knowing them to be the property of the trustees, gave credit to A; B afterwards issued execution, and the goods were sold under a *fi. fa.*: Held, that the trustees might recover against the sheriff in an action of trespass, B having had notice of the change of property, and the possession of A being consistent with the deed. *Wooderman* v. *Baldock*, 8 Taunt. 676.

A made an assignment for a good consideration of his interest in a farm, including his cattle and implements of husbandry, then in the hands of the sheriff under a writ of *fi. fa.* at the suit of C, and the property was liberated by the sheriff on his taking security from B; B, after the assignment, managed the property, but A still remained in possession. On the property subsequently being taken in execution at the instance of D, it was held to be protected by the assignment to B. *Jeseph* v. *Ingram*, 8 Taunt. 838.

Where the late sheriff levied goods under an execution, and returned that they remained in his hands for want of buyers; and four several writs of *distringas* were issued to the succeeding sheriff, under which issues were levied,—the Court directed the sheriff to proceed to a sale. and pay over the proceeds to the party at whose suit the execution was sued out. *Head* v. *Whitehead*, 5 Law J. C.P. 53.

If, at a public sale, a sheriff, under a *fi. fa.* against A, sells the goods of B, B may maintain an action of trover against the vendee. *Farrant* v. ——, 3 Stark. 130. [Abbott]

Where the vendee, at a sale under an execution, purchased sails with a knowledge that they were deposited at a sail-maker's, and did not apply for a delivery till after the time when the sheriff was bound to pay over the money: Held, that he could maintain no action against the sheriff, though the sail-maker refused to deliver them up, as it must be considered he accepted the order from the sheriff in substitution of the goods. *Duncan* v. *Carrall*, 1 C. & P. 169. [Abbott]

The occupation of premises, and payment of a fixed annual rent for the same, under a clause in an agreement for a lease of other property, engaging "to accommodate" the tenant [so occupying] with such premises during the continuance of the intended lease, will be deemed a tenancy from year to year, and will therefore vest such an interest in the tenant, as may be seized and sold by the sheriff, under a *fi. fa.* against such tenant. *Doe d. Westmoreland* v. *Smith*, 6 Law J. K.B. 44, s. c. 1 M. & R. 137.

A party who has taken out execution, is not precluded from purchasing the property seized under it. *Stratford* v. *Twynam*, 1 Jac. 418.

A judgment creditor, who files a bill against prior incumbrancers, in order to have his judgment satisfied out of freehold estates, need not have sued out execution upon his judgment. *Townshend* v. *Agnew*, 3 Law J. Chanc. 200.

If after a decree for the administration of the testator's estate, and notice thereof, a creditor obtains judgment and levies, it seems that the sum levied will be ordered to be restored. *Clarke* v. *Ormonde*, 1 Jac. 122.

### (B) PRIORITY.

[See EXTENT.]

Though the writ of execution against a debtor's goods, which is first delivered to the sheriff, is, in general, entitled to priority, yet delay in enforcing the writ will endanger the priority; and if a jury should be satisfied that the delay was caused by a desire to protect the goods for the debtor, a writ of execution delivered after the first, and followed up by sale, will be entitled to the priority.

This rule prevails, although the writ first delivered may have been delivered to a former sheriff. The new sheriff, to whom the second writ be delivered, will be bound to enforce it; although the goods may be nominally in the custody of the former sheriff. *Lovick* v. *Crowder and Kelly*, 6 Law J. K.B. 263, s. c. 8 B. & C. 132, s. c. 2 M. & R. 84.

### (C) STAYING AND SETTING ASIDE.

The Court of Exchequer will not set aside an execution, on the ground of the allowance of a writ of error having been served. *Bleasdale* v. *Darby*, 11 Price, 606.

If execution issue on a judgment signed for an irregularity in the proceedings, the Court will set the execution aside on security being given to defend on the merits, &c. *Mills* v. *Spedding*, 1 Ken. 343.

The defendant having been taken in execution under a *ca. sa.* sued out by the plaintiff in person, and sent to the sheriff in a blank sheet of paper;—on an affidavit by the defendant that he did not know the plaintiff, nor had ever any dealings with him, nor received any notice of the plaintiff's proceeding, until he was taken in execution: The Court ordered the proceedings to be set aside, and the sum levied under the execution to be returned to the defendant. *Morgan* v. *Short*, 5 Law J. C.P. 131, s. c. 4 Bing. 147.

### (D) EQUITABLE EXECUTIONS.

*Semble*, an equitable execution can be maintained only where there is an unsatisfied term, or where a person has converted his legal into an equitable estate, for the purpose of defeating his creditors. *Kirby* v. *Dillon*, 2 Law J. Chanc. 150.

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## EXCISE.

On an information under the statutes 24 Geo. 3, c. 56, and 10 & 11 W. 3, c. 21, s. 14, against tar-distillers, for penalties incurred by the non-compliance with those statutes: Held, that as by a necessary consequence the distillers of tar were, in the process of their manufacture, compelled to make *tar acid*, or *acetous acid*, they are clearly vinegar-makers within the 6th section of the former statute, and, as such, liable to the excise-regulations relative to vinegar-makers; therefore, if such a party does not give notice to the Excise, as prescribed by the 14th section of the 10 & 11 Wil. 3, c. 21, he renders himself liable to be sued for the penalties given by that act. *The Attorney General* v. *Houlgrave*, 11 Price, 217.

On an information for penalties against tanners, for refusing to furnish scales and weights for the re-weighing of hides, &c. chargeable with the duties of Excise; and for refusing to assist the surveyors and supervisors in re-weighing such hides and examining his pending stock, contrary to the 5 Geo. 3, c. 43, s. 22: Held, that the pending stock of a tanner, within the meaning of the 5 Geo. 3, is all the hides, &c. taken out of the wooze, and not merely those which have been weighed and marked by the officer; consequently the tanner, by not forwarding, &c. and by not assisting, &c. has clearly incurred the penalties sued for. *Attorney General* v. *Bevington*, 11 Price, 222.

Counts in an information charging a tanner under the 56 Geo. 3, c. 110, s. 4, with "taking hides out of the wooze, &c. so that the duties payable thereon might not be duly charged, accounted for, or paid," and with concealing hides, so that, &c. using the words of the statute; and with not hanging up hides taken out of the wooze to dry, separate and apart from hides taken out to dry on a former day—was held to be supported by proof, that the tanner, after certain hides had been taken out of the wooze and weighed by the surveying officer, and marked by him as having been charged with the Excise duty, which was accordingly entered in his book, had substituted hides of less weight, also so marked on a former day, which was detected by the supervisor on weighing the hides, and who found the hides which had been withdrawn, on unentered premises. *Attorney General* v. *Courtice*, 9 Price, 450.

The 35 Geo. 3, c. 114, gives glass bottle-manufacturers an option of having the duty taken upon the materials ascertained by the gauge, or when manufactured, by weighing them. In an information for using false weights,—it was holden, that if he adopted the latter course, he was bound to deliver to the officer of Excise a declaration in writing to that effect. *Attorney General* v. *Pemberton*, M'Clel. 635.

A foreign ambassador, on retiring from office in this country, left a quantity of foreign wines and other customable goods, which had been imported in the usual manner, duty free, in the hands of an agent for sale, who employed a sworn broker, who sold them by public auction, without any condition that the purchaser should be answerable for the duties, the broker paid the Excise duties, and applied to the Commissioners of Customs for leave to pay the British ship instead of the foreign ship duties, which was granted; and also for indulgence as to payment of those duties from time to time during a year and a half: Held, on an information on 59 Geo. 3, c. 52, s. 6, with counts for money had and received to the use of the Crown, that upon the wines passing from the privileged person, they became liable to the duties, notwithstanding the 7 Anne, c. 12, s. 3; that the price for what they sold was to be taken to include the original value and the duties payable thereon; and that the defendant was to be taken as the agent of the ambassador, *quoad* the latter, and was therefore liable under the second count, although there was no evidence of the amount of the price actually received, and although he had immediately handed over the whole proceeds to his employer. *Attorney General* v. *Thornton*, M'Clel. 600.

On the trial of an information for penalties against a husband, for possessing uncustomed goods with a guilty knowledge, the wife's falsely saying that "he was gone into the country," when immediately afterwards he was discovered by the Excise officers on the premises, is admissible evidence, as a part of the *res gesta*. *Attorney General* v. *Good*, 1 M. & Y. 286.

Any officer of Excise, whose accounts may be frustrated or evaded by the fraudulent use of permits, is within the words "officer or officers," used in the 57 Geo. 3, c. 123, s. 3. *Attorney General* v. *Slee*, M'Clel. 567.

The lien given by the 3 Geo. 4. c. 95, on stage-coaches, horses, harness, &c. for non-payment of the duties, attaches, though the property has passed under a commission of bankrupt: Held also, that there was no general lien on the whole stock, but merely on each coach. *In re Day*, M'Clel. 384.

An action against an officer of Excise, not brought

within the time prescribed by 28 Geo. 3, c. 37, s. 23, is barred. *Hendry* v. *Biers*, 2 D. & R. 9.

Where goods have been seized by Excise officers, under a magistrate's warrant, to levy for a penalty, and that penalty is afterwards paid, the Excise officers are not bound to restore the goods until a demand made by the owner; nor are they answerable for any injury which may happen to the goods subsequently to the payment of the penalty. *Hutchings* v. *Morris*, 5 Law J. M.C. 144, s. c. 6 B. & C. 464.

Where goods become forfeited in consequence of any fraud or neglect in respect of the revenue laws, the loss, as between the buyer and seller, must fall upon him whose fraud or neglect occasioned the forfeiture.

But if the seller be a party to the intended fraud or neglect, or connive at it, he shall not recover; although the act of fraud or the neglect was committed by, or was chargeable upon the buyer. *Studdy* v. *Sanders*, 4 Law J. K.B. 290, s. c. 5 B. & C. 628, s. c. 8 D. & R. 403.

The sale of real estate extended under the excise laws, was directed to take place in the county where the property was situated, before the resident collector. *Rex* v. *Dyer*, 1 M. & Y. 261.

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## EXECUTOR AND ADMINISTRATOR.

[See ADMINISTRATION, WILL, and LEGACY.]

(A) RIGHTS AND INTERESTS.
(B) POWERS AND DUTIES.
(C) LIABILITIES.
(D) ASSETS.
(E) ACTIONS AND SUITS BY AND AGAINST.
(*a*) *Where maintainable.*
(*b*) *Parties.*
(*c*) *Pleadings.*
(*d*) *Evidence.*
(*e*) *Practice.*
(*f*) *Costs.*

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### (A) RIGHTS AND INTERESTS.

An executor may renounce after he has taken the oath of office, and given an appearance, in a case touching the validity of the will, for the purpose of becoming a witness. *Jackson* v. *Whitehead*, 3 Phil. 577.

An executor who has renounced, in order to his becoming a witness in a suit commenced touching the validity of the will, may, at the termination of such suit, retract his renunciation, and take probate of the will. *Thompson* v. *Dixon*, 3 Add. 272.

One of several executors who has renounced, may, after the deaths of his co-executors who have proved the will, retract his renunciation, and take probate, as a matter of course. But the same right does not accrue to an executor who has renounced, after administration, with the will annexed, granted; from the possible inconvenience that might accrue, in other quarters, if the chain of executorship, once broken, were thus suffered to revive.

Nor any administration, with the will annexed, be then granted to such executor; a residuary legatee, if any, being preferably entitled—if there be no residuary legatee, a next of kin. *In the goods of William Thornton*, 3 Add. 273.

A appoints executors, who prove his will in the Prerogative Court; B, the surviving executor, dies, having appointed C his executor; and C proves B's will in the Consistory Court of Llandaff:—C is the personal representative of A. *Fowler* v. *Richards*, 6 Law J. Chanc. 185.

Letters of administration, granted by a bishop, are sufficient to pass property within his diocese, although there may be *bona notabilia* in divers dioceses, which would require prerogative letters of administration. *Stokes* v. *Bates*, 4 Law J. K.B. 221, s. c. 5 B. & C. 491, s. c. 8 D. & R. 247.

*Quære*—Whether a person who merely holds a will, monished to bring it in at the suit of a party entitled to administration with the will annexed, has any right to insist on proof of "*bona notabilia*," prior to bringing in the will.

An allegation of "*bona notabilia*" when established, is sufficient to found the jurisdiction of the prerogative court. *Brown* v. *Coates*, 1 Add. 345.

*Quære*—Whether any chancellor, commissary, official, or the like, has the power of putting the executor, or one entitled to administration of the effects of a party dying within his diocese, &c. upon proof, *otherwise than by oath in his own court*, of the deceased having left *bona notabilia* in divers dioceses, sufficient to found the jurisdiction of the prerogative court, before requiring probate, or administration in the prerogative court. *Chase* v. *Yonge*, 1 Add. 336.

Executors or administrators, where they take a real estate as annexed to their offices, are not trustees for the heir-at-law of the testator or intestate. *Quære*, whether they are trustees for his next of kin. *Wellman* v. *Bowring*, 1 Law J. Chanc. 27, s. c. 1 S. & S. 24.

If property is given to executors as trustees generally, and the beneficial interest is only partially disposed of by the will, the executors are trustees of so much of the beneficial interest as is not disposed of, either for the next of kin, or for the heir, according to the nature of the property. *Madgin* v. *Lumley*, 1 Law J. Chanc. 236.

An executor who has not proved cannot assent to a legacy. *Monday* v. *Hurley*, 5 Law J. K.B. 212.

*Semble*—that an executor cannot sell the personal property before probate. *Pinney* v. *Pinney*, 6 Law J. K.B. 353, s. c. 8 B. & C. 335.

Where an executor assents to part of a devise, contending that only that part was intended to pass under it, he cannot at law set up his want of assent to the devise, where it shall appear that the devise carried more. His assenting to part, and denying title as to the remainder, is an assent to the whole. *Doe d. Sims* v. *Sims*, 5 Law J. K.B. 140.

An administratrix having, through the misinformation of one of her intestate's creditors, confessed a judgment, and the creditor having taken out execution thereon, the Court set aside the judgment, and ordered the goods to be restored. *Anon.* 2 Ken. 294.

Even in an insolvent estate, the personal representative will be allowed a sum expended for funeral expenses, according to the situation of life in which the deceased had lived. *Pitchford* v. *Hulme*, 3 Law J. Chanc. 223.

An executor has not a right to call on the residuary legatee for an account of all the estate and effects of the testator. *Graham* v. *Keble*, 2 Bligh, 52.

One of several co-executors and trustees cannot purchase his testator's share of a partnership concern, through the medium of the surviving partners.

A valuation made with a view to such a purchase, and to which the executor, who intended to purchase, was a party, cannot stand. *Cooke* v. *Collingridge*, 1 Law J. Chanc. 74.

Purchase by an executor rescinded after twenty years by remainder-man, the transaction having taken place under circumstances of disguise and concealment. *Watson* v. *Toone*, 6 Mad. 153.

A defect in the legal representation of a party, occasioned by the lunacy of one of his several administrators, how permitted by the Court to be supplied. *In the goods of the Rev. William Phillips*, 1 Add. 335.

An executor, by proving his debt specially before the Master, divests himself of his right to retain. *Player* v. *Foxhall*, 1 Russ. 538.

The right of retainer extends to the executor of an executor. *Thompson* v. *Grant*, 1 Russ. 540.

An administrator in India, being a creditor of the intestate by specialty, and also by simple contract, possesses himself of assets not sufficient to discharge the two debts which are due to him, and claims against the assets possessed by another administrator in England: Held, that his right of retainer must be exercised in satisfaction of the specialty debt; and that he will rank only as a simple contract creditor upon the assets in England. *Johnson* v. *Ward*, 1 Law J. Chanc. 137.

The right of a personal representative to retain, out of the assets in his possession, a debt due to him from the deceased, is not affected by the circumstances that he did not acquire the character of personal representative till after the usual decree had been made in a suit instituted by creditors against the former administrator. *Nunn* v. ——, 2 Law J. Chanc. 123.

A decree, at the instance of creditors, for the administration of assets, does not preclude the personal representative from retaining his own debt, though the assets, out of which he seeks to retain his debt, came to his hands after the decree. *Nunn* v. *Barlow*, 1 S. & S. 588.

Where the plaintiff had given the defendant a power of attorney, who acted under it, and took out administration in India: Held, that the defendant could not retain as against the plaintiff, on the ground of a subsequent administration, obtained by other creditors in this country. *Farrington* v. *Clarke*, 1 Chit. 429.

An intestate having covenanted with trustees, that, in case he shall marry, they shall pay to his intended wife an annuity of 20*l.*; or that his heirs, executors, &c. shall pay unto the trustees, within a certain time after his death, the sum of 400*l.* to remain vested in them—this was held, not such a covenant as would entitle the widow to retain the 20*l.* as administratrix of her husband, and to set up a retainer under a plea of *plene administravit*, because the *corpus* is to be paid to the trustees. *Thompson* v. *Thompson*, 9 Price, 464.

An executrix, under a misapprehension of the true construction of a will, had, after a party who was entitled to an annuity to commence only on his coming of age, paid to him sums in respect of the annuity for the two years preceding that period: Held, that she was entitled to retain these sums out of the future payments of the annuity. *Livesey* v. *Livesey*, 6 Law J. Chanc. 13.

In deciding the question, whether an executor takes the residue beneficially, it is necessary that those motives, which might influence the testator in favour of the executor, should be considered. *Lynn* v. *Beaver*, 1 Turn. 68.

If an executor admits that all the testator's debts, &c. have been paid, the Court will, on motion, order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue. *Dando* v. *Dando*, 1 Sim. 510.

E being tenant for life under a deed of settlement, with a power to lease, under certain restrictions, grants leases not in conformity with the power, and dies, leaving by will the residue of his personalty to J E, his son, the next remainder-man under the settlement. J E having called upon the executors to pay the residue, they require an indemnity against the contingent claims of the tenants in case of eviction; and, upon the refusal of J E to give such indemnity, he files a bill against them, for an account and payment of the residue.

Held, (reversing the judgment of the Court below,) that as J E had the power to disturb the leases, he was bound either to confirm them, or to give the indemnity required; and that the executor had a right to hold the residue till he obtained the confirmation or indemnity. *Vernon* v. *Lord Egmont*, 1 Bligh, N.S. 554.

### (B) POWERS AND DUTIES.

*Quære*—Whether a husband has a right to compel the wife's executor to pay her funeral expenses out of her separate estate. *Gregory* v. *Lockyer*, 6 Mad. 90.

An executor, in discharging legacies, ought to be influenced by the testator's intention, by giving the articles specifically bequeathed to the legatees for whom they were willed. *Clarke* v. *Ormonde*, 1 Jac. 108.

Executors may pay legacies, or hand over the residue within the year after the death of the testator. *Angerstein* v. *Martin*, 1 Turn. 240.

*Semble*—That an administrator is not bound to distribute the residue without an order of the Ecclesiastical Court. *Archbishop of Canterbury* v. *Tappen*, 6 Law J. K.B. 250, s. c. 8 B. & C. 151, s. c. 2 M. & R. 136.

It is settled by the authority of the House of Lords, that the personal representatives of a testator, after a bill filed against them by creditors, may voluntarily pay the demands of other creditors.—*Semble*, that this rule is at variance with the general principles on which a court of equity administers assets. *Maltby* v. *Russell*, 3 Law J. Chanc. 85, s. c. 2 S. & S. 227.

Executors, as such, having invested part of the estate in stock, which on taking the account was by mistake omitted: the Court allowed them to transfer the principal sums without the dividends, it appearing they had been put to expenses exceeding the amount. *Della Cainea* v. *Hayward*, M'Clel. 16.

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tes. After six years had elapsed from their dates, e of the parties died, naming the other among his ecutors. The survivor paid a year's interest on his n account. To an action on these notes the Statute of Limitations was pleaded by the executors; d the Court held, that the implied promise by the rvivor did not make the executors liable to be ed on the notes. *Atkins* v. *Tredgold*, 1 Law J. B. 228, s. c. 2 B. & C. 23, s. c. 3 D. & R. 200.

Actions at law by creditors after a decree for the ministration of a testator's estate, will be restrained. nd if the executor permits the creditors to proed, he will be personally responsible. *Clarke* v. *monde*, 1 Jac. 122.

Therefore, where, after a decree for the administration of a testator's estate, a creditor recovered verdict against the executor on these pleas—*non umpsit*, *set-off*, and *plene administravit præter*—The ourt granted an injunction. *Lord* v. *Wormleighton*, Jac. 148.

### (D) ASSETS.

Debts mentioned in the inventory given in by an ecutor to the Ecclesiastical Court, are *primâ facie* coverable, and will be taken as assets if he do not pel the legal presumption. *Young* v. *Cawdrey*, 8 unt. 734.

A borrowed a sum of money from B & Co., nkers, and conveyed to them some premises, with power of sale to re-imburse themselves that sum, d any other they might advance to him. A, dying solvent, left all his estates, real and personal, to ree persons, first to pay his debts, and then to vide the property. He made two of them his ecutors. In the lifetime of those two executors, & Co. sold the premises, and C, the solicitor for both parties, kept the balance in his hands. The o executors died. C also died. The plaintiffs took letters of administration *de bonis non* of the ects of A, and brought an action against the dedant, as the representative of C, to recover that ance: The Court held, that the balance was itable assets, and could not be recovered in an ion at law. *Clay* v. *Willis*, 1 Law J. K.B. 144, 1 B. & C. 364, s. c. 2 D. & R. 539.

leasehold, held under the church, and renewable tated times, is bequeathed to A for life, remain- to B: B, as executor, renews the lease at the per times; and, in the renewed leases, enters the same covenant to repair as was contained he old leases; A dies, leaving the premises in a dilapidated state: Held, that A's assets are le to B, to answer the amount requisite for reing the premises. *March* v. *Wells*, 2 Law J. nc. 191, s. c. 2 S. & S. 87.

n executor gives a creditor of the testator, who uing him at law, a cognovit, with stay of execu- : this is not an admission of assets. *Stirling* v. —, 4 Law J. Chanc. 223.

he circumstance that monies were paid in by an cutor to his bankers, and placed to the executor- account, is *primâ facie* evidence that those ies were in the executor's own hands as assets e estate. *Crossdail* v. *Phillips*, 5 Law J. Chanc.

ffect of the conduct of parties as to whether ey, which originally was impressed with a trust laid out in land, shall be regarded, in equity, as money or as land. *Hougham* v. *Sandys*, 6 Law J. Chanc. 671.

Where one executor is appointed in Amboyna, and another in England, and the latter proves the will in England, and the former does not, the assets in England will not be bound by the act of the executor in Amboyna, even supposing him to have a right, by the Dutch law, to prove the will here and administer the assets here. *Lord* v. *Genslin*, 1 Law J. Chanc. 189.

*Quære*, If an heir-at-law be an infant, whether a decree to marshal the assets is binding.

An amicable suit having been determined by a decree for the administration of assets, a creditor filed a bill, praying for the usual accounts (which had been directed by the former decree), and also to have the assets marshalled, (which was neither prayed for nor directed in the first decree): the Court, therefore, made another decree, that the assets should be marshalled, and that the accounts directed by the first decree should be furnished. The first suit would have been a bar to the second if it had been for the same object, and the Court would have even stayed proceedings before answer. *Pott* v. *Gallini*, 1 S. & S. 206.

A judgment in the Lord Mayor's Court, obtained against the garnishee, does not entitle the plaintiff to rank as a judgment-creditor in the administration of the garnishee's assets. *Holt* v. *Murray*, 1 Sim. 485.

In a creditor's suit for administering the assets of B, a joint creditor of A and B was permitted to prove, A having become bankrupt, and it appearing that there were no joint assets of A and B. *Cowell* v. *Sikes*, 2 Russ. 191.

A person mortgaged freehold estates, and, two months afterwards, he surrendered copyholds to the use of the mortgagee, to secure the same debt; in a suit, after the death of the mortgagor, for the administration of his assets, the freeholds were sold with the consent of the mortgagee, and, the personal estate having been exhausted, the mortgage debt was, by order of the Court, satisfied out of the proceeds of the freeholds: Held, that the specialty creditors of the mortgagor were entitled to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate. *Gwynne* v. *Edwards*, 2 Russ. 289, n.

An executor in India collecting assets in India is entitled to a commission of 5 per cent. even upon assets collected for the payment of legacies given to himself. He is entitled also to his commission, though part of the assets are in the hands of a mercantile house in which he is a partner, and in which the testator was at the time of his death a partner. *Cockerell* v. *Barber*, 5 Law J. Chanc. 77, s. c. 1 Sim. 23.

### (E) ACTIONS AND SUITS BY AND AGAINST.

#### (a) *Where maintainable.*

An action of assumpsit will not lie against an administrator, for the distributive share to which the next of kin of an intestate is entitled, under the statute 22 & 23 Car. 2, c. 10, although the administrator has admitted a fixed sum to be due, and has promised to pay the same. *Jones* v. *Tanner*, 6 Law J. K.B. 71, s. c. 7 B. & C. 542, s. c. 1 M. & R. 420.

[illegible] others, being residuary [illegible] of one T P, the defendants, [illegible] in the will, accounted with [illegible] to the latter the respective [illegible] thereon, took from them and from [illegible] but did not pay the plaintiff [illegible] having consented to allow it to remain [illegible] Held, that, the money not being [illegible] the defendants in their character of [illegible] the plaintiff was entitled to recover it in [illegible] law. *Gregory* v. *Harman*, 6 Law J. [illegible] s. c. 1 M. & P. 209.

[illegible] general principle of law, that when property [illegible] assets of the estate of an intestate, whose [illegible] is dead, that the administrator *de bonis non* may sue on promises made to that administratrix.

A and B were partners; A died, and C, his wife, administered part of his effects; B drew a bill on a debtor to the partnership, and indorsed it to C, as part of the partnership property, to which A was entitled; C died; afterwards E and F took out letters of administration *de bonis non* of the goods of A, and sued the debtor on the bill of exchange: The Court held, that the action was well brought. *Cotherwood* v. *Chabaud*, 1 Law J. K.B. 66, s. c. 1 B. & C. 150, s. c. 2 D. & R. 271.

An action on the case lies against the executrix of an attorney, for the negligence of her testator, in making insufficient inquiries as to the validity of a security, upon which his client proposes to advance money. *Wilson* v. *Tucker*, 1 D. & R. N.P.C. 30. [Abbott]

A testator in Peru directs a sum of money, in the hands of A in London, to accumulate till his children come of age; a court of justice in Peru orders part of it to be expended, in payment of a balance due to the executor for monies expended by him in maintaining the widow and children of the testator: and a person, who, under the direction of the Peruvian executor, has obtained letters of administration to the testator in England, brings an action against A to recover the portion of the assets which were in his hands; B files a bill to restrain the action, and to have the directions of the Court as to the disposal of the money, on the ground that it is an appropriated fund which the plaintiff wishes to misapply: Held, that such a bill cannot be maintained. *Darthez* v. *Winter*, 4 Law J. Chanc. 175, s. c. 2 S. & S. 139.

A died intestate; B, the next of kin, having died without administering to the effects of A, C, executor of B, takes out administration to A, the grant being of the goods, &c. "*left unadministered*" by B. Held, that a payment to B is no bar to an action by C.—Graham, B. *dubitante*. *Mitchell, administrator of Rebecca Humphrey*, v. *Moorman*, 1 Y. & J. 21.

### (b) *Parties.*

If a creditor's bill is filed against an administrator *de bonis non*, the suit is imperfect, unless the former administrator, or his personal representative, be made a party. *Watson* v. *Ridge*, 1 Law J. Chanc. 15.

Where one executor has alone proved, he may sue without making the other executors parties, although they have not renounced. *Davies* v. *Williams*, 1 M. & R. 5.

An executor who has not proved, need not be a party to a bill of revivor. *Davies* v. *Williams*, 4 Law J. Chanc. 210.

### (c) *Pleadings.*

Where a surviving executor brought an action of assumpsit in his own right, against the surviving partner of a deceased co-executor, without stating him to be a surviving partner: The Court held, that this action could not be maintained. *Fitzgerald* v. *Boehm*, 6 B. Mo. 332.

Where three executors ordered goods to be sold, as the property of their testator, and afterwards sued the purchaser for the amount, without describing themselves as executors in the declaration, and without joining a fourth executor, who was named in the will, but who had refused to prove or act under it: Held, that the action was well brought, as the order for sale was given by the three alone, and as they did not appear to have acted in their character of executors. *Brassington* v. *Ault*, 3 Law J. C.P. 243, s. c. 2 Bing. 171, s. c. 9 B. Mo. 340.

In an action of debt an executor may declare in the *debet* and *detinet*; at least it is only a ground of *special* demurrer. *Foot* v. *Stokes*, 2 Ken. 529.

In a declaration of assumpsit by executors for money lent to the defendant by their testator, it was alleged, that the latter promised to pay instead of the defendant: Held, that this was immaterial. *Buxton* v. *Nancolas*, 4 Law J. C.P. 212.

Where a party is described in the process generally, he may be declared against as an administrator, the object of the writ being only to bring the defendant before the Court. *Watson* v. *Pilling*, 6 B. Mo. 66, s. c. 3 B. & B. 4.

A count in assumpsit for money had and received by defendant, as executor, to the use of the plaintiff, cannot be joined with a count for money due to plaintiff from defendant, as executor, upon an account stated with him of money due from him as executor.

*Semble*, That a count for money paid by plaintiff to the use of the defendant, as executor, may be joined with such a Count on an account stated. *Ashby* v. *Ashby*, 6 Law J. K.B. 41, s. c. 7 B. & C. 444, s. c. 1 M. & R. 180.

A plaintiff sued as executor, and in his declaration made profert of the letters testamentary in the usual form, which states—"whereby it appears to the Court here that the plaintiff is executor," &c. The defendant did not demand oyer, but pleaded that the plaintiff never was nor is executor "in manner and form" as alleged in the declaration. The plaintiff replied that he was, and continued to be executor in manner and form, &c.: Held, that the plaintiff might recover on this issue, although he had not taken probate till some months after the declaration. *Thompson* v. *Reynolds*, 3 C. & P. 125. [Best]

In assumpsit against several defendants, as executors, with plea of *ne unques executors*, the plaintiff may have a verdict against the real executor on the counts laying the promises by the testator, and the other defendants must be discharged. *Griffiths* v. *Franklin*, 1 M. & M. 146. [Gaselee]

The plea of *plene administravit*, except to a certain sum, is an admission of that sum. *Curtis* v. *Hunt*, 1 C. & P. 180. [Abbott]

Under a plea of *ne unques administrator*, a defen-

dant only puts in issue the actual grant of the letters of administration, and not the authority by which they have been granted. If, therefore, he relies upon his own residence out of the diocese, or any other fact, to shew that the letters of administration did not pass the subject-matter in question, he must specially plead it. *Stokes* v. *Bate*, 4 Law J. K.B. 221, s. c. 5 B. & C. 491, s. c. 8 D. & R. 247.

Executors pleaded to an action for breaches of covenants by the testator, *plene administravit præter*, a sum not sufficient to pay one of the executors a simple contract debt. The plaintiffs denied the truth of that plea, and issue was joined in Trinity term, 4 Geo. 4. At the next assizes the executors pleaded, that since the last continuance, (on 2d August,) a person had recovered a judgment against them on a writing obligatory. The plaintiffs replied, that the executors had notice of that writing obligatory before they pleaded to the declaration. The executors demurred: The Court held, that the executors might plead that judgment at the assizes, although it appeared to be a judgment of Trinity term. *Lyttelton* v. *Cross*, 3 Law J. K.B. 2, s. c. 3 B. & C. 317, s. c. 5 D. & R. 175.

To a bill in which the plaintiff claims as executor, a plea alleging that he has not proved, in England, the will under which he is executor, is a good defence. *Simons* v. *Millman*, 6 Law J. Chanc. 148.

A creditor of a testator files a bill against A, stating that A is the executor, and has proved the will; that he sets up a fraudulent assignment from the testator, under which he claims to be entitled to the property, and that, whether he has proved the will or not, he has possessed himself of the personal estate of the testator; and praying an account of the personal estate, and that the deed may be declared void: a plea that A is not executor is a good plea to the whole bill. *Hill* v. *Neale*, 5 Law J. Chanc. 144.

Declaration, in assumpsit against executors, stated that the testator, at the time of his death, was indebted to J. Younghusband in 200*l.* and interest, on a promissory note; that, after the death of J Y, the note being unpaid, it was found, before the coroner on view of the body of J Y, then lying dead, by the oaths of lawful men, that Younghusband was *felo de se*, as appeared by the record of the inquisition, by means of which felony and inquisition, J Y forfeited the note to the King; that the King, by grant under the sign manual, assigned the note to the plaintiff, as mentioned in a certain other inquisition, and delivered the note to the plaintiff, of which the defendants, after the death of the testator, had notice.

Breach—Non-payment by testator or defendants. Pleas and issues thereon: First, That testator *non assumpsit*. *Similiter*.—Second, That the note became due and payable to J Y during his life, and that the causes of action did not accrue to him within six years before exhibiting plaintiff's bills. Issue thereon.—Third, *Nul tiel record* of the coroner's inquest. Issue thereon.—Fourth, That there was no such grant as the plaintiff alleged. Issue thereon. All the issues, except the second, were found for the plaintiff.

On motion by the defendant to enter a nonsuit: Held, first, that the second inquisition being an office of instruction only, and not of entitling, was not necessary to be produced at the trial; secondly, that the grant under the sign manual passed the property in the note.

On motion by the defendant in arrest of judgment: Held, first, that the declaration sufficiently shewed a debt due from the testator in his lifetime to the *felo de se*, and the note to be the security for such debt, and that both debt and security passed to the Crown by operation of law, so as to be assignable by the Crown without indorsement; secondly, that, supposing it to be necessary to vest chattels of a *felo de se* in the Crown, that the coroner's inquest should be found by twelve men, it must, after verdict, be taken that the inquest was so found.

On motion by the plaintiff to enter judgment *non obstante veredicto*: Held, first, that the plea of the Statute of Limitations, viz. the second, was bad, for not shewing that J Y's right of action was barred by the statute at the time of his death; and if it was not so barred at that time, then that, the King not being within the statute, his rights, and those of his grantee, to the cause of action on the note, were not barred: secondly, that the plea confessed a cause of action at one time in J Y, the *felo de se*, (which had passed from him to the Crown by forfeiture, and from the Crown to the plaintiff,) while the matter pleaded in avoidance was insufficient—so that the plaintiff was entitled to judgment *non obstante veredicto*, on the second issue. *Lambert* v. *Taylor*, 3 Law J. K.B. 160, s. c. 4 B. & C. 138, s. c. 6 D. & R. 188.

### (*d*) *Evidence.*

A legatee who has received his legacy, is a competent witness in an action by the executor to increase the general fund. *Clarke* v. *Gannon*, 1 R. & M. 31. [Abbott]

The term *funeral expense* does not apply to mourning supplied to the widow and family, and cannot be claimed against his estate by the executor, if he gives the order; and by consequence, a legatee who has not received his legacy, is a competent witness on the part of the executors, in an action brought against him for the recovery of such demand. *Johnson* v. *Baker*, 2 C. & P. 207. [Best]

In a cause, questioning the validity of a will, the wife of the executor is not a competent witness. *Dean* v. *Russell*, 3 Phil. 334.

The production by a plaintiff, suing as administrator to A, of the letters of administration, is not *primâ facie* evidence of A's death, *Moons* v. *De Bernales*, 1 Russ. 301.

The probate act book is evidence of a person being executor, without producing the probate. *Cox* v. *Allingham*, 1 Jac. 514.

Where a person claims title to personal property through an executor, the production of the will, without probate, is not evidence of the title of the executor. *Pinney* v. *Pinney*, 6 Law J. K.B. 353, s. c. 8 B. & C. 335, s. c. 2 M. & R. 436.

In an action by administrators *de bonis non*, it is not necessary to produce the letters granted to the first administratrix; for the letters granted to the former persons recite those granted to the latter persons. *Catherwood* v. *Chabaud*, 1 Law J. K.B. 66, s. c. 1 B. & C. 150, s. c. 2 D. & R. 271.

The proof of the amount of duty paid on the probate by an executor, is evidence to go to the jury, (on a plea of *plene administravit*,) as some evidence

to shew the presumptive amount of the effects received by him. *Foster* v. *Blakelock*, 4 Law J. K.B. 170, s. c. 5 B. & C. 329, a. c. 8 D. & R. 48.

Evidence tending to shew that an executor has received more than his answer admits, cannot be received, because, to go into such evidence, would be to take an account in part, which the Court cannot do—the Master's office being the proper forum for that purpose. *Law* v. *Hunter*, 1 Russ. 100.

Money paid by an administrator for a half-year's rent, commencing before and ending since the death of the intestate, may be given in evidence under *plene administravit*, he being entitled to retain. *Thompson* v. *Thompson*, 9 Price, 465.

(*e*) *Practice.*

The Court set aside an interlocutory judgment to enable the defendant, an administratrix *de bonis non, cum, &c.*, to plead the Statute of Limitations; the original testator having died seven years ago, and no proceedings being then pending against him, nor taken against the intermediate executor. *Jones* v. *Scott*, 2 Law J. C.P. 67.

An administrator *cum testamento annexo*, cannot declare before administration is granted. *Phillips* v. *Hartley*, 3 C. & P. 121. [Best]

In a suit against defendants who were the personal representatives both of testatrix, who died during coverture, and of her husband, praying an account of her separate estate, and a declaration that certain sums of stock which stood, and always had stood, in her name, constituted part of that estate; although the husband and his executors, during a long period of years, had uniformly acknowledged these sums to be, and dealt with them as being, part of her separate property, and though strong evidence was adduced by the plaintiff, which was not met by any evidence on the other side, yet the Court refused to make the declaration at the original hearing, and only referred it to the Master to take the account generally, with special inquiries founded upon the evidence. Where an inquiry as to debts has been directed before decree, and the Master has reported that there are no debts, the decree at the original hearing must nevertheless direct an account of debts. *Hornby* v. *Hunter*, 1 Russ. 89.

After a decree for the administration of the assets in a creditor's suit against an executor, the plaintiff, as well as the defendant, may move to restrain a creditor from proceeding at law.

The injunction will not be granted in such a case, unless the plaintiff has compelled the defendant to set forth in the answer the state of the assets.

If it is suggested, that in the suit, in which the decree has been made, the pleadings have omitted to raise a question, in which the estate under administration is interested; an inquiry into the matter so omitted will be directed, and the result of the inquiry will be incorporated with the proceedings on further directions. *Robson* v. *Cameron*, 3 Law J. Chanc. 135.

After a double default, and peremptory undertaking given, the Court permitted an administratrix to discontinue an action,—where the declaration contained two sets of counts, the one laying the promises to the intestate, and the other to the plaintiff as administratrix,—upon the terms of paying the costs of the latter counts, there appearing to be no vexation on the part of the plaintiff. *Blakeney, administratrix*, v. *Edwards*, 2 Y. & J. 559.

An action being brought against an executor by the residuary legatee, it is not, always, necessary to ascertain whether all the debts and the legacies have been paid before the amount due to the residuary legatee can be determined. *Graham* v. *Keble*, 2 Bligh, 152.

(*f*) *Costs.*

Under a declaration containing counts on promises to the testator and to the plaintiff, as executors, without saying concerning sums due from the defendant to the testator, the defendant, on the plaintiff's being nonsuited, is entitled to costs, as the executors might have sued for the cause of action as in their own right. *Jones* v. *Jones*, 1 Law J. C.P. 87, a. c. 1 Bing. 249.

Where an executor institutes a suit properly, and a co-executor refusing to join in it is made a defendant, this co-executor will not be allowed his costs. *Collyer* v. *Dudley*, 2 Law J. Chanc. 15.

In a suit by a specialty creditor for the administration of a testator's real and personal estate, the costs of the executor are to have precedence of all other claims, and, after them, the costs of the plaintiff creditor. *Loomes* v. *Stotherd*, 1 Law J. Chanc. 220, s. c. 1 S. & S. 458.

An executor may discontinue without paying costs, in the absence of proof that he brought the action vexatiously. *Stubbing* v. *Hammond*, 8 B. Mo. 689.

Executors are bound like other plaintiffs to proceed peremptorily, or give a *stet processus*; but they are not liable to costs on discharging the rule. *Herbert* v. *Keal*, 4 D. & R. 833.

Where on the question of probate, a creditor, after suppressing the fact of assets, makes a disclosure, the Court will decree probate to the executor, with costs. *Lyon* v. *Balfour*, 2 Add. 501.

Executors to an action on a covenant by their testator pleaded a judgment recovered *puis darr. cont.*, to which the plaintiff replied, and on demurrer judgment was given for the defendants: Held, that they were entitled to the costs incurred after the plea of *puis darr. cont.*, but not to the costs of the whole cause. *Lyttleton* v. *Cross*, 4 B. & C. 117, a. c. 6 D. & R. 81.

Where a solicitor is employed by an executor and other co-defendants, the testator's estate is only bound to pay that proportion of costs, as between himself and the co-defendants, which the executor ought to bear. *Harmer* v. *Harris*, 1 Russ. 155.

Where an executor qualified his offer to pay a legacy, by insisting that it should be laid out on such security as he should approve of, the costs of a bill filed for the payment were ordered to be paid out of the testator's general estate. *Walter* v. *Patey*, 1 Russ. 375.

Where an executrix answered, no assets; and, on a reference to the Master, it appeared that she had more assets than she had admitted, but not sufficient to pay the creditor's debt, his bill was dismissed without costs against the executrix. *Robinson* v. *Elliott*, 1 Russ. 599.

In taking the accounts of a personal representative, bills of costs paid by her are not to be taxed, but the Master will consider the reasonableness of

any items to which objections may be taken. *Pitchford* v. *Hulme*, 3 Law J. Chanc. 223.

## EXPORTATION.

On a *scire facias* for the breaches of a common exportation bond, that the defendant had not exported, &c., and that he had not unshipped and relanded, &c., after a plea of performance, and a replication thereto assigning breaches, it appeared that the spirits had been in fact shipped, and carried out to the place of the vessel's destination; and that they were not landed there, but were partly used at that place and on the homeward voyage, by the master and crew of the vessel; and that the remainder was brought home into the London Docks, where it was emptied out of a beer cask (into which it had been drawn off out of the export cask) into the water; and, notwithstanding the absence of fraud—Held (Graham *B. dub.*) to be a non-compliance with the condition of the bond, it being literally an unshipping and relanding in Great Britain. *Rex* v. *Dixon*, 11 Price, 204.

It seems doubtful whether custom-house officers' power, under the 21 Geo. 3, c. 37, relative to forfeited machinery, is confined in its exercise to the limits of the port to which they are officers—or whether it extends to any place within a reasonable distance therefrom. *Attorney General* v. *Jeffreys*, 13 Price, 545, s. c. M'Clel. 270.

## EXTENT.

(A) In general.
(B) Who entitled to.
(C) Priority.
(D) What may be taken.
(E) Sale.
(F) Proceedings.
(G) Setting aside.

### (A) In general.

Distinction between aid and extent in chief in the second degree.

The statute of the 57 Geo. 3. does not apply to extents in chief in the second degree; therefore, the Crown may proceed by extent to recover a debt due from a person indebted to the crown debtor, (a collector of taxes,) who had received and misapplied the Crown's money, although he be not a debtor to the Crown within the 4th section of that statute.

Neither does the recent rule of Court respecting extents in aid, apply to extents in chief in the second degree.

It is not necessary in the affidavit made for obtaining a Baron's fiat for such an extent, in such a case, that there should be any averment of the insolvency of the crown debtor, or any fact stated from which it may be inferred.

Nor is it necessary in such a case that collusion should be negatived.

The protection of parishes from re-assessment is an object of the care of the Court; and the necessity of process of extent in the second degree for that purpose, where a collector has become a defaulter, is a strong ground for granting the fiat; and the existing liability of the parish is consequently no answer to the objection of the crown debt being in danger. *Rex* v. *Bell*, 11 Price, 772.

Where the Crown has issued an extent in chief, which has been satisfied, the parties prosecuting the extent in aid, must apply to the Court by motion, to be paid out of the overplus, if any, which, under the 57 Geo. 3, c. 117, s. 2, is ordered to be paid into court to abide their order respecting the overplus. *Rex* v. *Larking*, 8 Price, 683.

When the Crown is proceeding to recover the debts of its debtor within the first degree, it is unnecessary first to apply the immediate effects of the debtor, before it has recourse to the debtor's debt. *Rex* v. *Larking*, 8 Price, 683.

To make an extent valid, it must be against *goods and chattels*, as well as *lands and tenements*. *Rex* v. *Lambe*, M'Clel. 402.

The 41st section of the 1 Geo. 4, c. 119, relative to the discharge of prisoners under extents, does not authorize an application for the discharge of a prisoner, whose principal has paid part of the debt, and given a warrant of attorney for the residue. *Rex* v. *Cuming*, 1 M'Clel. & Y. 266.

Upon a summary application, the Court quashed a fiat *quid, improvide emanavit*, and the extent in aid which had issued thereon, on the ground that the inquisition upon which the fiat was obtained, and the extent sued out, was made without *vivâ voce* testimony having been given to the jury of the existence of the debt, and that they found it to be due solely on the usual affidavit on which the judge's fiat issued, made for that purpose by or on behalf of the prosecutors of the extent: Held also, that an inquisition cannot be supported by such an affidavit, it not being legal evidence.

Pending a question as to the validity of an extent, the Court will grant further time for the assignees to appear and claim. *Rex* v. *Hornblower*, 11 Price, 29.

At the instance of assignees of a bankrupt, the Court refused to declare either that certain extents in aid had been fraudulently and colourably sued out, so as to obtain an undue priority in payment of debts, there being, as it was alleged, no debt due from them to the Crown when the extents were issued; or to decree repayment of the sums recovered by the judgment obtained thereon, as it appeared that the money was actually due at the period the extent issued. *Evans* v. *Solly and the Attorney General*, 9 Price, 525.

Parties claiming goods which have been found by inquisition to be the property of a defendant under an extent, must shew title in themselves, and cannot, unless that title be admitted on the record, object on demurrer to the proceedings upon the extent. *Rex* v. *Soulby*, 1 Y. & J. 249.

An agreement on borrowing (by recital in a bond) money on the part of the borrower, that certain real property (freehold and leasehold) should stand pledged for repayment of it, and a delivery of the title deeds, amounting in equity to a mortgage or right to a mortgage, creates a lien binding as against the prerogative lien of the Crown, in respect of a debt accruing due to the King subsequently; and the equitable mortgagees are entitled to be first paid their principal and interest out of the produce of

the sale of the premises, the property of the Crown debtor, seized under an extent in chief.

Where part of the property so equitably pledged was leasehold, renewable by the lessee, and the equitable mortgagee had procured a renewal of the lease in the name of the lessee (the Crown debtor), by surrendering the original lease and taking a new one of the same premises after the Crown debt had accrued,—such new lease, and the premises leased thereby, held to be subject to the equitable lien on the old lease, and the lien to be preferable to the demand on the part of the Crown against the Crown debtor in respect of priority of satisfaction out of the proceeds of the sale.

A further debt so agreed to be secured by pledge of the property so equitably mortgaged, is also tantamount to a further equitable mortgage; and possession of the deeds by the first mortgagee is a possession by the second. *Fector, Philpott & Menet* v. *Philpott*, 12 Price, 197.

### (B) WHO ENTITLED TO.

An extent cannot be obtained by a committee of a lunatic against a preceding committee, who has become bankrupt ten years previous to the application, a *sci. fa* being the appropriate remedy. *In re Lang*, 10 Price, 135.

An obligor to the Crown to account and pay over the produce of certain sugars, may, under the 57 Geo. 3, c. 117, sue out a writ of extent in aid, as upon a debt due from him to the Crown, arising from the sale of such sugars. *Rex* v. *Kynaston*, 11 Price, 598.

An immediate debtor to the Crown, indebted by reason of his receipt of the Crown's money, is not entitled to sue out an extent in his own aid against a banker with whom the money had been deposited, unless there has been, in point of fact, a literal breach of the bond entered into by the former to the Crown, by the latter detaining the money more than twenty-one days. In order to obtain an extent, the fit must state the breach. *Rex* v. *Tarleton*, 9 Price, 647.

### (C) PRIORITY.

An immediate extent, and an extent in chief in the second (or any other) degree, are to be satisfied before an extent in aid of a prior teste. *Rex* v. *Larking*, 8 Price, 683.

*Quære*, Whether goods seized by the sheriff under a *fieri facias* at the suit of a subject, are protected against an extent tested and issued *after the seizure* but *before sale*. *Giles* v. *Grover*, 1 Y. & J. 232.

### (D) WHAT MAY BE TAKEN.

Calicoes in the white, frame-marked, the property and manufacture of third persons, in the hands of the printer, are not liable to seizure under an extent for by-gone duties due from the printer, by virtue of the stat. 28 Geo. 3, c. 37, s. 21, the printer not being the maker or manufacturer, within the meaning of that act.

*Quære*, Whether printed calicoes, the property of third persons, in the hands of the printer, are liable to seizure under an extent for duties in respect of those goods, due from the printer, by virtue of stat. 28 Geo. 3, c. 37, s. 21. *Rex* v. *Tregoning*, 2 Y. & J. 132.

An extent at the instance of the Crown, does not apply to real property vested in trustees, to secure money due to the vendor of such estate. *Rex* v. *Lambe*, M'Clel. 403.

Goods on which a wharfinger has a general lien, in respect of freight and wharfage accruing before the date of the extent, cannot be extended. And there seems no difference between the cases of a wharfinger and a warehouseman. *Rex* v. *Humphrey*, 1 M'Clel. & Y. 173.

### (E) SALE.

An application for the sale of lands under the 25 Geo. 3, c. 35, need not be made personally by the Attorney General. *Rex* v. *Bulkeley*, 1 Y. & J. 256.

Where an interest in premises leased for lives, and for a further term of years after the decease of the survivor, had been extended, and sold by the sheriff under a writ of *venditioni exponas*, but no order of court had been obtained for the sale under the stat. 25 Geo. 3, c. 35, the Court refused to confirm the sale and order the remembrancer to execute a conveyance to the purchaser. *Rex* v. *Blunt*, 2 Y. & J. 120.

The Crown may move to discharge the purchaser of an estate sold under an extent, where a good title cannot be made out, without such vendee's consent, and without payment of his costs, incurred in consequence of the purchase. *Rex* v. *Cracroft*, 1 M'Clel. & Y. 460.

The real property of a Crown debtor sold under an order of court, is not, under the 25 Geo. 3, c. 35, an equitable proceeding, so as to make it the subject of an appeal to the House of Lords. *Wall* v. *Attorney General*, 1 M'Clel. & Y. 643.

### (F) PROCEEDINGS.

Where an affidavit is made to obtain the *fiat* of a *Baron* for an extent, it is unnecessary that it should contain any allegations tending to shew that the party, on whose behalf the application was made, is without the restraining provision of the 57 Geo. 3, c. 117, or that it should set out the condition of the bond for that purpose; it is sufficient that the *Baron* be satisfied that there is ground for granting a *fiat* for the extent. The statute does not require that such a course should be adopted, nor has it affected in any respect the old practice observed with reference to such preliminary matters. *Rex* v. *Dineley*, 9 Price, 311.

An insolvent debtor of the Crown, in prison under an extent, must, in order to obtain his discharge, present a petition, supported by an affidavit, praying an order that the defendant may be brought up to be examined on oath concerning his property, so that the Court may be enabled to judge of the merits of the application; and notice should be given to the Crown (that is, served on the Attorney General) as well as to the sureties, and the petition must contain a statement of the applicant's property, to enable him to be discharged under the 1 Geo. 4, c. 119, s. 41, by *supersedeas quoad corpus*. *Rex* v. *Austen*, 9 Price, 142.

It seems, that proceedings under an extent are proceedings at law. *Wall* v. *Attorney General*, 1 M'Clel. & Y. 643.

A replication to a plea to an extent will not be struck out, because it is inconsistent with the facts

ted in the affidavit on which the *fiat* was granted. *x v. Barbery*, 10 Price, 46.

An affidavit, for an immediate extent in chief ainst a surety, need not state that application has en made to the principal. *Rex* v. *Marsh*, 1 M'Clel. Y. 688.

Where the affidavit in support of an immediate tent in chief against a bond crown debtor did not ntain a distinct, positive, and unequivocal allegan of the breach, it was set aside. *Rex* v. *Marsh*, 'Clel. 688.

The Crown is not entitled to have a rule for an tent re-argued after it has been regularly argued d confirmed. *Rex* v. *Marsh*, M'Clel. 688.

In the absence of a previous application, the ourt will not make an order on the Attorney Geral to reply to a plea to an extent. *Rex* v. *Slee*, 1 'Clel. & Y. 361.

*Quære*—Whether, upon an inquisition, a *verdict* r penalties is legitimate evidence of a debt due to e Crown. *Rex* v. *Soulby*, 1 Y. & J. 249.

A party, to obtain a fiat for an extent in aid, must ake an affidavit, that unless the process of extent r the debt due to him be forthwith issued, the debt e to the Crown from the party applying will be in nger of being lost to the Crown. *Reg. Gen.* 11 rice, 160.

After issue joined in a *scire facias* issued on an quisition under an extent in chief against a bankpt crown debtor, to recover a debt found to be e from the defendant to the debtor of the Crown, e Court refused to postpone the trial until the ming in of the answer to a bill in equity filed by e defendant against the crown debtor for a disvery, under which an injunction had been obined, for want of answer, to restrain the crown btor from proceeding in an action commenced by m against the defendant for the same debt, on the plication of the defendant in the *scire facias*, beuse the statements in the answer could not in any sible view be given in evidence by the defendant support of the issue taken on the defendant's e, traversing the debt due from him to the crown btor. *Rex* v. *Williams*, 13 Price, 181.

### (G) Setting aside.

An ex tent will not be set aside on a summary plicati.on, even on grounds which might have pported a motion to quash the writ. *Rex* v. *Seton*, Price, 671.

Where an extent had been set a side for irregularity, d the property extended ordered to be delivered to the assignees, the debtor having become bankpt:—it was holden, that the assignment to the signees had so changed the property, that a second tent, tested the day after the first was set aside, s of no avail. *Rex* v. *Marsh*, 1 M'Clel. & Y. 250.

## EXTINGUISHMENT.

If there is sufficient evidence of an intention exeted on the part of a creditor, to make to his debtor gift of the debt, a court of equity will not permit e executor of the creditor to enforce payment of e debt, even though there should be nothing nounting to a release of the debt at law.

Such a gift of a debt from a father to a son, will construed an advancement, unless there is evidence of such an intention on the part of the father, as will take the case out of the general rule. *Gilbert* v. *Wetherell*, 3 Law J. Chanc. 138, s. c. 2 S. & S. 254.

A sum of money, to which A's daughter was, under his marriage settlement, entitled, expectant upon his death, is, by her marriage settlement, assigned to trustees upon certain trusts for her and her children: A dies in 1797, having the money in his hands, and leaving an only son, who was also one of the trustees of the daughter's marriage settlement, his executor; in the same year, the son pays his sister and her husband small legacies, given them by his father's will; and by a deed, purporting to be made in consideration of natural love and affection, declares the trusts of stock, which he expended £2000 in purchasing, and which stood in the names of himself and another person, to be for his sister, and her then children; he dies in 1813, and no demands being made during his life, of any sum as due under his father's marriage settlement: Held, upon a bill filed after his death by his sister and her husband, and their only surviving child and the trustees of their settlement,—that the gift by the brother was not a satisfaction of the debt due from him as executor of his father; and that the length of time which had elapsed, without any steps being taken to enforce the claim, was not a sufficient ground for presuming satisfaction, where a married woman was concerned. *Drewe* v. *Bidgood*, 4 Law J. Chanc. 33, s. c. 2 S. & S. 424.

## FACULTY.

[See Church.]

In support of an application for a faculty to pull down a church, it was proved by the applicants that the building was in a state of dilapidation, and that no person or persons were bound to repair or uphold the same. The Court, after observing that the parish had better consider whether it would not be expedient for them to repair the same, said, that if the application was pressed, it would be compelled to accede. *Steeven* v. *St. Martin Orgars*, 2 Add. 255.

Where a faculty is sought to be had for erecting a vault in a church-yard, &c. the Court will scruple to decree it, without being satisfied that the proposed erection is not likely to be generally prejudicial to the parish, even though its issue be unopposed, either on the part of the parish, or on that of any particular parishioner. *Rosher* v. *Vicar of Northfleet*, 3 Add. 14.

## FAIR.

An annual offieer of a hundred, to which the privilege of holding a fair has been granted, may prescribe to retain it, although not a corporation. *Taylor* v. *Rendeau*, 2 Ken. 50.

## FALSE IMPRISONMENT.

[See Constable.]

Voluntarily going with a constable, into whose charge you have been given, is sufficient to support an action for false imprisonment. *Chinn* v. *Morris*, 2 C. & P. 361. [Best]

A person voluntarily going with a constable, who says, *you must go with me*, may maintain false imprisonment; and, if he fails in proving the imprisonment as laid, he may resort to the count for a common assault. *Pocock* v. *Moore*, 1 R. & M. 321. [Abbott]

Plaintiff appeared before defendant, a magistrate, to answer the complaint of A, for unlawfully killing his dog. Defendant advised plaintiff to settle the matter, by paying a sum of money, which plaintiff declined; defendant then said, "he would convict plaintiff in a penalty under the Trespass Act, in which case he would go to prison." Plaintiff still declined paying, and said he would appeal: defendant then called in a constable, and said, "Take this man out, and see if they settle the matter; and if not, bring him in again, as I must proceed to commit him under the Act." Plaintiff then went out with the constable, and settled the matter by paying a sum of money: Held, that this was an assault and false imprisonment, for which trespass would lie; and which, as no conviction had been drawn up, defendant could not justify. *Bridget* v. *Coyney*, 6 Law J. M.C. 42, s. c. 1 M. & R. 211.

If a person be taken by a private individual without warrant, on suspicion of felony, and will not tell his name, and otherwise conducts himself, so as to excite suspicion; this only goes in mitigation of damages, if it turn out that no felony was committed. The stat. 3 Geo 4, c. 55, s. 21, which relates to the apprehension of *reputed thieves* without warrant, only extends to persons *generally reputed* to be thieves, and not to persons suspected of a particular theft. *Cowles* v. *Dunbar*, 2 C. & P. 565. [Abbott]

A person had been convicted in a penalty under the game-laws, and a warrant was issued to levy it of his goods; at the time of sale he attended, and told the persons assembled, that they were not his goods, and, in consequence, the officer returned, that there was nothing of which he could levy. He was then committed to prison, and brought an action for false imprisonment; but the Court held, that his conduct was a sufficient answer to such an action. *Weatherall* v. *Wu..on*, 1 Law J. K.B. 101.

Whilst the minister, after performing the communion service, was walking from the table to the vestry-room, a person rose in the church and read a notice, requiring the inhabitants to meet in the vestry, respecting the churchwardens. The constable, at the request of the minister, took the person out of the church, and detained him until he gave his word to appear before a magistrate the next morning, where he did appear, and was discharged. —The Court held, that the constable was not justified in detaining the person until he was taken before a magistrate, and that reading a notice in the church at that time was not an offence. *Williams* v. *Glenister*, 2 Law J.K.B. 143, s. c. 2 B. & C. 699, s. c. 4 D. & R. 217.

A party entering a public-house after it had been closed for the night, and behaving insolently to the proprietor, will not justify the latter in sending for a constable and charging the former with felony. *Rose* v. *Wilson*, 2 Law J. C.P. 14, s. c. 1 Bing. 353, s. c. 8 B. Mo. 362.

Where an attachment is irregularly issued, the Court will not permit the defendant, who is arrested under it, to bring an action for false imprisonment. Even though the irregularity should proceed from error or inadvertence, the defendant is entitled to compensation for the injury which he has sustained by the execution of the attachment: and for that purpose, a reference will be made to the Master, in order to ascertain the amount of compensation which ought to be allowed to him. *Kilshaw* v. *Crowther*, 3 Law J. Chanc. 101.

False imprisonment lies against a gaoler for taking prisoners out of his county, without a *habeas corpus* or judge's order for that purpose, to be present at the trial of other prisoners. *Bint* v. *Lavender*, 1 C. & P. 659. [Littledale]

A plea which professes to justify an assault and imprisonment, on the ground that there was reasonable and probable cause to suspect the plaintiff of felony, must state the particular facts which amount to reasonable and probable cause. The truth of the facts only, is to be ascertained by the jury. Their legal result, on the question of probable cause, is for the decision of the Court. *Haynes* v. *Mewis*, 5 Law J. K.B. 47.

To trespass for false imprisonment by the master of a man-of-war against the captain, it was pleaded, first, that the defendant imprisoned the plaintiff in order that he might be brought, and until he should be brought, to trial by a court marshal for disobedience, quarrelling, and behaving with contempt to the defendant; secondly, that the defendant arrested plaintiff, &c. in consequence of certain complaints, charges and accusations made to him by a superior officer: Held, first, that, the defendant not having pleaded the sentence of the court martial by way of estoppel, it was open to the jury to inquire into the truth of these charges; and, secondly, it was for the jury to say, whether the arrest took place in consequence of those acts of misconduct charged against the plaintiff, or from any other cause. *Hannaford* v. *Hunn*, 2 C. & P. 148. [Abbott]

The plaintiff having been arrested and imprisoned, under a magistrate's warrant, brought trespass against the party suing it out, for false imprisonment: Held, that it was not necessary for the plaintiff to produce the warrant; but that it was incumbent on the defendant to do so, to shew that it had been properly issued. *Holroyd* v. *Doncaster*, 4 Law J. C.P. 178, s. c. 3 Bing. 492.

Where A, in continuation of an imprisonment, delivers the prisoner to B; in an action for false imprisonment, the declaration of B is admissible against A. *Powell* v. *Hodgetts*, 2 C. & P. 432. [Garrow]

In an action for false imprisonment against three defendants jointly, the declarations of one tending to shew malice, made some weeks after the imprisonment, though in the absence of his co-defendants, are admissible. *Wright* v. *Court*, 2 C. & P. 232. [Garrow]

In an action against a constable for false imprisonment, evidence of reasonable suspicion of felony may be given in mitigation of damages. *Chinn* v. *Morris*, 2 C. & P. 361. [Best]

## FALSE PRETENCES.

The offence of obtaining goods under false pretences, is well laid if the indictment aver "that the defendant knowingly and designedly did *obtain* the goods by means of," &c. *Rex* v. *Howarth*, 3 Stark. 26. [Best]

A pretence to a parish officer, or an excuse for not orking, that the party has not clothes, when he ally has, though it induce the officer to give him othes, is not obtaining goods by false pretences thin the statute 30 Geo. 2, c. 24. *Rex* v. *Wakeg*, 1 R. & R. C.C.R. 504.

An indictment for obtaining money under false etences, is not supported by the prosecutor's shewg that the vendor had covenanted, that he had a od title, when, in fact, he had previously sold his terest to a third person; his remedy being a civil tion for a breach of the covenant. *Rex* v. *Codringns*, 1 C. & P. 661. [Littledale]

In an indictment for obtaining money or goods nder false pretences, proof of any one of the false etences will sustain the indictment, provided it pear that the money or goods were obtained in nsequence of that one pretence. *Brenning* v. *ssens*, 5 Law J. K.B. 48.

Indictment for false pretences in passing a note of bank that had stopped payment as a good note. he prisoner knew that the bank had stopped payent; but it appeared that two only of the partners the bank had become bankrupt, and that the third d not: *Held*, that the prisoner must be acquitted. er v. *Spencer*, 3 C. & P. 420. [Gaselee]

## FAMILY COMPACT.

A transaction between parties dealing upon a ubtful question as to their rights, if it be not inted with fraud, will be upheld, although one of e parties, being an advocate and brother of the her party, acted generally in the transaction as e legal adviser of his brother.

I, being seised of lands in Scotland, executes a ed, vesting the lands in trustees for sale to pay bts, and afterwards to manage the residue of the nds until, by accumulation of rents, they could rchase an equivalent in lands in the place of those hich should be sold; and he directed that an anity of 100*l*. for life should be paid to D, his broer and heir-at-law, and a like annuity to W, the n of D; and when the purposes of the trust should accomplished, the trustees were to divest themves of the estate in favour of such persons as at at time might be the eldest son of D, and his heir. had never completed his title to the lands, and er his death D, not being satisfied with the prosions of the trust, served himself heir to his father, ssing by his brother I, and brought an action to duce the deed of trust. A judicial sequestration the estate was the consequence of this action, and her matters in litigation respecting the estate. In der to settle all disputes, the parties interested, cluding D & W, executed a deed, submitting all ferences to the award of chosen arbitrators. The ed, among other things, empowered the arbitrars to determine "in what manner and to what ries of heirs, and under what conditions, &c." the eds should be settled. The arbitrators, by their ward, directed that D & W should execute, as to e lands not sold, a tailzie and strict settlement, favour of D in life-rent, and W and the heirs ale of his body in fee, whom failing, &c., with the uses prohibitory, &c., contained in a scroll, &c., d particular that the life-rent of D should be charged with the payment of an annuity of 250*l*. to W, which should be a real burden on the lands. D & W executed a deed of entail accordingly, but, D refusing to deliver it, another deed of similar import was drawn up, and executed by W only, to whom the trustees executed a deed of renunciation, and disposed the lands: D having previously by order of the arbiters conveyed to the trustees, upon his claim of right as heir and to perfect their title. The entail contained the usual prohibitions against selling the estate. Upon failure of issue of W, the lands by this new entail were limited to J D, next brother of W. The entail was executed in 1776. In 1785, D being dead, and W being in possession of the lands, and claiming a right, notwithstanding the entail, to sell for payment of debts, conveyed part of the lands to a trustee for that purpose; and, the trustee having accordingly contracted with a purchaser, an action of declaration was raised by W and the purchaser against J D, and the other heirs of entail, concluding to have it declared that the lands were liable to the trust for the payment of debts, and the decree of the Court was according to the conclusion of the summons. In the year 1808, W, being embarrassed and in debt, advertised all the lands, except one farm and a few parks, with the mansion, for sale. Whereupon J D remonstrated, and having threatened, on behalf of himself and the other heirs of entail, to prosecute a declaratur of irritancy, a compromise was effected, on the terms that a sufficient part of the lands should be sold to discharge the debts of W, and that of the lands remaining unsold, a new entail should be made, restricting the estate of W to a life-rent, and giving to J D and the heirs of the former entail, estates in tail general. In this transaction W had no legal adviser but his brother J D, who was an advocate, and had usually acted as the legal adviser of W. The deed of entail was drawn up under the direction of and settled by J D. It contained a recital of the former entail; a statement of former sales of parts of the lands by W, that he had thereby become liable to a declaratur of contravention of irritancy at the suit of J D, but that he had agreed, for the accommodation of W, not to object to the sales already made, nor prosecute his right of action, on condition that W would execute the deed; and upon this recital, W thereby limited the lands unsold to himself in life-rent, and to J D and the heirs male of his body, whom failing, to heirs female of his body; &c. This deed was accordingly executed by W, but he, becoming again embarrassed and involved in debt, at the instance of his creditors, brought an action to reduce this deed of entail, on the ground of fraud, want of power, &c. The Court below held, that W had power to execute the deed; that it was delivered and irrevocable; that there was no legal ground to set it aside; and that it did not appear from the tenor of the deed or collateral evidence, that W was improperly or fraudulently induced to execute it. This judgment was affirmed on appeal. *Hotchkis* v. *Dickson*, 2 Bligh, 304, 305.

## FELONY.

If money be given to a person for a particular purpose, and such person converts it to his own

use,—it is for the jury to say, whether he received it with an intent to steal it; and, if they arrive at that conclusion, in an action for money had and received, the verdict will be entered for the defendant, with a view to the prosecution of the felony. *Prosser* v. *Rowe*, 2 C. & P. 421. [Park]

The maxim that "the civil right is always merged in the felony," is not universally correct, and must be, therefore, taken with qualification. The object of the rule is to cause public justice to have the prior claim to satisfaction; and, wherever public justice has been satisfied, the private right becomes restored. *Stone* v. *Marsh*, 5 Law J. K.B. 201, s. c. 6 B. & C. 551, s. c. 8 D. & R. 71, s. c. 1 R. & M. 364.

## FEOFFMENT

An assignee of the residue of a long lease of certain premises from the lord of a manor, in consideration of his intended marriage, and for the considerations mentioned in a certain *indenture of three parts*, intended to bear date the day after the day of the date of the assignment, made an indenture of assignment of those premises to two persons, upon trust that he should hold the premises during his life, and upon other trusts (as corresponding with limitations of real estate in tail) to which leasehold property may be subjected.

On the next day he executed an indenture, by which, in consideration of his intended marriage, and of a considerable marriage portion which he would receive with his intended wife, he *enfeoffed* two other persons of the same premises, to uses, such as real estate is commonly conveyed to, by way of entail, and a memorandum of livery of seisin was indorsed upon it.

The assignee continued in possession of the premises during his life. And an ejectment was afterwards brought by his heiresses for the freehold, against the representative of the survivor of the two persons to whom the premises had been *assigned* in trust.

The Court held, inasmuch as the trustees under the assignment did not know that there was to be a *feoffment*, and did not afterwards consent to it, that the feoffment had not destroyed the term for years, as between these parties, whatever might be the advantage which the reversioner might take of it. *Doe d. Maddock* v. *Lynes*, 3 Law J. K.B. 77, s. c. 3 B. & C. 388, s. c. 5 D. & R. 160.

## FERRY.

Whether a *ferry* can be demised without deed—*quære.*

Where the owner of a ferry, having, by parol, demised the same for a year, afterwards makes a parol agreement with the tenant to take the profits thereof, and to allow the tenant so much per day for working the same; this by operation of law will amount to a surrender of the interest of the tenant; and will restore to the owner the right of action for a disturbance.

In order to sustain such an action, the plaintiff need only prove possession at the time when the cause of action arose; and need not shew that the fare claimed and paid has been always the same; nor that he has any property in the soil on each side of the river: it is sufficient that he has the right to use the land for the purpose of embarking and disembarking his passengers. *Peter* v. *Kendal*, 5 Law J. K.B. 282, s. c. 6 B. & C. 703.

It is sufficient for the plaintiff to prove that he was in possession of the ferry at the time the cause of action accrued, to entitle him to maintain an action on the case for the disturbance of it. From an user of thirty-five years, the jury may presume that a ferry had a legal origin. A variation in the amount of ferryage will not avoid the franchise. *Trotter* v. *Harris*, 2 Y. & J. 235.

## FINE.

Fines imposed on defendants, convicted on indictments or informations in the King's Bench, are to be paid to the king's coroner; and if such fines are not paid within three terms after assessment, the coroner, or other officer, is bound by the 22 and 23 Car. 2. to estreat them into the Exchequer as fines enforced and not received; and when received, an estreat to that effect must be made on the last day of the succeeding term, which fine is paid into the king's privy purse, and not the Exchequer, first deducting the prosecutor's expenses. Where three defendants, summoned by the King's Bench to pay fines, amounting in the whole to 1600*l.*, and to be imprisoned for different terms and until satisfaction of the fines, paid the fines at the expiration of the respective terms to the marshal of the King's Bench prison, and the king's coroner, and were thereupon severally discharged out of custody, in August and October 1822; and the latter officer, in Hilary and Trinity terms 1822, certified into the Exchequer 1300*l.* of the fines, as fines imposed and not received: and in Hilary term 1823, certified all the fines into the same court as fines received; and the summons of the green wax was issued by the deputy clerk of the foreign estreats, to the sheriffs of Surrey and Middlesex successively, for the levying of the fines estreated as not received, who on their appeals returned *nihil*, and those returns were transmitted by the clerk of the estreats (who did not read or know the contents of the estreats of fines received, and retained the same in his own hands without transmission further,) through the clerk of the *nihils* to the pipe office, and entered on the great roll as debts of record, and as such passed to the lord treasurer's remembrancer's office, from which a writ of extent for their recovery issued, of course, on the seal day after Trinity term 1824, to the sheriffs of London, whose officer, not having any original receipt produced to him, seized the effects of two of the defendants, and continued in possession twenty-four hours; but then, on investigation of the circumstances, withdrew: Held, first, that the king's coroner had only done what was required by the statute; secondly, that the sheriffs were not liable for the wrongful seizure, because they would not have been warranted in staying the execution upon bare presumption; thirdly, that the writ had issued improvidently, and was to be set aside in order to remove any obstruction which it might present to an action for damages against the officer of the Exchequer, through whose default or negligence it had issued. *Rex* v. *Shackell*, 1 M'Clel. & Y. 514.

Instance of the exercise of the power of the Barons, to respite process issued in respect of fines imposed at the assizes upon inhabitants of towns, &c. on presentments, when estreated into the Exchequer, upon summary application on reasonable grounds.

Mode of obtaining the order of the Court for that purpose.

Such orders will not ordinarily be made indefinitely, or until further order generally, but merely from term to term. *In the matter of a Fine set upon the Inhabitants of the City of Norwich*, 11 Price, 66.

Course of proceeding in order to obtain the direction of the Court, requiring the officer of the Exchequer called the Foreign Apposer, to set over fines (by apportionment) to lords of liberties, claiming them under their grants of legal franchises from the Crown.

Materials on which applications for such purpose must be founded.

Notices to be served, and on whom.

Where the Attorney General opposes the application and a question of title, or extent or construction of the applicant's title, arise, the Court will make no order on motion, because it then becomes matter of claim against the Crown, which must be determined by judgment on matter of record, and must therefore be brought before the Court in a more solemn and formal manner, by claiming upon record, to give the Crown opportunity of contesting it by plea or otherwise.

*Qu.* of the divisibility of post fines by apportionment, between lords of liberties claiming a fine of lands lying in two or more liberties; and of the course for effecting an apportionment by order of the Court or otherwise, in such cases. *In the matter of the claim of* [apportionment of] *Fines by the Dean and Chapter of the Collegiate Church of St. Peter's, Westminster*, 12 Price, 174.

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## FINE OF LANDS.

(A) LEVYING, ACKNOWLEDGMENT, AND PASSING.
(B) EFFECTS.
(C) AMENDMENT.

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### (A) LEVYING, ACKNOWLEDGMENT, AND PASSING.

Where a rent-charge, payable to a married woman for her life, was assigned by her and her husband, who received the purchase-money, and both executed a deed of conveyance; the husband being afterwards separated from the wife, who was unacquainted with his residence, and could not, after diligent search, find him. The Court, on the application of the feme to be permitted to levy a fine of the rent-charge, to perfect the titles without her husband, refused to interfere. *Ex parte St. George*, 8 Taunt. 590, s. c. 2 B. Mo. 652.

The statute 6 Geo. 4, c. 87, s. 20, does not authorize a British Consul abroad to take an affidavit of the acknowledgment of a party to a fine. *Ex parte Hutchison*, 6 Law J. C.P. 137, s. c. 4 Bing. 606, s. c. 1 M. & P. 559.

It is doubtful whether the affidavit of the acknowledgment of a fine, taken at Caen in Normandy, can be sworn before the British Consul resident there; the mayor having previously refused to take such affidavit, on the ground that the proceedings were not in the French language. *Riddell, pl.; Nash, def.*, 8 B. Mo. 632.

A notary's certificate of the acknowledgment of a fine, taken abroad, must be written on parchment, and a literal translation of the certificate engrossed on parchment. *Randall, pl.; Lowring, dem.*, 6 B. Mo. 232.

Where the christian name of one of the parties was written on an erasure, in the acknowledgment of a fine taken abroad, the Court refused to pass it without an affidavit, describing in what stage of the proceedings the alteration had been made. *Douglas and Wife, con.*, 8 Taunt. 334, s. c. 2 B. Mo. 375.

The conusors of a fine, having signed their surnames on the acknowledgment inconsistently with the dedimus, the Court would not allow the fine to pass. *Scott and Wife, con.*, 5 Law J. C.P. 106.

The Court will not allow a fine to pass, if one of the conusors sign his christian name different to that in the other proceedings. *Parker, pl.; Parker, def.*, 5 Law J. C.P. 77, s. c. 4 Bing. 79.

The necessary documents for levying a fine having been executed, but not perfected, through the negligence of the attorney, and the name of one of the commissioners before whom it was acknowledged being obliterated, the Court refused to pass the fine, leaving the parties to levy another. *Fawcett, pl.; Slingsby, def.*, 7 B. Mo. 338.

A variance in the caption of a fine taken abroad, and affidavit, with respect to the names of the parties, is fatal, and the Court will not suffer the fine to pass. *Maidment, pl.; Proctor, def.*, 6 B. Mo. 517.

If there be an erasure in the caption of a fine taken abroad, the signature of the commissioner or magistrate before whom it was taken, must be authenticated by affidavit. *Thistlewayte, dem.; Maidment, ten.*, 3 Law J. C.P. 34, s. c. 2 Bing. 361.

Permission to pass a fine of Trinity term 1814, was refused, when all the parties were alive, and no affidavit produced, stating or assigning reasons for the delay. *Inglis, pl.; Heald, def.*, 8 Taunt. 442.

In support of a motion, that a fine acknowledged more than a year should pass, an affidavit, stating that the parties were alive within fourteen days, is not sufficient; it should shew the reason of the delay, and the state of the title. *Anon.* 2 Law J. C.P. 42. *Semble* s. c., *Rowntree*, 1 Law J. C.P. 98.

Although the date of a fine was not sworn to, and which had been rejected by the officers, as out of time, the Court permitted it to pass, on affidavits, stating, that after the due taking of the acknowledgments, the papers had been laid aside and forgotten. *Lidbetter, pl.; Barton and Wife, def.*, 8 Taunt. 438.

The Court permitted a fine to pass, where the documents connected with it had been mislaid, although one of the conusors was dead, and the acknowledgment had been taken more than twelve months before the application was made. *Fitchley, pl.; Jervis, def.*, 6 B. Mo. 315.

Where an affidavit states that the deforciant was between 90 and 100 years old, and imbecile in mind, the Court will not suspend the granting of the fiat. *Price, dem.; Watkins, def.*, 1 Bing. 73.

One at least of the Commissioners for the taking of the acknowledgment of a fine and recovery must be a person not concerned as attorney, solicitor, or agent,

[illegible] pl.; *Harrison*, *def.*, 2 [illegible] 3. Mo. 449.

[illegible] Scott, signed their [illegible] Scott: fine not allow- [illegible] *Scott* and *Wife*, *def.*, [illegible]

[illegible] amended, by insert- [illegible] in conformity with [illegible] *Wilmot*, [illegible] 555.

[illegible] amended, by sub- [illegible] written on an erasure [illegible] of the name of [illegible] stating, that it was [illegible] name had been [illegible] deed, prior to its exe- [illegible] *def.*, 4 Taunt. 691, [illegible]

[illegible] in a fine and deed [illegible] against the former, if [illegible] *Hunn.* 6 B. Mo. [illegible]

[illegible] amendment of a fine, [illegible] occasioned by the ori- [illegible] into two by acts [illegible] *Hennum*, *def.*, 8 B. [illegible]

[illegible] for another in a [illegible] in the deed to lead [illegible] 3 Law J. C.P. [illegible] 30.

[illegible] substituting one parish [illegible] contiguous, and the [illegible] *Hinton*, pl.; *Cock-* [illegible] 7.

[illegible] name of a parish, [illegible] the deed to lead [illegible] certain street which was [illegible] to mean a hamlet they were [illegible] to be the mean of B. ——, [illegible] 184.

[illegible] promises to be at Hinton, in the [illegible] to amend by adding the [illegible] before Hinton, that town [illegible] *Ring*, *def.*, 4 B. Mo. [illegible]

[illegible] time and memory to be [illegible] by inserting the words "upon Trent," [illegible] "Stoke," —on affidavits, [illegible] intended to be conveyed [illegible] Stoke-upon-Trent, and [illegible] called "Stoke," [illegible] in which the [illegible] *Swanson*, *def.*, 5 Law J. C.P. 81, [illegible] *Swanson*, *def.*, ——, *teacher*, 10 [illegible] 198.

[illegible] may be altered by inserting a [illegible] the hour of the writ, instead of the [illegible] *Hunn.* 1 Law J. C.P. 114.

[illegible] made or amending a fine, unless [illegible] for the amendment be founded upon an [illegible], connecting the possession with the title, under which the amendment is prayed. *Slaney* [illegible], *Mountfort*, *ten.*; *Foley*, *teacher*, 1 Law. J. C.P. [illegible]

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[illegible] mentioned, the Court [illegible] the writ [illegible] second, on affidavit [illegible] Stevens woman, and that [illegible] ascertained at the time

## FISHERY.

The owner of a several fishery is, *primâ facie*, the owner of the soil. *Partheriche* v. *Mason*, 2 Chit. 658.

A several fishery is an incorporeal right; and can only, *per se*, be passed by deed.

The right to a several fishery does not necessarily imply ownership of the soil.

The exercise of this right from time immemorial, in an arm of the sea, under a grant from the Crown, does not give a property in the soil, unless the soil also has been granted by express words.

And therefore, where, by parol agreement, a term for years of a several fishery in an arm of the sea, had been granted by the proprietor of the fishery (a grantee from the Crown);—it was held, that such agreement did not vest the right in the lessee; nor deprive the lessor of his action of trespass for an invasion of that right. *Duke of Somerset* v. *Fogwell*, 5 Law J. K.B. 49, s. c. 5 B. & C. 875, s. c. 8 D. & R. 747.

If a conviction under 5 Geo. 3, c. 14, for killing fish in a private river, without the consent of the owner, does not state the offence to have been committed in an inclosed ground, it is bad. *Rex* v. *Sadler*, 2 Chit. 518.

## FLEET PRISON.

[See PRISON.]

## FORCIBLE ENTRY.

A forcible entry, or detainer, may be effected without any assault; as, where a number of persons take or keep possession of a house or land, and shew force calculated to deter the right owner from resuming his own possession. *Milner* v. *Maclean*, 2 C. & P. 17. [Abbott]

In an indictment for forcible entry, an averment that the prosecutor was "seised," is sufficient to found an application for a writ of restitution, and it is not necessary for the prosecutor to shew that he still continues seised. *Rex* v. *Dillon*, 2 Chit. 314.

An indictment for a forcible entry and detainer, under the statutes of R. 2. and Jac. 1, cannot be supported by the testimony of the party grieved. *Rex* v. *Beaven*, 1 R. & M. 242. [Littledale]

An action cannot be maintained under the 8 Hen. 6, c. 9, s. 6, to recover damages for a forcible entry, unless the plaintiff is entitled to the freehold of the premises. *Cole* v. *Eagle*, 6 Law J. K.B. 369, s. c. 8 B. & C. 409.

## FOREIGN ATTACHMENT.

It is essentially necessary to aver, in a plea of foreign attachment, that the garnishee resided within the jurisdiction of the Mayor's Court.—*Quære*, If it must not be averred, that the defendant had notice of the custom, and of the attachment against garnishee. *Tamm* v. *Williams*, 2 Chit. 438.

A judgment in the Lord Mayor's Court, obtained against the garnishee, does not entitle the plaintiff to rank as a judgment creditor, in the administration of the garnishee's assets. *Holt* v. *Murray*, 1 Sim. 485.

## FOREIGN LAWS.

Pending hostilities between Great Britain and Denmark, the latter government made an ordinance that debts due from a Danish subject to a British subject were to be paid to commissioners at a certain rate, who were to give receipts. In an action brought in the Danish court, on the production of the receipt by the commissioners, the Court quashed the suit: Held, in an action in the Court of King's Bench for the same debt, that such receipt was no bar, and that the ordinance was void. *Wolff* v. *Oxholm*, 6 M. & S. 92.

Penalties imposed by a foreign law, must be enforced in the foreign court, and not in England. *Le Louis*, 2 Dods. 255.

It is illegal to purchase obligations or securities purporting to be granted by the government of a foreign country, which government has not been recognized by the King of England. *Thompson* v. *Barclay*, 6 Law J. Chanc. 93.

The law of France, as to marriage, proved by the production of a book purporting to be published at the Royal Printing Office, stated by oral testimony to be authorized to print the laws of France by the government; the book also being proved by the same testimony to contain the law of France. *Lacon* v. *Higgins*, 1 D. & R. N.P.C. 38, s. c. 3 Stark. 17. [Abbott]

## FORFEITURE.

[See LEASE.]

## FORGERY.

A letter or power of attorney, to transfer stock in the public funds, being a deed within the 2 Geo. 2, c. 25, it is forgery to make such letter or power. *Rex* v. *Fauntleroy*, 1 C. & P. 421, s. c. 1 R. & M. C.C.R. 52, s. c. 2 Bing. 413.

Instrument in the form of a promissory note held not to be the subject of an indictment for forgery at common law. *Rex* v. *Burke*, 1 R. & R. C.C.R. 496.

An indictment for forging foreign instruments must set out the same, not only in the foreign language, but there must be an English translation. *Rex* v. *Goldstein*, 10 Price, 88.

If a party, whose name has been forged, be released, he is a competent witness to prove the forgery. *Rex* v. *Pigeon*, 1 C. & P. 98. [Park]

A release to the acceptors of a bill jointly, on a joint acceptance on a *single* stamp is sufficient, and, on an indictment for forgery, makes them competent witnesses. *Rex* v. *Bayley*, 1 C. & P. 435. [Littledale]

Upon an indictment for forging or uttering a power of attorney to sell and transfer stock in the funds, the person whose name is forged is a competent witness for the Crown if the stock has not

been transferred, and he has given notice to the bank disavowing the power.

Especially if it be previously proved, that though there is an attestation, importing that he executed in the presence of two witnesses, he did not so execute in their presence; the Bank Act not authorizing any transfer under a power of attorney, unless it is attested by two witnesses.

And it will make no difference whether the stock was the property of the person whose name is forged, or whether he was a mere trustee. *Rex* v. *Waite*, 1 R. & R. C.C.R. 505, s. c. 1 Bing. 121.

An indictment on the 43 Geo. 3, c. 187, for forging foreign instruments, is supported by shewing that the instrument forged resembles such as pass abroad. *Rex* v. *Goldstein*, 10 Price, 88.

Upon an indictment for uttering a forged acceptance in payment for goods, which the prisoner had promised to pay for by an acceptance on a London banker: the bill purported to be accepted by W & Co. bankers, of No. 3, Birchin-lane; and it was proved that W & Co. bankers, of No. 20, Birchin-lane, had not accepted the bill; but there was no evidence to shew that W & Co. No. 3, Birchin-lane, had not accepted it, or that the latter persons were not bankers: Held, by eleven judges (*dissent.* one), that the forgery was not proved. *Rex* v. *Watts*, 11 Price, 620, s. c. 3 B. & B. 197.

If a second uttering be made the subject of a distinct indictment, it cannot be given in evidence, to shew a guilty knowledge in a former uttering. *Rex* v. *Thomas Smith*, 2 C. & P. 633. [Vaughan]

A question of forgery may be decided by the Court of Chancery, without sending the facts to be ascertained by a jury—unless a witness swears to the authenticity of the instrument, when an issue will be directed. *Peake* v. *Highfield*, 1 Russ. 559.

## FORMEDON.

The demandant may withdraw a demurrer, and reply, on payment of costs, in a writ of formedon, on an affidavit stating that his title had only recently accrued to him. *Chelmely* v. *Paxton*, 3 Law J. C.P. 118, s. c. 3 Bing. 1.

## FRANCHISE.

A charter of Car. 2. gave to the lords of an ancient liberty, the execution of all writs, processes, and precepts of his Majesty within the liberty, and contained a *non intromittent* clause, restraining the sheriff from entering, "unless it touched his Majesty or his crown, and unless upon default of the bailiffs and officers" of the lord: Held, first, that neither the charter, nor the 27 Hen. 8, excused the bailiff of the liberty from obeying the precept of the sheriff, directing him to summon the jury within the liberty to attend the quarter sessions;—and secondly, that the sessions might fine the bailiff of the liberty for such disobedience. *Rex* v. *Jarvis*, 4 B. & C. 692, s. c. 7 D. & R. 163.

## FRAUDS, STATUTE OF.

(A) Agreements.
- (*a*) *In general.*
- (*b*) *Promises for other persons.*
- (*c*) *Sale of interest in lands.*
- (*d*) *Sale of goods.*

(B) Pleading.

### (A) Agreements.

#### (*a*) *In general.*

A court of law is bound to take notice of the Statute of Frauds, though a court of equity is not, unless the party put himself on the statute. But where, on the trial of an issue out of the Court of Chancery, the jury thought there was a parol agreement, the judge indorsed their finding on the postea as special matter. *Burnand* v. *Nerot*, 1 C. & P. 578. [Best]

*Semble*—That the assignees of a party, who has become bankrupt, can recover from the defendant, though the bankrupt, before his bankruptcy, agreed to set his demand off against a debt which he owed to the defendant's brother, if such arrangement be not in writing. *Cuxon* v. *Chadley*, 1 C. & P. 174. [Abbott]

The defendants entered into and signed the following agreement, in writing, on the 26th May, 1824, addressed to the plaintiffs, viz.—"We hereby promise that your draft on W C, Son, & Co., due at Messrs. Masterman's, at six months, due on the 27th of Nov. next, shall be then paid out of money to be received from St. Philip's Church, say amount 174*l.* 13*s.* 5*d.*" Held, that this was not an undertaking to bind the defendants within the Statute of Frauds, as no consideration for their promise was stated on the face of the agreement. *Morley* v. *Boothby*, 3 Law J. C.P. 177, s. c. 3 Bing. 197, s. c. 10 B. Mo. 395.

A agreed with B *by parol*, that if B would take of him a lease for twenty-one years, of certain premises, he would give 20*l.* towards putting them into repair. B accepted the lease, and A refused to pay the money: Held, in an action for it, that an admission by A that the money was due, entitled B to recover upon the account stated. *Seago* v. *Deane*, 4 Bing. 459, s. c. 1 M. & P. 227, s. c. 3 C. & P. 170. [Gaselee]

A parol agreement by the master of a ship at I, to carry a cargo of corn to H, and after landing the cargo there, to proceed to B, and to bring back a cargo of coals from the latter place, at a certain price, is valid as an executory contract, and not within the Statute of Frauds. *Cobbold* v. *Caston*, 2 Law J. C.P. 39, s. c. 1 Bing. 399, s. c. 8 B. Mo. 456, s. c. 1 C. & P. 51.

Where an agreement is to be performed on a contingency, which may happen within the year, and it does not appear on the face of it, that it is to be performed after that period, it does not fall within the fourth section of the Statute of Frauds, which requires the agreement to be in writing, and signed by the party to be charged therewith.

Where, therefore, a testator stated that he had already provided for the payment of a sum of money by his will, and had directed his executors to pay

it: Held, to be binding on his executors. *Wells* v. *Horton*, 5 Law J. C.P. 41, s. c. 4 Bing. 41.

A contract for the yearly service of a clerk, at a salary payable quarterly, is not such a contract as is required by the Statute of Frauds to be in writing. *Beeston* v. *Collyer*, 5 Law J. C.P. 180, s. c. 4 Bing. 309.

(b) *Promises for other Persons.*

[See GUARANTIE.]

No action lies upon any special promise to be answerable for the debt of another person, unless it be in writing. *Fish* v. *Hutchinson*, 2 Ken. 537, s. c. 2 Wils. 94.

Where during the progress of a negotiation for the settlement of accounts between debtor and creditor, a guarantie was signed by the defendant on a paper, containing a correspondence between them, which disclosed the whole transaction and consideration for the guarantie: the Court held it not to be within the Statute of Frauds, and that one stamp only was necessary. *Stead* v. *Liddard*, 1 Law J. C.P. 52, s. c. 1 Bing. 196, s. c. 8 B Mo. 2.

A debtor of the plaintiffs being arrested by them, executed an assignment of monies due to him from the defendants, who were partners in three several firms in London, B, A, and C; a written notice of which assignment was sent to the partners carrying on the business in London, who promised that they would pay when they received the money, after a prior claim had been paid, and said, that a notice to C would have made no difference: Held, that such promise was not within the Statute of Frauds, as an undertaking to pay the debt of another; and that the *admission* as well as the *promise* by one partner, was binding upon them all. *Lacy* v. *M'Neile*, 4 D. & R. 7.

Where A, a creditor, directed B his debtor, to pay C, which B consented to do,—it was holden, that B's promise to pay C was not a promise to pay the debt of a third person, and consequently not within the Statute of Frauds. *Hodson* v. *Anderson*, 3 B. & C. 842, s. c. 5 D. & R. 735.

The Statute of Frauds does not apply to a case where the original credit is given to a third person, and not to the party who is to be benefitted: and it is a question for the jury, whether the credit was or was not given to such third person. *Darnell* v. *Tratt*, 2 C. & P. 82. [Best]

So it does not extend to a promise by a person to execute a bail-bond, on a writ to be sued out against A B, in consideration of the plaintiff's forbearance to arrest A B, and writ already sued out. *Jarmain* v. *Alger*, 1 R. & M. 348, s. c. 2 C. & P. 249. [Abbott]

The defendant, an auctioneer, being about to sell goods on premises for which rent was due to the plaintiff from the persons to whom the goods belonged, the plaintiff's agent applied to him for it, and said that it was better to apply so, than to distrain and stop the sale; the auctioneer answered, "You shall be paid; my clerk shall bring you the money:" Held, that the promise need not be in writing. *Bampton* v. *Paulin*, 5 Law J. C.P. 168, s. c. 4 Bing. 264.

(c) *Sale of Interest in Lands.*

A contract for the sale of a growing crop of potatoes, to be dug up by the seller, is not a contract for the sale of an interest in land, so as to require a note in writing to satisfy the Statute of Frauds. *Evans* v. *Roberts*, 4 Law J. K.B. 313, s. c. 5 B. & C. 829, s. c. 8 D. & R. 611.

The sale of growing underwood, to be cut by the purchaser, confers an interest in land under the fourth section of the Statute of Frauds, 29 Car. 2, c. 3. *Scorell* v. *Boxall*, 1 Y. & J. 396.

(d) *Sale of Goods.*

Where a vendee of 100 sacks of flour, good English seconds, at 45*s.* per sack, wrote to the vendors as follows:—"I hereby give you notice, that the corn you delivered to me, in part performance of my contract with you, for 100 sacks of good English seconds flour, at 45*s.* per sack, is of so bad a quality that I cannot sell it, or make it into saleable bread, and the sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action:" to which the vendors answered by their attorney, "that Messrs. L and L consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder, and unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount:" It was held, that a jury was warranted in concluding that the contract mentioned in the vendors' answer, was the same as that particularized in the purchaser's letter, and that, therefore, the two writings constituted a sufficient memorandum of the contract under the 29 Car. 2, c. 3, s. 17. *Jackson* v. *Lowe*, 1 Bing. 9, s. c. 7 B. Mo. 219.

A memorandum of a contract required by the 29 Car. 2, must state the price of the goods. *Elmore* v. *Kingscote*, 5 B. & C. 583, s. c. 8 D. & R. 343.

A letter from the buyer to the seller, acknowledging the receipt of an invoice, but complaining of the non-delivery of the goods, is not a sufficient "note in writing" according to the Statute of Frauds, to charge the buyer in an action for goods sold and delivered. *Richards* v. *Porter*, 5 Law J. K.B. 175, s. c. 6 B. & C. 437.

Where, in an action for not accepting goods, the bought note was only signed by the plaintiff,—it was holden, that he could not recover, because, if the plaintiff acted as broker, he could not sue as principal, and if he were a principal, his signing could not bind the defendant. *Rayner* v. *Linthorne*, 1 R. & M. 325, s. c. 2 C. & P. 124. [Abbott]

Where A having goods to sell, employed a broker for the purpose, and B, being desirous of purchasing them, authorized the broker's salesman to offer a certain price, who in consequence brought the parties together, and who having concluded the contract, in the absence of the salesman, dictated to him the terms of it; of which he made an entry in his master's book, but *did not sign it*, and afterwards communicated the circumstances to the broker, who directed a clerk to enter and sign the contract in his book, and sent a sale note, signed by himself to A, but no bought note was sent to B: Held, that there was no note or memorandum in writing signed by an agent duly authorized, to satisfy the Statute of Frauds, 29 Car. 2, c. 3, s. 17. *Henderson* v. *Barnewall*, 1 Y. & J. 381.

A & Co. in London had a traveller who called upon B in the country for orders; B gave an absolute order for a quantity of cream of tartar, and

offered to take a quantity of lac dye at a certain price, which the traveller said was too low, but that he would send to his principals, and if they did not send to B in one or two days, he might consider that his order was accepted; A & Co. sent all the goods, but never wrote to B: Held, therefore, that this was not a joint order for them all, so as to make the acceptance of the cream of tartar the acceptance of the lac dye, within the Statute of Frauds. *Price v. Lea*, 2 D. & R. 295, s. c. 1 B. & C. 156.

There must be an unequivocal acceptance of goods by the vendee, where they are above 10*l.*, if there be no memorandum in writing, in order to make the contract binding under the Statute of Frauds. *Nicholls v. Plume*, 1 C. & P. 272. [Best]

A person in a linen-draper's shop bargained for several different articles in the same time, and set them apart, marking some of them as he agreed for them. Upon the goods being sent to his house the same day, he refused to take them in. No one article was equal in value to 10*l.*, but the whole amounted to 70*l.*: The Court held, that the dealings were part of one *entire* contract, and that there had not been any *acceptance*, so as to take the case out of the Statute of Frauds. *Baldey v. Parker*, 1 Law J. K.B. 229, s. c. 2 B. & C. 37, s. c. 3 D. & R. 220.

Goods were made to order, to the amount of 144*l.*, for which a bill of exchange was to be given. A part of them, of the value of 2*l.* 10*s.*, was taken away by the person who ordered them, who was afterwards held to bail for goods sold; the declaration was for goods sold, and for not delivering the bill: The Court held, that there had not been an acceptance of the goods to satisfy the Statute of Frauds. *Thompson v. Maceroni*, 2 Law J. K.B. 208, s. c. 3 B. & C. 1, s. c. 4 D. & R. 619.

On the sale of wine which is in the London Docks, the acceptance of a delivery order not acted upon, is not an acceptance of the wine within the Statute of Frauds. *Bentall v. Burn*, 3 Law J. K.B. 42, s. c. 3 B. & C. 423, s. c. 5 D. & R. 284, s. c. 1 R. & M. 107.

The marking, by the vendor, of casks of wine lying in the docks with the initials of the purchaser, at his request, and in his presence, the terms of payment not having been settled at the time, and consequently the contract not being complete, is not an acceptance under the 17th section of the Statute of Frauds. *Proctor v. Jones*, 2 C. & P. 532. [Best]

*If a man bargain for the purchase of a given quantity out of a heap, when the vendor sets out that quantity, and gives notice to the vendee that he has done so, the property at common law would pass from the vendor to the vendee.*

*And where the vendee, under such circumstances, takes a part, and adopts the act of the vendor in setting out the remainder of the stipulated quantity, or by promising to fetch the same away, the Statute of Frauds is satisfied; and the vendor may maintain an action for goods bargained and sold. Rhode v. Thwaites*, 5 Law J. K.B. 163, s. c. 6 B. & C. 388.

(B) PLEADING.

*Semble.* It is not necessary to plead the Statute of Frauds, if it appears negatively on the face of the bill, that the regulations of that act have not been complied with. *Hill v. Hobson*, 3 Law J. Chanc. 66, s. c. 1 S. & S. 543.

A declaration against a person on his undertaking to be answerable for the debt of another, is good, though it state an inadequate consideration, since a full consideration need not be shewn,—a good and valuable consideration in law being sufficient to support such an action.

A declaration on a collateral undertaking to pay the debt of a third person, need not set out the instrument—nor state that it is in writing, nor that it is signed; and the same rule applies to a replication, even though the defendant plead that no memorandum in writing was entered into. *Lilley v. Hewitt*, 11 Price, 494.

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## FREEHOLDER.

A summons in an action at the suit of a freeholder, praying that a charter and infeftment may be reduced (absolutely), on the ground that the tenure has been unwarrantably changed from burgage to blench, for the purpose of giving a qualification to vote, cannot without limitation be sustained.

*Semble*—That such freeholder has no title to sue unless the conclusion of the summons can be limited to the question of inrolment.

Whether the Court of Session has power to qualify the conclusion of the summons, and limit it to the reduction of the charter, &c. to the effect of excluding the party claiming under it from the roll of freeholders—*quære.*

Supposing the reduction to be capable of being, and to be in fact so limited, whether the case does not fall under the provisions of the statute 16 Geo. 2, c. 11, s. 4, by which the period of bringing complaints is limited to four months—*quære.*

Whether an action at common law to reduce the charter generally, or as conferring a freehold qualification, is competent after the lapse of four months from the time of inrolment—*quære.*

Whether a summons at the suit of a freeholder, praying an unlimited reduction of a charter, &c. can be limited by the Court to a partial reduction, so far as they constitute freehold qualification—*quære.*

Whether upon such a summons (if it may be so limited), judgment can be given in a case where no application had been made to be put on the roll of freeholders, at the time when the action was commenced, but where the party became a freeholder pending the action—*quære.*

The Scotch statute, 1681, c. 2, directing that a roll of freeholders shall be made up, according as the same shall be instructed to be, of the holding, extent, and valuation, in the act specified, and providing that the freeholders shall meet to revise the roll for election, &c. and giving jurisdiction to the Court of Session to determine objections against "any insertion in the roll:"—Held, in the Court of Freeholders and the Court of Session, and on appeal, that the freeholders have no authority as to the holding (although they may as to the extent and in valuation), to look beyond the titles produced to them by the claimant, or to receive evidence from the production of anterior titles, to shew that the holding is different from that which is expressed in the *tenendas* clause of the charter, as that it is burgage where it purports to be blench-farm. *Gibson v. Forbes*, 3 Bligh, 498—538.

## FRIENDLY SOCIETY.

In the absence of some of the trustees under a riendly society act, the Court will not take into onsideration their liability, without first ascertainng their claims, by bill. *Anon.* 6 Mad. 98.

As soon as a friendly society ceases to act as diected by the statute founding it, a court of equity as no jurisdiction. *Ex parte Norrish*, 1 Jac. 162.

Where one of two trustees of a friendly society ad absconded, the money in the funds in their ames, was ordered to be transferred by the other rustee into his own name and that of another trustee ointly, elected in the room of him who had absented imself. *In the matter of a Friendly Society*, 1 S. & . 82.

The 33 Geo. 3, c. 54, which authorizes justices, n complaint made on oath by any member of a riendly society, "to hear and determine in a summary way the matter of such complaint, and to make such order therein as to them shall seem just," s confined strictly to the subject matter of complaint y the party grieved. Therefore, where the complaint was for refusing relief to a member, and the ustices not only ordered relief, but directed that the omplainant should be continued a member: The Court held the latter part of the order illegal. *Rex v. Soper*, 3 B. & C. 857, s. c. 5 D. & R. 669.

An innkeeper, at whose house a friendly society was holden, covenanted, that he would, when required by a majority of the society, or by their committee for the time being, deliver unto the committee the club-box, securities, &c., and likewise render a true and just account, "according to the rules, orders, and regulations of the said society, and the statutes and these presents." In an action against him for the non-delivery,—it was holden, that he had committed a breach, in having refused to deliver up the box, &c. to the committee for the time being, and that the latter words did not qualify the power of the committee to demand the box, &c. *Wybergh* v. *Ainsley*, M'Clel. 669.

On an indictment against the stewards, &c. of a benefit society for disobeying an order of two justices, commanding them to re-admit A B to be a member of that society, it is no defence, that A B was a person, who, by the rules of the society, was ineligible to be a member of it, as that was matter of defence before the justices; and if it be proved that the order was served on one of the defendants, and that the others, when A B applied to be readmitted, said, that they would not admit him, and did not care for the justices' order; that is presumptive evidence of a service of the order upon them. *Rex v. Gilkes*, 3 C. & P. 52. [Tenterden]

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## GAME.

(A) PROPERTY IN.
(B) QUALIFICATION.
(C) PENALTIES.
(D) INFORMATIONS, CONVICTIONS, AND INDICTMENTS.

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### (A) PROPERTY IN.

The lord of a manor has not the privilege in right of his manor to enter all lands within his manor, for the purpose of sporting and killing game. *Pickering* v. *Noyes*, 4 Law J. K.B. 10, s. c. 4 B. & C. 639, s. c. 7 D. & R. 49.

Grouse is not a bird of warren. *Duke of Devonshire* v. *Lodge*, 5 Law J. K.B. 319, s. c. 7 B. & C. 36.

### (B) QUALIFICATION.

Where a bill prayed relief against a conveyance granted as a colourable qualification to kill game, the Court retained the bill for a year, with liberty to the plaintiff to bring an action.

*Quære*, Whether a conveyance is valid at law, when executed by a father, to give a colourable qualification to his son to kill game, but is kept in his possession during his life, without being used, or made known to the son? *Cecil* v. *Butcher*, 2 J. & W. 565.

It seems that a deputation is not evidence of a qualification to kill game in the absence of registration; and, to prove a colourable title to a deputation, there must appear—first, the existence of a manor; and second, that there exists some serious claim to the manor on the part of the person under whom the deputy claims appointment. *Rushworth* v. *Craven*, 1 M'Clel. & Y. 417.

In an action of debt against an unqualified person for killing game: Held, that the defendant was not precluded from proving his qualification, although he paid the amount of one penalty into court. *Smyth* v. *Jefferies*, 9 Price, 257.

### (C) PENALTIES.

An action for a penalty under the game laws was brought against a servant in husbandry, who was seen to go up to a snare laid in a hedge, take out a hare, and carry it to his master. The Court held, first, that the proof of the innocence of the possession of game, lies on the person accused of having it; but that, inasmuch as this servant never intended to make any use of it for himself, he could not be said ever to have had the possession of it. *Hemming* v. *Haley*, 1 Law J. K.B. 105.

Where penalties under the game laws were to be recovered within six months, and the defendant proceeded to trial without having obtained a particular of the penalties: It was holden, that the plaintiff was entitled to recover for an offence committed within six months from the commencement of the action, though not proved to have been known to him till six months after its commission. *Rushworth* v. *Craven*, 1 M'Clel. & Y. 417.

### (D) INFORMATIONS, CONVICTIONS, AND INDICTMENTS.

[See FALSE IMPRISONMENT.]

The prosecutor of an information for penalties under the game laws, cannot give a notice to the defendants under 48 Geo. 3, c. 58, and then put pleas of *not guilty* on the record, and proceed to trial. The Court set aside verdicts against the defendants on such an information, after notice given under that statute, as it applied only to criminal cases. *Davies* v. *Bint*, 3 Law J. K.B. 76, s. c. 3 B. & C. 586, s. c. 5 D. & R. 353, s. c. 1 C. & P. 439.

An information on the game laws cannot be established in the defendant's absence, unless, it seems, he has been *personally* summoned. *Rex* v. *Commins*, 8 D. & R. 344.

On a record of a conviction by default, on the 5 Anne, c. 14, it must appear that the defendant was personally summoned. *Rex* v. *Hall*, 6 D. & R. 84.

Under 5 Anne, c. 14, s. 4, a conviction for keeping and using a gun to kill game without being qualified, must be made within three lunar months after the commission of the offence. *Rex* v. *Bellamy*, 2 D. & R. 727, s. c. 1 B. & C. 500.

Where a conviction under the 5 Anne, c. 14. stated that the defendant "killed a hare:" It was holden bad, as the words of the statute are prohibitory against keeping or using a gun, and not against killing, &c. *Rex* v. *Morgan*, 2 Chit. 563.

On a conviction against a common carrier, under the 5 Anne, c. 14, s. 2, for having game in his possession *as such*: Held, first, that it was unnecessary for the conviction to negative the defendant's qualification to kill game; and, secondly, that it was not essential to aver he had them in his possession knowingly. *Rex* v. *Marsh*, 2 B. & C. 717, s. c. 4 D. & R. 260.

The indictment under 57 Geo. 3, c. 90, charging a party with having entered into a forest, chase, &c., with intent to destroy game, and being found armed in the night, must, in some way or other, particularise the place. *Rex* v. *Ridley*, 1 R. & R. C.C.R. 515.

A person convicted under 57 Geo. 3, c. 90, of being found armed in the night in a forest, chase, park, wood, or plantation, may be sentenced to hard labour by 3 Geo. 4, c. 114, for all these places are either open or inclosed ground. *Rex* v. *Pankhurst*, 1 R. & R. C.C.R. 503.

## GAMING.

[See Bill of Exchange, Horse-Race, Practice, and Stakeholder.]

It is, at common law, an indictable offence to keep and maintain a common gaming table for gain and profit; the game of "*rouge et noir*" is illegal. *Rex* v. *Rogier*, 1 B. & C. 272, s. c. 2 D. & R. 431.

Under the penal statute, 9 Anne, c. 14, enacting penalties against gambling, and giving half the penalty to the poor of the parish in which the offence is committed, a declaration, stating that W, at the parish of St. J, in the county of M, at one sitting, by playing at &c., lost to T, 25*l*., and then and there paid the same to T, is sufficiently certain.

*Semble*, As to the allegation of the parish, although it appear *aliunde*, that there was another parish of St. J, in the county of M, at all events such objection, if sustained, should be taken before, and is bad after verdict, and the parish entitled under the act may recover half the penalty from the plaintiff.

From the allegation that "W, by playing, lost to T," it is a necessary implication, that W was playing with T, in a case where the statement of facts excludes the supposition of a loss by betting. *Taylor* v. *Willans*, 1 Bligh, N.S. 414, s. c. 3 Bing. 445.

The parish where the offence was committed are entitled to one moiety of the sum recovered, without deducting costs. *Willans* v. *Taylor*, 7 B. & C. 111.

## GAVELKIND.

One of several co-heirs in gavelkind, may distrain for rent due to him and the rest, without an express authority from the others. *Leigh* v. *Shepherd*, 5 B. Mo. 297, s. c. 2 B. & B. 465.

Money produced by the sale of gavelkind lands, and impressed with a trust to be laid out in the purchase of lands, does not partake of the nature of gavelkind lands, but, upon the death and intestacy of the person entitled to it, will descend to the heir-at-law. *Hougham* v. *Sandys*, 6 Law J. Chanc. 671.

## GIFT.

Where A deposited a sum of money for the purpose of purchasing C's promotion in the army, and it remained unapplied until A's death, when C's health compelled him to quit the army: Held, that C was entitled to have the deposit paid over to him, though it was not laid out as the donor directed. *Leche* v. *Kilmorey*, 1 Turn. 207.

In cases of parent and child, guardian and ward, trustee and *cestui qui trust*, &c. courts of equity, although in general, they will not disturb the enjoyment of benefits conferred by acts purely voluntary, will regard the gifts of the latter, made without consideration, with much jealousy; but where the parties stand in the relation of attorney and client, so immediately is the former under the eye of the Courts, and so anxiously do they watch the interests of the latter, that although the voluntary gift of the client may be supported, it is so indispensably necessary to shew it to be *bonâ fide*, and free from the imputation of any of the above objections, as to render it in some sort essential to its validity and stability, that some other professional man than the the donee, should have the conduct of it, or at least, that some indifferent third person should be privy to the whole transaction.

Where the relation between the parties was that of attorney and client, as well as of *quasi* guardian and ward, and there were strong circumstances of authority to shew that the defendant was unworthy of the credit and kindness intended—The Court determined, that a voluntary gift to the wife, of a considerable annuity, effected by undue influence of the husband, was equally within the principle; and continued an injunction which had been obtained against an action on the annuity deed. *Goddard* v. *Carlisle*, 9 Price, 169.

## GLASS.

By the 6 Geo. 4, c. 117, s. 8, manufacturers of glass are directed to unstop their glass-pots at one and the same time, and to work out the whole of the materials of the pots constituting that journey on or before six o'clock of *Saturday* evening; the section then provides, that, upon a notice given for that purpose, the manufacturer may lade the materials which may remain in the pots, after he shall have ceased to work out any wares therefrom, and the gauged weight of such materials shall be deducted from the duty chargeable on the gauge of the full pot: Held, that the lading out can only take place at the termination of a journey, and that if laded out during a journey, the manufacturer is en-

titled to no deduction, but is liable to the full duty, unless he shew that when the journey is finished, the materials so laded out remained *in specie*, or were put into another pot, as an overtaker, so that the duty would be paid. *Attorney General* v. *Bell*, 2 Y. & J. 431.

## GOODS SOLD AND DELIVERED.

[See VENDOR AND PURCHASER, and FRAUDS, STATUTE OF.]

## GRANT.

A grant of a rent charge upon particular lands, in consideration of an intended marriage, is, in equity, if the grantor be evicted from the particular lands, a general agreement to grant a rent-charge of that amount, to be issuing out of some lands. *Corbet* v. *Corbet*, 2 Law J. Chanc. 108, s. c. 1 S. & S. 621.

T being seised of the manor of F, and the demesne lands thereunto belonging, in fee, and all the coal mines lying under the manor, enfeoffed E (among other premises) with several closes, with a proviso saving and excepting unto the said T, his heirs and assigns, all tithes of corn and grain arising or accruing within the said several closes, and all coals in all or any of the said lands and premises, together with free liberty for them, (the said T, and his heirs and assigns, and servants,) from time to time, and at all times thereafter during the time that the said T and his heirs should continue owners and proprietors of the demesne lands of F, to sink or dig pits, or otherwise to sough and get coals, in all and *every* the said lands, and to sell and carry away the same with carts, or otherwise dispose of the same coals, at his and their wills and pleasures, he, the said T, from time to time giving and paying unto E sufficient satisfaction for such damages as the said E should sustain by reason of the digging, sinking of pits, and carrying away the said coals, as two persons, being indifferently chosen, should award and think fit to be paid. By virtue thereof, the said T (continuing owner of the demesne lands of the manor of F, and entitled to the coals in &c.) dying, the said demesne lands became vested in W D, who, by lease and release, in consideration of a certain sum, conveyed the manor of F, and its demesne lands, with its rights and appurtenances, and all the coal mines in or under the said closes in question, to J A, in fee: Held, that under the general exception and reservation contained in the grant, the coals remained in the feoffor; and therefore, the defendant, as purchaser, was entitled to the coals; and if he was not entitled to the incidental right of getting them, he was entitled to the liberty expressly reserved by the feoffment, because the defendant, to whom the coals belonged, was also owner of the demesne; and though they did not come to him by descent, yet that the liberty was not confined to those who took by descent, but secured also to those who took by purchase. *The Earl of Cardigan* v. *Armitage*, 2 B. & C. 197, s. c. 3 D. & R. 414.

Where it appeared that fishermen had been used, for above twenty years, to land and pull their nets on certain parts of the banks called Pellings, which they had also occasionally sloped and levelled: Held, that the acts being such as could scarcely have taken place without the privity of the owner, the judge properly left it to the jury to presume a grant from some former owner of the soil. *Gray* v. *Bond*, 5 B. Mo. 527, s. c. 2 B. & B. 667.

Where, on the dissolution of monasteries, the possessions of an abbey came to the Crown, and the Crown subsequently granted all the tithes yearly renewing, with all their rights, members, and appurtenances: Held, that the Crown being the rector, or *in loco rectoris*, the tithes granted must mean the rectorial tithes, or all the tithes except such as had been withdrawn by an endowment for the minister; but royal grants being strictly construed, the Court would not hold that the grant extended to the rectory, the rectory not being granted in express terms. *Governors of Lupton School* v. *Scarlett*, 2 Y. & J. 330.

The title of a portioner must be proved by the grant, or there must be such an excuse for its non-production as will enable the Court to presume its existence. *Woolley* v. *Platt*, M'Clel. 473.

Uninterrupted possession, or the enjoyment of a right for a long series of years, is sufficient to warrant a jury in presuming a grant as against the Crown, as well as against a subject. *Lopes* v. *Andrews*, 5 Law J. K.B. 40.

The absence of recital that a conveyance is made in consideration of love and affection does not afford ground to presume fraud, when the grantor is described as a relation, and the conveyance, in the operative part, purports to be made for love and affection.

The purchase of a reversion, by a nephew from an uncle of very advanced age, for a price grossly inadequate, the deed of conveyance, in the operative part, but not in the recitals, expressing that the grant was made partly in consideration of love and affection, not impeached on the ground of fraud under the circumstances.

A reversion, valued at 6,000*l.* and upwards, in consideration of annuities secured to be paid on the lives of two very old persons, and valued at less than 400*l.* is conveyed by a deed executed by an uncle, aged 80, in favour of a nephew, who was so described in the deed. There was no recital that blood formed a part of the consideration; but in the operative part of the deed the grant is expressed to be made in consideration "of love and affection," as well as the annuities.

The grantor had previously made a valid will, devising the reversion to his nephew, the grantee; and after the execution of the will, and before the grant, had sold part of the reversion, and received the price. The attorney (a stranger to both parties) who drew the will upon his own suggestion, but by the instructions of the uncle, and the deed upon the instruction for both parties, was dead.

The deed was executed in 1773; the grantor died in 1774, leaving an heir, who died in 1791, not having impeached the deed; in 1794, the heir of the heir filed a bill to set aside the deed, on the ground of fraud, which bill was dismissed for want of prosecution.

In 1812 the devisees of that heir filed a new bill for the same purpose.

Held, That the description of the party as a relation was equivalent to a recital; that the making the will was evidence of the truth of the consider-

ation of love and affection; that the absence of recital did not afford sufficient ground to presume fraud, which being denied by the answer, and not proved in the cause, no issue ought to be directed, as the court of equity had before it sufficient evidence to decide the case; and on these grounds, and under these circumstances, that the conveyance was rightly held valid, and the bill properly dismissed. *Whalley* v. *Whalley*, 3 Bligh, 1.

The 57 Geo. 3, c. 127, gives to Greenwich Hospital a claim of 5 per cent. "upon all grants whatsoever:" Held, that the generality of the terms should be restricted, and confined to remunerative grants purely naval.

A monition, calling upon the Hospital to refund the deduction, upon the ground of its having been made in a case of conjunct expedition, not enforced, *per centage* allowed. *Booty in the Peninsula*, 1 Hag. 309.

## GUARANTIE.

(A) CONSTRUCTION.
(B) NOTE OR MEMORANDUM WITHIN THE STATUTE OF FRAUDS.
(C) RIGHTS, LIABILITIES, AND REMEDIES.
(D) PLEADINGS AND EVIDENCE.

### (A) CONSTRUCTION.

It is undecided whether an undertaking by the defendant, in consideration that the plaintiffs would discount a bill of exchange for one A B, that he, the defendant, would pay to them such sums of money as should be due from him to A B, for work done by A B, is a guarantie. *Parkins* v. *Moravia*, 1 C. & P. 376. [Abbott]

A guarantie in these terms, "You may let L have coals to 50*l.*, for which I will be answerable at any time," is not a continuing guarantie. *Bovill* v. *Turner*, 2 Chit. 205.

Where a lease contained a covenant by A B, that if the tenant did not pay the landlord his rent for forty days after it became due, that A B would pay on demand—the landlord, having declared generally against A B, assigning for breach, rent-arrear,—it was holden, that A B was not chargeable until after forty days, and demand made. *Sicklemore* v. *Thistlethwaite*, 6 M. & S. 9.

A gave B the following guarantie, "I have given C an order to purchase cotton, and as it may be to my advantage to have his bills on me negotiated through your house, I have in such case to request that you will honour his drafts to the amount of those he may send to you for sale on my account, and I engage that his bills on me, so transmitted, shall be regularly accepted and paid:" Held, that, under this guarantie, B was justified in honouring C's draft, to the amount of a bill drawn by C on A, and represented by C to B, as being drawn on account of A; though such bill was in fact drawn by C on his own account. *Ogden* v. *Aspinall*, 7 D. & R. 677.

An attorney in London advanced to a young attorney residing in the country, the sum of 36*l.* to pay for his certificate, &c. The latter, with sureties, gave a bond to the former, with a condition that he (the country attorney) would pay the 36*l.* so advanced, as well as such sums of money as should become due to the London attorney, as his agent: but the sureties were not to be liable for more than 100*l.* At the end of three years, upwards of 100*l.* was due to the London attorney; but more than 36*l.* had been paid on account: The Court held, that the London attorney could only recover 64*l.* against one of the sureties, as being the amount of the continuing guarantie. *Smith* v. *Davies*, 3 Law J. K.B. 109.

Where an agreement for the letting of a part of a house contained a clause "that the plaintiff should be liable only to the said rent of 30*l.*"—it was holden to be an engagement to indemnify against any other rent; but in order to render the guarantor liable, on a special count framed on the indemnity, notice must be given to him to pay the rent, though the plaintiff may recover under the money counts. *Evans* v. *Curtis*, 2 C. & P. 296. [Abbott]

Where, in an action on a guarantie, by which the defendant undertook, "in consideration of the plaintiffs' giving J S a current credit for silk, on the event of his failure, to make good any loss the plaintiffs might sustain, not exceeding 400*l.*"—and it appeared that the plaintiffs had renewed bills of exchange accepted by J S, without giving any notice to the defendant, and without his authority or assent: Held, that it was unnecessary to give him such notice; and that the mere renewal of the bills could not be considered as a failure.

A applied to B for goods; B asked for a reference; A referred him to C; C, on being applied to, inquired the amount of the order, and on what terms the goods were to be furnished; and on being told, said "You may send them, and I'll take care that they are paid for at the time." He was afterwards written to, to accept a bill for the amount; to which he replied, that he was not in the habit of accepting bills, but that the money would be paid when due. After this B, the seller, wrote to C about the goods, and spoke of them in his letter as goods which C had "guaranteed; and the attorney of B's assignees (when he had become bankrupt) wrote to A for the money, and threatened process; but this letter was a circular, written in pursuance of a list made out for him by B, and without any knowledge of the circumstances under which the debt was contracted: Held, that on this evidence C was not primarily liable, but only as a guarantor of the debt of A. *Rains* v. *Storry*, 3 C. & P. 130. [Best]

A, B, and C, carried on business as bankers. S and P covenanted by deed, that they or one of them, would pay to A, B and C, the survivor or survivors of them, &c. all sums which, until a specified day, (which was the end of the term of the partnership,) should become due from S to A, B and C, the survivor or survivors of them. A died, having bequeathed his share of the concern to his executors in trust for his children, and his executors interfered in the management, and shared in the profits of the bank, which continued to be carried on under the same firm as before: Held, that the deed of guarantie did not extend to cover sums advanced to S by the bank after A's death. *Pemberton* v. *Oakes*, 6 Law J. Chanc. 35.

### (B) NOTE OR MEMORANDUM WITHIN THE STATUTE OF FRAUDS.

Where a clerk of the plaintiffs wrote a memorandum in the presence of the defendant, that the

defendant had called to say, that he would be responsible for the plaintiff: Held, not a sufficient undertaking by the 29 Car. 2. *Dixon* v. *Broomfield*, 2 Chit. 205.

An instrument signed, and dated, and containing the following words,—"To the amount of 100*l.*, consider me the security on J C's account," was held an insufficient memorandum to bind the defendant under the Statute of Frauds, as there appeared to be no consideration. *Jenkins* v. *Reynolds*, 6 B. Mo. 86, s. c. 3 B. & B. 14.

A guarantie "agreeing to become surety for A B, now your traveller," is sufficient, because the continuing to employ him is the consideration. *Ryde* v. *Curtis*, 8 D. & R. 62.

Where goods had been shipped by the plaintiff to R S, and the plaintiff refused to deliver the bill of lading to him, without he obtained a guarantie; upon which the defendant enclosed a bill accepted by R S in a letter to the defendant, in which he stated, that, as R S had accepted the bill, he gave his guarantie for the due payment of it, in case the bill should be dishonoured: Adjudged, that the consideration was sufficiently expressed in the guarantie. *Boehm* v. *Campbell*, 8 Taunt. 679.

Where it appeared on the face of a guarantie of a bill of exchange, that it was given to secure the payment of the half of the freight of a ship chartered by the plaintiff to a third person: Held, that the consideration was sufficiently expressed. *Pace* v. *Marsh*, 1 Law J. C.P. 69, s. c. 1 Bing. 216, s. c. 8 B Mo. 59.

A guarantie framed in these words—"I undertake to guarantee to you, (the plaintiff, assignee of a bankrupt) the payment of 100*l.* now due to the estate of G, a bankrupt, from W, for articles which have been delivered to him, for the use of his trade or business, as &c.—so that this my guarantie shall not be put in force against me, for that sum, for two whole years from the date hereof,"—is sufficient, if the defendant in a letter recognise the guarantie, and request forbearance to W, as the correspondence and guarantie constitute a sufficient consideration within the 29 Car. 2, although no specific consideration appear on the face of the guarantie. *Coe* v. *Duffield*, 7 B. Mo. 252.

### (C) RIGHTS, LIABILITIES, AND REMEDIES.

A factor who has entered into a contract of guarantie, is entitled to his commission immediately on his effecting the sale, and not in respect of the event, which is merely collateral: Held, therefore, on error, that a declaration in *indebitatus assumpsit*, for commission due for having guaranteed the payment of goods sold by him as the factor or agent, to third persons at his request, was sufficient after verdict. *Solly* v. *Weiss*, 8 Taunt. 371, s. c. 2 B. Mo. 420.

A party, by permitting a guarantie to remain dormant an unreasonable time, divests himself of the right of calling upon the surety for payment; as, where A and B undertook to indorse any bill or bills S might give P, in part payment of an order for lace, which was then being executed for him, and the goods were delivered to S, who accepted a bill at eighteen months date, which the plaintiff retained, without making any application to the defendants to indorse it, for the space of seventeen months, which was a few days previous to S becoming insolvent: Held, that to make the surety liable, the demand must be made within a convenient and reasonable time; and that, the plaintiffs having forborne to demand the indorsement for seventeen months, and not until S had become insolvent, they were not entitled to the benefit of the guarantie. *Payne* v. *Ives*, 3 D. & R. 664.

The guarantie for the performance of a contract, to be afterwards entered into, will bind the guarantor, though the contract contain an agreement for *liquidated damages*, to be paid by the principal. *Mount* v. *Rolt*, 4 Law J. K.B. 69.

The defendant had originally given his acceptance to A B as an accommodation, and security for two acceptances of plaintiff, and which were subsequently paid, but in fact the debt continued, the bills being paid by money raised upon new acceptances of the plaintiff, which the defendant knew, and did not call for his own bill to be given up: Held, that it must be presumed he allowed it to remain as a security for the subsequent acceptances. *Woodroffe* v. *Hayne*, 1 C. & P. 600. [Best]

A person gave a guarantie to be answerable for £200 worth of iron. It was afterwards discovered, that the vendors and the vendee, before the guarantie was given, had entered into a private bargain, that the vendee should pay a greater sum than the market price for the iron, as it was delivered, and that the excess should go in liquidation of an old debt due to one of the vendors: The Court held, that the agreement was a fraud on the surety, and vitiated the guarantie. *Pidcock* v. *Bishop*, 3 Law J. K.B. 109, s. c. 3 B. & C. 605, s. c. 5 D. & R. 505.

A person who guarantees the payment of a bill of exchange, is liable, although he has not received notice of the non-payment, where the insolvency of the principal takes place before the bill arrives at maturity. *Holbrow* v. *Wilkins*, 1 Law J. K.B. 11, s. c. 2 D. & R. 59, s. c. 1 B. & C. 10.

An action lies against a guarantor, in the absence of a demand, and a refusal from the principal. *Lilley* v. *Hewitt*, 11 Price, 494: s. P. *Magor* v. *Wilkes*, 5 Law J. K.B. 308; *Atkinson* v. *Carter*, 2 Chit. 403.

A party who has become a guarantor for the debt of a third person, may be arrested and held to bail on the common affidavit. *Cope* v. *Joseph*, 9 Price, 155.

A partner may give a guarantie where the obligation has reference to business connected with the partnership, and where the guarantie is notified to the firm, and they do not dissent from it. *Ex parte Nolte*, 2 G. & J. 295.

A creditor, pending an action on a guarantie against a surety, who contests the question of his liability, proves the debt under a commission of bankrupt against the principal debtor, and, by his signature, enables the bankrupt to obtain his certificate, though the surety had given him notice not to sign it; the surety is not thereby discharged from his liability on the guarantie. *Brown* v. *Carr*, 2 Russ. 600.

A guarantie was given to the junior member of a banking concern for the payment of a sum of money to be advanced. The money was taken from the partnership funds, and the borrower made a debtor in their books: The Court held, that the junior partner could not maintain an action in his own

name on the guarantie. *Garrett* v. *Handley*, 3 Law J. K.B. 47, s. c. 3 B. & C. 462, s. c. 5 D. & R. 319, s. c. 1 C. & P. 483.

A guarantie given for the benefit of several partners, may be sued on by the firm, although given personally and individually to only one of them. *Garrett* v. *Handley*, 4 B. & C. 664, s. c. 7 D. & R. 144.

### (D) Pleadings and Evidence.

In an action on a guarantie for the payment of work and labour, the Court held, that the plaintiff might resort to the common counts, if he could make out the defendant's liability as principal. *Edge* v. *Frost*, 4 D. & R. 243.

A guarantie for goods, addressed to one of two partners, may be declared on, as given to both, if it appear that the partner to whom it was addressed did not carry on any separate business.

A guarantie not addressed to any one, must be declared on as given to the party to whom or for whose use it was delivered. *Walton* v. *Dodson*, 3 C. & P. 162. [Gazelee]

In an action on a guarantie to pay, in case the principal should not, it is not necessary to set out the contingency that the principal should not pay—that being an implied exception in the law, from the nature of a guarantie. Nor, in such an action, is it necessary to prove a demand of payment from the principal, unless the making of such a demand were a part of the contract. *Meyer* v. *Withes*, 5 Law J. K.B. 308; and see *Lilley* v. *Hewitt*, 11 Price, 494, ante (C).

In an action on a guarantie, notice of non-payment by principal, or demand on surety, need not be averred or proved. *Atkinson* v. *Carter*, 2 Chit. 403.

On a guarantie to "make provision for the repayment" of a sum lent to a third person, the plaintiff, in an action on that guarantie, must give some proof that no provision has been made by the defendant; but slight proof will avail. *Garrett* v. *Handley*, 1 C. & P. 217. [Abbott]

Variance between declaration and proof.—The plaintiff declared on a guarantie by the defendant to pay for coals supplied to N H, in case N H should not pay the same within one month after the expiration of a credit of two months from the delivery. The evidence was, that the coals were delivered daily, and that at the end of each month N H gave his acceptance at two months date for the month's supply: Held, that this was a credit at variance with that stipulated for by the guarantie, and that the surety was thereby discharged. *Hall* v. *Hadley*, 6 Law J. C.P. 216, s. c. 5 Bing. 54, s. c. 2 M. & P. 136.

## GUARDIAN AND WARD.

Directions for appointing a guardian of an infant, though usually applied for by petition, may be given at the hearing of the cause. *Bradshaw* v. ——, 2 Law J. Chanc. 79.

Guardian appointed without a reference. *In re Jones*, 1 Russ. 478.

Guardians appointed by Chancery must reside within the jurisdiction of the Court. *Logan* v. *Fairrie*, 3 Law J. Chanc. 137, s. c. 1 Jac. 193.

A settlement being made on an infant (whose father was dead), on condition of her being under the care of the settlor, it was referred to the Master, to consider whether he should be appointed guardian, taking the settlement into consideration. *Fagnani* v. *Selwyn*, 1 Jac. 268.

The Court cannot remove a testamentary guardian, but will appoint a proper person to superintend the maintenance and education of the infant. *Ingham* v. *Bickerdike*, 6 Mad. 275.

Where two guardians are appointed, and one of them dies, there must be a new appointment. *Bradshaw* v. *Bradshaw*, 1 Russ. 528.

Where a defendant is the guardian of an infant, and being a co-defendant, puts in a joint answer, it is sufficient if he sign it once. *Anon.* 2 J. & W. 553.

Where a ward, after he has attained full age, permits his guardian to continue managing the property, at the request of the ward, and before the account of his receipts and payments during the minority are settled, it is, as to the property, a continuance of the guardianship; and he must, on the same principle, account as if they were transactions during the minority. An injunction, under these circumstances, was granted, on terms, to restrain proceedings in an action by the guardian to recover the balance claimed by him, on account of transactions after his ward came of age. *Mellish* v. *Mellish*, 1 Law J. Chanc. 32, 120, s. c. 1 S. & S. 138.

If an infant female attempts an elopement with a person disapproved of by those under whose guardianship her property is, the guardians are perfectly justified in preventing such elopement.

So they are justified in stopping her clothes. *Barker* v. *Taylor*, 1 C. & P. 101. [Park]

The guardians of a young lady directed her teacher not to permit her to visit a relation, who was a tavern-keeper. The young lady went to his house to spend an evening at Christmas, when the guardians sent two police officers to bring her away. The tavern-keeper refused to let her go, and brought an action of trespass against the officers. They pleaded the general issue, and a verdict was given for £20. The Court held, that the damages were excessive, and that, if the facts had been pleaded in justification, they thought that there would have been an answer to the action. *Fleming* v. *Pratt*, 1 Law J. K.B. 195.

## GUNPOWDER.

It is doubtful whether the 11th section of the statute 12 Geo. 3, c. 16, which prohibits the keeping of more than a specified quantity of gunpowder, within certain limits there named, is applicable where gunpowder has been seized and deposited for security within those limits. *Rex* v. *Beauchamp*, 5 Law J. K.B. 66.

## HABEAS CORPUS.

(A) Where and how granted.
(B) Return to.
(C) Discharge under.

### (A) Where and how granted.

An *habeas corpus cum causâ*, is not sustainable to remove proceedings from an inferior court, unless it

appears that the defendant is actually or virtually in custody. *Mitchell* v. *Mitcheson*, 1 B. & C. 513, s. c. 2 D. & R. 722: s. p. *Palmer* v. *Forsyth*, 3 Law J. K.B. 260, s. c. 4 B. & C. 401, s. c. 6 D. & R. 497.

Neither at common law, nor under the 31 Car. 2, c. 2, does the writ of *habeas corpus* issue as a matter of course, in the first instance; but the application must be grounded on affidavit, and then, whether the writ shall or shall not issue, is in the discretion of the Court. *Rex* v. *Hobhouse*, 2 Chit. 207.

The writ of *habeas corpus ad subjiciendum* ought not to be issued as of course, but obtained by motion to the Court, or by application to a judge in vacation. *Anon.* 2 Law J. C.P. 11.

A *habeas corpus* does not lie to remove prisoners of war. *Anon.* 2 Ken. 473.

The Court of Exchequer will not grant a *habeas corpus* to enable a defendant in an information, who is confined in a country prison, under sentence of another court for a libel, to attend at Westminster in person, to conduct his own defence; he should apply to the Court by whom the sentence was passed. *Attorney General* v. *Hunt*, 9 Price, 147.

The Court has not power to bring up a person confined in the house of correction on a criminal prosecution, that he may be charged in the custody of the marshal upon a bailable writ, and be recommitted to his former custody. *Guthrie* v. *Ford*, 2 Law J. K.B. 169, s. c. 4 D. & R. 271.

The Court will not grant a *habeas corpus* to take a person out of a prison, to go before an arbitrator to give evidence in a matter of arbitration. *Ex parte Greives*, 3 Law J. K.B. 106.

When the Court of King's Bench grant a *habeas corpus* that a prisoner may be admitted to bail for a crime, they always direct a *certiorari* to issue, to bring the depositions into that court. *Rex* v. *Gittus*, 3 Law J. K.B. 55.

A plaintiff and defendant will not be allowed to collude together, to remove the defendant from the prison of a court of inferior jurisdiction, into that of the Court of King's Bench, as thereby other persons may be prejudiced. *Goodfellow* v. *O'Burne*, 2 Law J. K.B. 113.

A *habeas corpus* does not lie where the party does not say that he is detained against his consent; and, therefore, was refused to discharge an apprentice who had been impressed from a king's ship, on the ground that there was no such allegation by the apprentice. *Ex parte Grocot*, 5 D. & R. 610.

If a writ of *habeas corpus* be granted, on the ground that the party has been illegally committed by a magistrate, the judge will not make it a part of the rule for issuing the writ, that the party shall not bring an action against the magistrate. *Ex parte Hill*, 3 C. & P. 225. [Tenterden]

### (B) RETURN TO.

An under-sheriff, who, to his return to a *habeas corpus* for bringing the body of a debtor on another matter, had annexed the original writ, was excused from returning the writ, on acknowledging that he had the defendant once in his custody, and that he was at large. *Ex parte the Sheriff of Worcestershire*, 1 Law J. K.B. 35.

The return to a writ of *habeas corpus*, assigning as a cause for the prisoner's detention—first, a conviction for smuggling, and second, a desertion from the navy—is not impeachable by affidavit shewing, either that the prisoner never had been a seaman in his Majesty's navy, or that, supposing him in fact a seaman, he had been illegally impressed in the first instance. *Rex* v. *Rogers*, 3 D. & R. 607.

On the return of a by-law to a *habeas corpus cum causâ*, a *procedendo* cannot be awarded to any corporation, unless it be the Corporation of London. *Rex* v. *the Chamberlain of Worcester*, 2 Ken. 469, s. c. 2 Burr. 775.

Where a *habeas corpus* issues at common law, the prisoner may, under the 56 Geo. 3, c. 100, controvert the truth of the return. *Ex parte Beeching*, 4 B. & C. 136, s. c. 6 D. & R. 209.

### (C) DISCHARGE UNDER.

A defendant having published a libel upon the House of Commons, and the House having voted him guilty of a breach of their privileges, and accordingly ordered him to be committed to Newgate, during their pleasure; and the Speaker's warrant being returned into the Court of K.B., upon a *habeas corpus* sued out by the defendant, the Court refused to discharge him out of custody. *Rex* v. *Hobhouse*, 2 Chit. 207.

Where the crew of a ship suspected to be a smuggler had been taken into custody after an engagement with a revenue cutter, and were put on board a king's vessel, and detained fourteen days without any warrant, and were afterwards brought up by *habeas corpus* to be discharged, the Court refused to discharge them, as it appeared from the return, that there was cause to suspect them of felony, but ordered them to be committed to the custody of the marshal of the Marshalsea, in order that they might be taken before a competent tribunal, to be dealt with according to law. *Ex parte Kraus*, 1 B. & C. 258, s. c. 2 D. & R. 411.

If a defendant is brought into court under a *habeas corpus*, to be charged in execution, his bail cannot justify; as the defendant must virtually be considered as charged in execution. *Bircham* v. *Chambers*, 4 Law J. C.P. 142.

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## HACKNEY COACHES.

A conviction, by the commissioners of hackney coaches, on an information charging the defendant, as a coach-master, with *driving and letting to hire* a coach and two horses, within the bills of mortality, and upon the paved streets of London and Westminster, cannot be supported under any of the statutes by which hackney coaches are licensed, as it was not alleged to be a *hackney coach*; and the offence by those statutes is, to ply or presume to *drive for* hire, which cannot apply to stage coaches taking up or setting down passengers. Where, therefore, the owner of a stage coach, licensed to carry passengers between London and Hammersmith, was convicted under the above information, for taking up a passenger in St. Paul's Churchyard, and setting him down at Hyde Park-corner: Held, that such conviction was bad, and that a distress taken by virtue of it was altogether void. *Cloud* v. *Turfery*, 3 Law J. C.P. 16, s. c. 2 Bing. 318, s. c. 9 B. Mo. 595.

By the present general law, hackney coachmen in London and Westminster and the suburbs, may take their stands in the middle of any street which is thirty feet wide from pavement to pavement.

It seems that the power to remove stands, (in the absence of any local act,) is, with the general power, in the hackney coach commissioners, subject to the approbation of the Lord Chancellor, the two Chief Justices, and the Chief Baron, for the time being.

A power to commissioners in a local act to "direct" and "regulate" hackney coach stands, includes a power to remove them from any particular place; but not to direct them to any other out of their own district. *Rex* v. *Rawlinson*, 5 Law J. M.C. 16, s. c. 6 B. & C. 23, s. c. 9 D. & R. 7.

## HAWKERS AND PEDLARS.

The Hawkers and Pedlars Act extends to persons buying books in sheets, and making them up, and then going from London into the country, and disposing thereof. *Moore* v. *Edwards*, 2 Chit. 218.

The 50 Geo. 3, c. 41, authorizes the manufacturer of goods, wares, and merchandize, to vend and hawk them in those places enumerated in the 23rd section. But where a hawker sold them in a place not mentioned in the 23rd section, and was convicted in the penalty of 10*l*. for exposing goods to sale without obtaining a licence for that purpose: The Court held, that the defendant was guilty of an offence against the 17th section, and therefore liable to be convicted in the penalty of 10*l*. *Rex* v. *Webdell*, 2 B. & C. 136, s. c. 3 D. & R. 360.

A hawker subjects himself to the penalty of 10*l*. under the 50 Geo. 3, c. 41, by selling tea, as such, without a licence, even though by the 12 Geo. 3, c. 46, s. 6, it is made illegal to dispose of tea at all in an unentered place with a licence.

If the servant or agent of an unlicensed hawker or pedlar sells goods without a licence, he renders himself liable to the penalty imposed by the Hawkers and Pedlars Act. *Rex* v. *M'Gill*, 2 B. & C. 142, s. c. 3 D. & R. 377.

A cabinet-maker residing at *Leicester*, and having a shop there, sent goods to *Ashby de la Zouch* in a cart which he accompanied on foot part of the way, and then went to *Ashby de la Zouch* by the mail, where he employed an auctioneer, and sold the goods by auction: Held, that he was a trading person travelling from town to town, within the statute 50 Geo. 3, c. 41, s. 7. It is not necessary, in an information for penalties under the statute 50 Geo. 3, c. 41, s. 7, to state that the defendant sold by auction, &c. by opening a room or shop, and exposing to sale his goods, &c. by retail. *Attorney General* v. *Hawkesse*, 1 Y. & J. 463.

A conviction on the 8 & 9 W. 3, c. 25, 9 & 10 W. 3, c. 27, and 3 & 4 Anne, c. 4, stating that the defendant "exposed to sale as a hawker," without alleging "that he was a hawker," which is the essence of the crime, was holden insufficient. *Rex* v. *Lewis*, 2 Ken. 317, s. c. 1 Burr. 610.

## HEAD-MONEY.

[See PRIZE.]

## HEIR.

[See DESCENT.]

"Lawful heirs," applied to personal property, mean next of kin. *Hayes* v. *Hayes*, 6 Law J. Chanc. 141.

"Heirs of the body," mean one person at any given time, but they comprehend all the posterity of the donee in succession.

Children are included in "heirs of the body;" and if there is but one child, he will be "heir of the body," and his issue will be "heirs of the body;" but because children are included in those words, it does not follow that they must mean children only, where you can find on the will a more general intent, comprehending more objects. *Jesson* v. *Wright*, 2 Bligh, 54.

The word *heir* is understood in Scotland in a different sense from what it is in England. In Scotland an heir may be the person pointed out by the destination of former settlements of an estate. In England the heir takes purely by descent; and the person taking by destination is considered as a purchaser; as a person not taking in the quality of heir. *Craufurd* v. *Coutts*, 2 Bligh, 667.

In Scotland the maxim of *mortuus seisit vivum* does not obtain as in England: a proceeding in Scotland to take up *hæreditus jacens*, is rather against the estate than the person; the right can be made effectual directly upon the estate, if constituted by a deed containing procuratory and precept by an adjudication in implement. *Craufurd* v. *Coutts*, 2 Bligh, 686.

Children born in the United States of America since the recognition of their independence, of parents who were born there before that time, but who continued subjects of the mother country, are entitled to inherit lands in England; although their parents may have settled in the United States and died there, subsequently to the recognition. *Doe d. Auchmuty* v. *Mulcaster*, 4 Law J. K.B. 311, s. c. 1 B. & C. 771, s. c. 8 D. & R. 593.

Where, from the lapse of time, a person must be necessarily presumed to be dead, it may also be presumed that he died without issue, no fact appearing to lead to a contrary presumption. *Doe d. Oldnall* v. *Woolley*, 6 Law J. K.B. 286, s. c. 8 B. & C. 22.

An heir-at-law is not entitled to have a case sent to law, if the construction of the will be clear. *Muddle* v. *Fry*, 6 Mad. 270.

A woman, seised in fee of two adjoining tenements known by two names, by her will devised her tenement, naming one of them, to her daughter then married, with the power of making a will. The daughter took possession in 1797 of both the tenements, and in 1807 she died, and the husband afterwards held them as tenant by the courtesy. In 1801 the husband granted a lease for ninety-nine years of the premises, and received the rent, until his death in June, 1815. In the meantime the heir-at-law of the testator died in 1815, and his son afterwards recovered possession of the tenement not named in the will: The Court held, that the son took the tenement *by descent* from his father, and was liable to pay his bond debts. *Bushby* v. *Dixon*, 3 Law J. K.B. 14, s. c. 3 B. & C. 298, s. c. 5 D. & R. 126.

Though a tenant for life was held to be liable to keep down the interest of debts,—yet, if he be heir-at-law as well, and not otherwise provided for, he is entitled to maintenance as against the remainder-man. *Burgess* v. *Mawby*, 1 Turn. 174.

An issue of *devisavit vel non* is usually granted to the heir at his request, and he is not liable to pay costs, though the issue be found against him. *Tucker* v. *Sanger*, 1 M'Clel. & Y. 425.

An acquiescence to a will, of sixteen or eighteen years, does not preclude an heir-at-law from obtaining an issue of *devisavit vel non*, as the acquiescence necessary to bar an heir-at-law of his right must be such as in point of law would bar him of his right to bring an ejectment, or it must be shewn, that the consequences of his acquiescence have placed the adverse party in a worse situation than he would otherwise have been in, as if he had paid off incumbrances, &c. *Tucker* v. *Sanger*, 13 Price, 119.

If, during the progress of a cause for establishing a will against an heir-at-law, he only cross-examine the witnesses for the will, he is entitled to his costs: if he examine witnesses in chief, he is not entitled; but in no such case are the costs decreed against him; though if he, as plaintiff, seeks to set aside the will, after any considerable lapse of time, he may be made to pay costs. *Tucker* v. *Sanger*, M'Clel. 445, s. c. 13 Price, 607.

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## HIGHWAY.

[See CERTIORARI, INCLOSURE, STATUTE, and WAY.]

(A) CONSTITUTION AND DEDICATION.
(B) SURVEYORS.
(C) COMMISSIONERS AND TRUSTEES.
(D) REPARATION.
(E) STOPPING UP, CHANGING, AND DIVERTING.

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### (A) CONSTITUTION AND DEDICATION.

It is not evidence that a way is not a carriage road, to shew that there are some kinds of carriages, which are too wide or too high to pass along it.

It is not always necessary, in order to prove a road to be a public highway, to shew that the parish have adopted it by repairing it. *Rex* v. *Lyon*, 3 Law J. K.B. 92, s. c. 5 D. & R. 497, s. c. 1 C. & P. 527.

Where a turnpike act described "the roads from A to the town of B, and from thence to C,"—Held, that the road *through* B is excluded. *Hammon* v. *Brewer*, 2 Ken. 33, s. c. 1 Burr. 576.

In an action on the case for an injury sustained by the plaintiff in consequence of the defendant having left an area of his house open; it appeared that the house was situate in an unfinished street, which communicated with another street at one end, and an open field at the other; but that it was paved and lighted, and used as a public road, and the occupiers had been rated accordingly: Held to be a sufficient dedication to the public, to entitle the plaintiff to recover for the injury he had sustained. *Jarvis* v. *Dean*, 4 Law J. C.P. 144, s. c. 3 Bing. 447.

A public footway over crown land is extinguished by an act of parliament, but is used notwithstanding as before for twenty-years. This is not evidence of a right of way, unless it be shewn that the Crown has consented. *Harper* v. *Charlesworth*, 3 Law J. K.B. 265, s. c. 4 B. & C. 574, s. c. 8 M. & R. 572.

Where a land-owner suffered the public to use, for several years, a road through his estate for all purposes, except that of carrying coals, and such road during the greater part of that time was repaired by statute duty: Held, that this was either a limited dedication of the road to the public, or no dedication at all, but only a licence revocable; and that a person carrying coals along the road after notice not to do so, was a trespasser.

*Quære*, whether there may be a partial dedication of a highway to the public. *Marquis of Stafford* v. *Coyney*, 5 Law J. K.B. 285, s. c. 7 B. & C. 257.

### (B) SURVEYORS.

The fact, that a highway is not thirty feet wide at the place where a fence stands, will not of itself enable a surveyor to take it down under 13 Geo. 3, c. 78, s. 64, unless it be placed on a spot, which was part of the existing highway at the time it was so placed there. *Lowen* v. *Kaye*, 3 Law J. K.B. 123, s. c. 4 B. & C. 3, s. c. 6 D. & R. 20.

The sessions have no jurisdiction over the surveyors' accounts, unless the items have been disallowed by a magistrate as directed by the general highway act, 13 Geo. 3. *Rex* v. *Justices of Somerset*, 5 Law J. M.C. 65, s. c. 5 B. & C. 816, s. c. 8 D. & R. 733.

The special sessions under 13 Geo. 3, c. 78, have no authority to examine a surveyor's accounts, unless those accounts have been first examined by a single magistrate, and by him referred to the sessions for judgment, on the details specifically objected to by the magistrate.

Accordingly, where a magistrate referred to the special sessions the accounts of a surveyor, without having first examined them himself: it was held, that the special sessions had no jurisdiction. *Rex* v. *Justices of the North Riding of Yorkshire*, 5 Law J. M.C. 63, s. c. 6 B. & C. 152.

A surveyor of highways is not bound to attend the meeting of the magistrates, when they proceed to apportion the statute duty and the composition money.

He must be served with the order made by the magistrates at such meeting, whether he attended or not; and the time for giving notice of appeal against the order, under the 4 Geo. 4, c. 95, s. 87, does not begin to run until he has been so served. *Rex* v. *Justices of Lancashire*, 6 Law J. M.C. 119.

### (C) COMMISSIONERS AND TRUSTEES.

If the trustees or commissioners of a turnpike road level a hill, and fill up a valley, without going on the adjoining land, and the work is performed neither negligently nor carelessly, they are not liable to answer in damages in an action at common law, for an injury which the owner of the adjoining premises may have sustained in consequence of that alteration having been made by them in the road. *Boulton* v. *Crowther*, 2 Law J. K.B. 139, s. c. 2 B. & C. 703, s. c. 4 D. & R. 195.

Trustees of a public road are not individually liable to an action for an injury sustained in consequence of negligence in the repairs thereof, unless

they personally interfere in the conduct and management of such affairs.

Merely overlooking workmen engaged in repairing or altering a road, and desiring the workmen to take precautions against accidents happening to the public, is not such an interference as will raise a personal liability in a trustee, in case an accident shall occur, in consequence of the dangerous state of the road. *Humphreys* v. *Mears*, 6 Law J. K.B. 89, s. c. 1 M. & R. 187.

The letting to hire, by a trustee of a turnpike-road, of horses and carts to a person who had contracted to repair the road, the trustee knowing that they were to be used for that repairing, is a letting to hire "for the use" of the road, within the terms of section 65 of c. 126, 3 Geo. 4.

In a notice of action against a trustee of a turnpike-road, to recover penalties for letting horses and carts to a person who had contracted to repair the road (in order that they might be used in that repairing,) if the notice profess to state the parish in which the offence was committed, a variance between the evidence and the notice will be fatal. *Towsey* v. *White*, 4 Law J. K.B. 61, s. c. 5 B. & C. 125, s. c. 7 D. & R. 810.

Commissioners of roads, by exceeding their authority, render themselves liable to an information. *Rex* v. *Rogers*, 2 Ken. 373.

The commissioners, under any local paving act in the metropolis, may sue in the name of their clerk, under the general act, 57 Geo. 3, c. 29, s. 120, although their own local act may direct them to sue in the name of another person.

Bankers are persons within the description in the general act, s. 51; and the assignees of bankers are liable to pay the full amount due to the commissioners, in preference to the other creditors. *Frost* v. *Bolland*, 4 Law J. K.B. 277, s. c. 5 B. & C. 611, s. c. 8 D. & R. 384: s. P. *Dougan* v. *Bolland*, 4 Law J. K.B. 278, s. c. 5 B. & C. 622, s. c. 8 D. & R. 435.

Under 52 Geo. 3, c. 113, (the Birmingham Paving Act,) a defendant, in whose favour a verdict is found, is entitled to treble costs. *Hall* v. *Smith*, 3 Law J. C.P. 263, s. c. 2 Bing. 267.

If a person is named in a turnpike act, as one of the trustees of a turnpike-road, and has acted as such, and been recognized as a trustee by the plaintiff, the judge, at the trial of a cause, in which the goodness of his title to act is not the matter directly in issue, will take him to be a good trustee, and will not allow evidence to be given on the part of the plaintiff, to show that the person has not taken the oath prescribed to be taken by trustees of roads before they act as such. *Pritchard* v. *Walker*, 3 C. & P. 212. [Vaughan]

## (D) REPARATION.

*Quære*—Whether a person is liable to be rated to the repair of the highways, where he lets his tithes from year to year to the several occupiers of the land, from which they issue. *Rex* v. *the Justices of Buckinghamshire*, 2 D. & R. 689, s. c. 1 B. & C. 46.

*Quære*—Whether the inhabitants of an extra-parochial hamlet are in the same situation as the inhabitants of a parish, with respect to being bound to repair and amend a common highway. *Rex* v. *the Inhabitants of Kingsmore*, 2 B. & C. 190, s. c. 3 D. & R. 398.

By a private inclosure act, the great tithes payable to the rector of a parish were abolished, and the commissioners were directed "to ascertain the net value of the tithes, and to affix a fair annual rent per acre in lieu of, and in compensation for, the tithes to the rector:" Held, that such rent was rateable to the repair of the highways in the hands of the rector. *Rex* v. *Lacy*, 5 Law J. M.C. 65, s. c. 5 B. & C. 702, s. c. 8 D. & R. 457.

No action lies against justices for a distress under a conviction for not doing statute labour on the highways, where, by reason of the plaintiff's occupying land within the parish, the magistrates have jurisdiction. A prescriptive exemption in respect of the particular estate or hamlet, should be pleaded or given in evidence before the magistrates, or made the subject of an appeal to the Quarter Sessions.

The surveyor called upon the plaintiff to do certain statute duty, or compound for it. The conviction stated, that he was an occupier of land in the parish, and had neglected to do the work, but did not notice the composition: Held, that it was unnecessary to do so, or to state that the plaintiff kept a team; for that, if he did not keep a team, or had compounded for the statute duty, that was a matter of defence, which ought to have been urged by him in answer to the complaint. *Fawcett* v. *Foulis*, 6 Law J. M.C. 44, s. c. 7 B. & C. 394, s. c. 1 M. & R. 102.

The information of the surveyor of highways, upon which justices of the peace are authorized by the 13 Geo. 3, c. 78, s. 24, to make presentments of highways, &c. out of repair, must be given by a surveyor of the township, parish, or place, in which the highway presented is situate. *Rex* v. *the Inhabitants of Fylingdale*, 6 Law J. M.C. 27, s. c. 7 B. & C. 438, s. c. 1 M. & R. 176.

The Court, upon an affidavit being produced, that a way is in repair, will not quash an indictment against a parish for not repairing, but the defendant must plead guilty, and consent to a nominal fine. *Rex* v. *Lincombe*, 2 Chit. 214.

An indictment against an extra-parochial hamlet, for not repairing a certain part of a common and ancient highway in the hamlet, alleged, that the defendants ought to repair the said highway, when and as often as it should be necessary: Held, to be untenable, since it must appear on the face of an indictment for not repairing a road, that the parties indicted are liable as of common right, or shew that the inhabitants of the place from time immemorial have repaired, either the particular road, or all roads lying within the district. *Rex* v. *Inhabitants of Kingsmoor*, 2 B. & C. 190, s. c. 3 D. & R. 398.

Where a judge certifies that the defence to an indictment, for not repairing a highway, was frivolous,—the defendant, by obtaining a rule *nisi* to arrest the judgment, does not deprive the prosecutor of his costs. *Rex* v. *Inhabitants of St. John*, 6 M. & S. 130.

A part of the inhabitants of a parish entered into an agreement with a parishioner, who had presented a road in it for want of repair, that he should stay proceedings on that presentment—that the inhabitants should allow him a sum of money towards the

xpenses of repairing the road—and that the statute luty of himself and certain inhabitants should be lone therein: The Court held, that a declaration, n which it was averred, that that part of the inhaitants had performed the agreement, but that the arishioner had not repaired the road or withdrawn he presentment, was bad on general demurrer. *effries* v. *Greenman*, 4 Law J. K.B. 13.

(E) STOPPING UP, CHANGING, AND DIVERTING.

An assent to the turning of a road, given under he hand and seal of an agent to the party through hose land the road is to pass, is insufficient.

When a footway, &c. is stopped up by an order of ustices, three descriptions of notices are required to e given by the 55 Geo. 3, c. 68, s. 2, and the order is o be confirmed and inrolled at the Quarter Sessions eld next after the expiration of four weeks from the irst day of giving such notice: Held, that the comutation of the four weeks was from the first day of iving that description of notice which is last pubished. *Rex* v. *the Justices of Kent*, 1 B. & C. 622, . c. as *Rex* v. *Crewe*, 3 D. & R. 6.

*Semble*—That, to an order for diverting a road, nade by justices, under the 13 Geo. 3, c. 78, the ames of the owners of the land through which the oad is to pass, is not essential. *Rex* v. *Casson*, 3 D. & R. 36.

Where justices had made an order for diverting a ighway, stating that the new road was to pass hrough the lands of the late T J, and that the justices ad received evidence of the consent of the said T J in his lifetime: Held, that the order was invalid, s it did not shew that T J was the owner of the state at the time when the order was made. *Rex* . *Kirk*, 1 B. & C. 21, s. c. 2 D. & R. 52.

The notices of holding a special sessions for the urpose of diverting a public highway, when given o the justices of the peace of the county acting vithin the district, must be given by the high contable of the hundred. *Rex* v. *Justices of Surrey*, Law J. K.B. 246, s. c. 5 B. & C. 241, s. c. 7 D. R. 357.

But a notice signed by the chief constables, and erved by a person acting under their authority on he justices of the district, is a notice given by the igh constable or other proper officer within the eaning of the statute 13 Geo. 3, c. 78, s. 62.

Upon a rule for a mandamus to compel the sesions to inrol an order of petty sessions, for stopping p a footway, there being fair ground for believing hat many persons had been misled by the published escription of the footway, and had therefore negected to give notice of appeal, the Court made a rule o let in the appeal. *Rex* v. *Justices of Suffolk*, 5 aw J. M.C. 27, s. c. 6 B. & C. 110, s. c. 9 D. & . 11.

An order made by justices of the peace, under tat. 55 Geo. 3, c. 68, s. 2, for stopping up an old ighway, and setting out a new one, must shew that t is made with the consent in writing under the and and seal of the owner of the land, through hich the new highway is proposed to be made.—Vhere an order, under this statute, recited that the ustices had received evidence of the consent of T J, sq., in his lifetime, to the new road being carried hrough his lands; by writing under his hand and eal, and it appeared that another person was owner of the land at the time the order was made: Held, that such order was insufficient, and could not be carried into execution. *Rex* v. *Justices of Denbighshire*, 2 D. & R. 52.

In an order of justices for stopping up an unnecessary highway under the 55 Geo. 3, c. 68, it must be stated that it appeared to the justices, on view, that the way was unnecessary; and, therefore, an order, merely stating that the "justices had, upon view, found, or that it appeared to them," that the way was unnecessary, is bad. *Rex* v. *Justices of Worcestershire*, 6 Law J. M.C. 106, s. c. 8 B. & C. 254.

By the general Turnpike Act, 3 Geo. 4, c. 126, s. 86, it is enacted, "That, after any new road shall be completed, the lands or grounds constituting any former roads or road, or so much and such part or parts thereof, as in the judgment of the trustees may thereby become useless or unnecessary, shall and may be stopped up, and discontinued as public highways, (unless leading over some moor, heath, common, uncultivated land, or waste ground, or to some church, mill, village, town or place, lands or tenements, to which such new road does not immediately lead, and which may therefore be deemed proper to be kept open, either as a public or private way or ways, for the use of any inhabitant at large, or any individual or individuals"): Held, that the exception did not take away from the trustees the power of stopping up the roads therein mentioned, but left them at their discretion to do so or not, and therefore, that the trustees might stop up, and give up to the owner of the adjoining land an old road leading to a church, &c. to which the new road did not immediately lead. *De Beauvoir* v. *Welsh*, 6 Law J. K.B. 78, s. c. 7 B. & C. 266, s. c. 1 M. & R. 81.

The right to appeal against an order for diverting a footway, appears to rest on 55 Geo. 3, c. 68, s. 3, which does not invest the sessions with power to give costs; and not on 13 Geo. 3, c. 78, s. 80, which does.

After notice of appeal, against an order of two justices for diverting a footway, the justices gave notice to the appellant, that they had abandoned the order, which was accordingly never filed with the clerk of the peace: The justices at the next sessions have no power to award the appellant costs incurred in preparing to try his appeal. *Rex* v. *Wing*, 3 Law J. K.B. 201, s. c. 4 B. & C. 184, s. c. 6 D. & R. 323.

A notice of appeal against an order for stopping up a public footway, must state that the appellant is a party grieved. *Rex* v. *Justices of Essex*, 5 Law J. M.C. 65, s. c. 5 B. & C. 433, s. c. 7 D. & R. 658.

## HIGHWAY ROBBERY.

[See ROBBERY.]

## HOLIDAY.

During the morning service on the 5th of November, it is a holiday at the office of the Signer of the Writs. *Day* v. *the Signer of the Writs*, 6 M. & S. 136.

[illegible] 345

[illegible] WAGER.]

[illegible] at a certain stake, [illegible] with the [illegible] that the horse [illegible] hounds went [illegible] hounds is not [illegible] 2 C. & P. 618.

## HORSE-STEALING.

[illegible] horse, not with the intention of [illegible] purpose of carrying away [illegible] which the prisoner [illegible] Rex v. Crump, 1 C. & P. [illegible]

[illegible] indicted for horse-stealing in [illegible] were found in joint possession of two [illegible] which they had jointly taken [illegible] times and places in county B: Held, [illegible] given in one only of the takings [illegible] being a separate felony; [illegible] prosecutor's counsel must elect on which [illegible] Rex v. Smith, 1 R. & M. 295. [Littledale.]

An indictment for horse-stealing is supported by [illegible] that the prisoner went to an inn, and desired [illegible] to bring out his horse, pointing to that of the prosecutor, which the ostler brought out, and the prisoner was about to mount. Rex v. Putman, 2 C. & P. 493. (Garrow.)

Colts and fillies are within the statute 2 & 3 [illegible], and are included in the words "horse, gelding, or mare." Held, therefore, that evidence of stealing a mare only, supported an indictment for stealing a mare. Rex v. Welland, 1 R. & R. C.C.R. [illegible]

## HOUSE-BREAKING.

[See STAT. 7 & 8 GEO. 4, c. 27, s. 29.]

The offence of house-breaking, when no person is [illegible], is not established, unless it be proved that the house was broken into at a time when there was light enough to distinguish a man's features. Rex v. [illegible] 1 C. & P. 297. [Park.]

Housebreaking in the day-time, 39 Eliz. c. 15, extended as to aiders and abettors by 3 & 4 W. & M. [illegible]

An offender ousted of his clergy by the latter statute, as being present though out of the house; and aiding and abetting one who breaks in and steals, may be charged with the breaking and entering. Rex v. [illegible], 1 R. & R. C.C.R. 526.

## HUNDRED.

[See STAT. 7 & 8 GEO. 4, c. 27.]

A building, finished as a dwelling-house, though never used as such, but used for two years previous to the burning as a barn, in which straw and timber were then kept: Held, not to be either house or barn, within the meaning of the statute 9 Geo. 1, c. 22; consequently the hundred not liable to the owner. Elsmore v. the Hundred of St. Briavells, 6 Law J. K.B. 372, s. c. 8 B. & C. 461.

The lessee of a farm having quitted the premises demised, in the middle of the hay harvest, the steward of the lessor, who resided at the distance of a mile and a quarter from the farm, employed and paid several persons to get in the hay, and the persons so employed had possession of the barn, and used the stables on the farm with their teams and horses. An under steward, who lived at the distance of five miles from the farm, superintended the executive part of the work. Some of these premises having been wilfully destroyed by fire, the steward of the lessor gave in his examination upon oath before the justices: Held, that the persons who had possession of the barn, and used the stables, were the persons having the care of the premises within the meaning of the act, and that they ought to have been examined. *Duke of Somerset* v. *the Inhabitants of the Hundred of Mere*, 4 B. & C. 167, s. c. 6 D. & R. 247.

The examination required by stat. 9 Geo. 1, c. 22, s. 8, to be sworn to before a magistrate, by the owner of premises wilfully set on fire, must state that "he does not know the person or persons who wilfully set fire to his premises, *or any of them*," or it will not support an action against the hundred. *Trimmer* v. *the Hundred of Mutford*, 3 Law J.K.B. 158, s. c. 6 D. & R. 10.

A person had some stacks of oats and hay maliciously burned. He immediately gave the notices required by the Black Act, 9 Geo. 1, c. 22. His stock being insured, he received the amount of his loss from the insurance company. He afterwards brought this action, for their benefit, against the hundred: and the Court held, that he could maintain it. *Clark* v. *the Inhabitants of Blything*, 2 Law J. K.B. 7, s. c. 2 B. & C. 254, s. c. 3 D. & R. 489.

The clause in the 9 Geo. 1, giving an action to the party grieved against the hundred, for any damage sustained under 30*l.* by means of the unlawfully and maliciously setting fire to any house, &c. is repealed by the 3 Geo. 4, c. 33, and a summary remedy given, although the injury has not been committed by a riotous and tumultuous assembly. *Rex* v. *the Justices of Somerset*, 4 B. & C. 915, s. c. 7 D. & R. 385.

The allegation in a declaration on the Black Act, 9 Geo. 1, c. 22, that notice was given to "divers inhabitants of the parish," is sufficient, after verdict, although that statute requires notice to be given to "some of the inhabitants of some town, village, or hamlet near to the place of the fire." But if evidence be produced, that the persons to whom notice was given lived at detached houses, then the verdict would pass for the defendants. *Read* v. *the Hundred of Kingsbury*, 2 Law J. K.B. 158.

Where the declaration alleged the notice of a fire to have been given to the *parish*, instead of the *town*, *village*, or *hamlet*, as required by the act, the Court held it an immaterial objection after verdict.

In an action on the 9 Geo. 1, c. 22, s. 8, against the hundred, to recover the value of a stack of corn alleged to have been wilfully, maliciously, and feloniously set on fire: Held, that in order to support the allegation that the fire was wilful and malicious, it was not necessary to give distinct and positive evidence of a wilful and malicious act: it being

ufficient to adduce reasonable evidence to satisfy he minds of the jury that it did not arise from an ccidental or innocent cause. *Rex* v. *the Inhabitants f Gainsbury*, 4 D. & R. 250.

It is not necessary for a party who applies to the agistrates for a remedy in respect of an injury ommitted against 9 Geo. 1, c. 22, to prove that it as committed by a "riotous" or tumultuous asembly, notwithstanding the introduction of those ords in the second and fourth sections of 3 Geo. 4. nd the Quarter Sessions on appeal, as well as the etty Sessions, may examine the party grieved. *Rex* . *Wylde*, 4 Law J. K.B. 67.

By the Black Act, 9 Geo. 1, c. 22, it is felony or any persons unlawfully and maliciously to detroy trees in a plantation, and the inhabitants of the undred are made answerable for damages for the njury: The Court held, that it was necessary that he act should be done from a malicious motive towards the owner of the trees.

Where some persons had set fire to a plantation, which was burned down, and also the adjoining plantation, at the distance of a mile from the place at which the fire commenced: The Court held, that here was not any evidence that the latter plantation ad been burned from malice to its owner; and conequently, that he could not maintain an action gainst the hundred. *Curtis* v. *the Hundred of Godey*, 2 Law J. K.B. 225, s. c. 3 B. & C. 248, s. c. D. & R. 73.

The 9 Geo. 1, c. 22, s. 7, directs that the inhabiants of the hundred are to make satisfaction for damages occasioned by certain acts therein menioned; under this statute it was held, that the action must be brought against all the inhabitants f the hundred; and the declaration being against wo only, was adjudged bad in arrest of judgment. *ackson* v. *Pearson*, 1 Law J. K.B. 119, s. c. 2 ). & R. 430, s. c. 1 B. & C. 304.

Two of the inhabitants of a town, which is not ituated within a hundred, are not entitled to the osts of defending an action brought against them, o recover the damages done by riotous assemblies, nder 57 Geo. 3, c. 19. *Rex* v. *the Justices of King's ynn*, 2 Law J. K.B. 219, s. c. 3 B. & C. 147, s. c. D. & R. 778.

## IDIOTS.

If a petition in the matter of an idiot, be not erved on the Attorney General, it is unavailable. *x parte Watson*, 1 Jac. 161.

## IMPERTINENCE.

[See PLEADING and PRACTICE.]

## INCLOSURE.

[See APPORTIONMENT, and COMMON.]

A recent right founded on an inclosure under an t of parliament, does not make a distinction with gard to general law. *Cooke* v. *Green*, 11 Price, 736.

Where a field has been allotted under an inclosure t, it is not always necessary to plant a quickset hedge round it; a large drain or ditch is a sufficient boundary. *Ellis* v. *Arnison*, 1 Law J. K.B. 24, s. c. 1 B. & C. 70, s. c. 2 D. & R. 161.

A being seised in fee of a messuage and lands in Dundraw, and also of the tithes issuing out of the same, devised all his freehold messuage and tenement, and all the profits arising therefrom, to his wife for life, with remainder over.

In 1813, an inclosure took place in Dundraw under an act of parliament; meetings were duly held for claims by the commissioners, of which no claims were made by any parties for equivalents in lieu of tithes; and an allotment was made and set out to the defendant, in respect of the above messuage and lands, no part whereof was expressed to be in respect of tithes.

In 1820, the commissioners not having executed their award, they, at the request of the lessor of the plaintiff, allotted part of the before-mentioned allotment to him, as an equivalent for and in respect of the tithes, he claiming the same under the coheirs of the testator; and contending, that they did pass by the word *profits*, in the testator's will: Held, in ejectment for that portion of land so set out for tithes, that the lessor of the plaintiff was barred, having neglected to make his claim within the time limited by the General Inclosure Act.

*Quære*, Whether the word "profits" so used, would pass tithes. *Doe dem. Watson* v. *Jefferson*, 2 Law J. C.P. 138, s. c. 2 Bing. 118, s. c. 9 B. Mo. 260.

By an inclosure act which passed in 1761, commissioners were empowered to make allotments, *inter alia*, to the rector of the parish of *Waddingham cum Snitterby*, within the adjoining townships of W S, and A, in lieu of the tithes belonging to the rector, and arising within the same lands and grounds, the award of the commissioners to be final, unless appealed against within six months, saving, however, the rights of persons other than those to whom allotments should be made in respect of their several interests. Under this act, the commissioners allotted to the rector lands in A and S, in respect of tithes and glebe to which he was there entitled; and in W, in respect of glebe, but made no specific allotment in W, in respect of tithes: the rector not having appealed against the award, in 1825, sued for tithes in W: Held, that he was not barred by the statute, the commissioners having made no allotment in respect of tithes in W. *Thorpe* v. *Cooper*, 2 Y. & J. 445.

A private inclosure act which has a clause, which declares that no item or charge in the accounts of the commissioners shall be binding on the parties concerned, or valid in law, unless the same shall have been duly allowed by a magistrate in the manner therein appointed, does not take away an appeal given by a subsequent clause, "to the party grieved by anything done in pursuance of that or the general inclosure act, declared to be binding, final, and conclusive:" And held, that the allowance of the accounts by a magistrate did not fall within this exception. *Rex* v. *the Justices of Cumberland*, 1 B. & C. 64.

Where an inclosure act empowered commissioners to fix and settle certain boundaries, and to insert in the award the description of the boundaries, and advertise the same, and then the award was to be

final: It was holden, that a variance between the advertisement and the award rendered the latter of no avail. *Rex* v. *the Inhabitants of Washbrook*, 4 B. & C. 132, s. c. 7 D. & R. 221.

An act authorizing commissioners to make roads through certain inclosed lands, and declaring that the commoners of inclosed lands shall be entitled to the herbage of the roads, in such manner as the commissioners shall award, does not authorize them to sell the herbage by auction, or otherwise, to one individual commoner. *Raimes* v. *Robinson*, 2 Chit. 501.

By the general Inclosure Act, 41 Geo. 3, c. 109, commissioners are empowered to set out private roads, which, when set out, are to be kept in repair by the owners of the allotments: Held, that the commissioners had no authority for levying a rate for making such roads. *Falmouth* v. *Richardson*, 3 B. & C. 837, s. c. 5 D. & R. 664.

By a local inclosure act, commissioners were empowered with the order and concurrence of two magistrates to stop up a certain way, and discontinue any of the roads or ways through, over, or in the sides of the inclosed lands; the general inclosure act, 41 Geo. 3, c. 109, s. 8, providing that in such stopping, &c. the same shall in no case be done without the concurrence and order of two justices, and such order shall be subject to an appeal: Held, that this act applied equally to a foot-way; and, therefore, that, although it might be the intention of the commissioners, by omitting to set it out in the map, to stop it up, yet, that such omission, without such previous order and concurrence of two justices, with the notice required by the local act, did not alone extinguish it within the meaning of sec. 11. *Harber* v. *Rand*, 9 Price, 58.

A public footway passed over a common into and across a farm-yard, to a public road on the other side of the farm-yard. By a local act for inclosing the common, giving power to divert and stop up roads over it, it was provided, that the commissioners should not *divert*, or turn, or stop up *any old road leading over other parts, not to be inclosed*, without the concurrence and order of two justices. The commissioners awarded the public footway over both closes to be a private footway: Held, that the old right of public footway remained over both closes; for the concurrence and order of two justices was necessary under the proviso in 41 Geo. 3, c. 109, s. 8, (the general Inclosure Act,) in order to extinguish the public right over the allotment of common, as well as that over the farm-yard. *Logan* v. *Burton*, 4 Law J. K.B. 217, s. c. 5 B. & C. 513, s. c. 8 D. & R. 299.

Under a private act for inclosing lands, which contained a proviso that "if any person should think himself aggrieved by anything done in pursuance of the said act, except as to such acts, determinations, or proceedings of the said commissioners, as are by the said act directed to be final and conclusive, he may appeal, &c." Held, where one of the commissioners named in the act, and two justices of the peace had ordered a road to be stopped up, that an appeal against such order lay to the sessions, there being nothing in the general Inclosure Act which makes the determination of the justices final and conclusive. *Rex* v. *the Justices of the West Riding of Yorkshire*, 2 B. & C. 228, s. c. 3 D. & R. 306.

Waste lands, under which there are mines of coal, are inclosed by virtue of an act of parliament, giving to the lord one sixteenth part of the whole, and reserving to him a right to make all convenient and necessary ways over the lands that were waste, for getting and carrying away the coals, to be made at his free will and pleasure in as beneficial a manner as if the act had not passed. An assignee of that lord made a waggon-way across an allotment, and dug up the adjoining soil to raise the low parts of the ground to form a level road. The Court held, that the question for the jury was, whether or not the road made was not such as a prudent man would have made over his own land: they also held, that he had a right to take the adjoining soil to make it a level one. *Abson* v. *Fenton*, 1 Law J. K.B. 94, s. c. 1 B. & C. 195.

In an act of parliament for inclosing a parish, no direction was given as to the place in which the award was to be deposited. The commissioners gave it to their clerk and solicitor, who, on resigning business, delivered it to his son and successor, who permitted every person to inspect it who thought proper. The churchwardens and overseers applied to the Court to have the award given up and deposited in the parish chest, but the rule was discharged with costs. *Wartnaby's case*, 2 Law J. K.B. 3.

The solicitor to the defendants, being also clerk to the commissioners under an inclosure act, to an information, admits, on his examination, that he has in his possession the original award of the commissioners, which ought, according to the act, to have been deposited in the parish chest: though it is sworn, that the production of the original award at the hearing will afford material evidence for the relators, the Court will not make an order on the solicitor for the production of the deed at the hearing. *Attorney General* v. *Berkeley*, 1 Law J. Chanc. 33.

## INCONTINENCE.

The 27 Geo. 3, c. 44, declaring that no suit for fornication or incontinence shall be brought after the expiration of eight months from the time when the offence shall have been committed, applies to laymen only; therefore it seems there is no limitation to such suits against clerks, &c. *Burgoyne* v. *Free*, 2 Add. 414.

## INDEMNITY.

[See BOND, PRINCIPAL AND SURETY, and VENDOR AND PURCHASER.]

The Court held the 4 Geo. 4, c. 1, an act to "indemnify such persons, &c. as have omitted to qualify themselves for offices and employments, and for extending the time limited for those purposes respectively," to be a prospective as well as a retrospective enactment. *In re Stevenson*, 2 B. & C. 34.

The obligee in an indemnity bond on being damnified, has an immediate right to be reimbursed. *Challoner* v. *Walker*, 2 Ken. 297, s. c. 1 Burr. 574.

The assignee of a lease executes a bond to indemnify the original lessees against the covenants

contained in the original lease; he afterwards quits the country, the house is left untenanted, and the original lessees are obliged to pay the rent reserved: the assignee, having subsequently returned to England, makes a compromise with them for the sum then due, in respect of his non-performance of the covenants, and shortly afterwards goes abroad; they demise the house to a person who continues in possession till the end of the term: Held, that this mode of dealing with the premises does not give the assignee any title in equity to relief, against the legal effect of his bond. *Anderson* v. *Bailey*, 1 Russ. 313.

If A at the desire of B commence an action for his benefit, A, being liable to the attorney for the costs, may maintain an action against B, on such indemnity, although he has not paid the attorney. *Bullock* v. *Lloyd*, 2 C. & P. 119. [Abbott]

Estates being sold in lots, under conditions, stating that they were subject to certain perpetual payments to the curate of N, and to an hospital, which were to be charged on and paid by the purchaser of Lot 1 only: Held, that a deed, by which the purchaser of Lot 1 granted a rent-charge of equal amount to trustees, to indemnify the other purchasers, with a covenant to indemnify them, was a sufficient indemnity. *Cassamajor* v. *Strode*, 1 Jac. 630.

## INDICTMENT.

(A) WHERE IT LIES.
(B) FORM.
(C) EVIDENCE.
[See CERTIORARI, PLEADING, and PRACTICE.]

### (A) WHERE IT LIES.

An indictment lies for disobeying an order of sessions. *Rex* v. *Robinson*, 2 Ken. 515, s. c. 2 Burr. 799.

Forcibly and unlawfully to enter "a willow garden, and dig down a water dam," is an indictable offence. *Rex* v. *Nicholls*, 2 Ken. 512.

An information against the defendant before the Lord Mayor, &c. for having in his possession saddles of leather not well tanned, quashed on the ground that the proceedings ought to have been by indictment. *Rex* v. *Williams*, 2 Ken. 572.

The non-performance of a particular duty on a highway, as directed by an act of parliament, renders the party liable to an indictment. *Rex* v. *Boyal*, 2 Ken. 549, s. c. 2 Burr. 832.

It is a misdemeanor to sell the dead body of a capital convict for dissection, where dissection is no part of the sentence. *Rex* v. *Cundick*, 1 D. & R. N.P.C. 13. [Graham]

One brother refusing to support another, is not an indictable offence—as, where a man had an idiot brother as an inmate of his house, and did not supply him with food, &c.—it was held no ground for an indictment. *Rex* v. *Smith*, 2 C. & P. 449. [Burrough]

An indictment charging the defendant with having an obscene libel in his possession, *with intent to publish it*, cannot be sustained. *Rex* v. *Rosenstein*, 2 C. & P. 414. [Park]

### (B) FORM.

An indictment will be quashed, if the style of the sessions be erroneously described. *Rex* v. *Roystead*, 1 Ken. 255.

The names of the grand jurors need not be set forth in the caption of an indictment. *Rex* v. *Davis*, 1 C. & P. 470. [Park]

Where in an indictment time and place are material, the Court will intend that the time and place mentioned in the indictment are the proper ones. *Rex* v. *Napp*, 1 R. & M. C.C.R. 44.

A prosecutor may be described by a name he has assumed, though it be not his right name. *Rex* v. *Norton*, 1 R. & R. C.C.R. 510.

The addition of "servant" in an indictment is too general. *Rex* v. *Checkets*, 6 M. & S. 88.

In an indictment, the addition of "esquire" to the name of the person in whom the property is laid, may be rejected as surplusage. *Rex* v. *Ogilvie*, 2 C. & P. 230. [Burrough]

The Court of King's Bench will not quash an indictment for perjury, because it does not contain the addition to the defendant's name, without an affidavit of the true addition being produced. *Rex* v. *Thomas*, 2 Law J. K.B. 41, s. c. 3 D. & R. 621.

If an indictment on the face of it appear to be bad in point of law, the judge at Nisi Prius may refuse to try it: as, where an indictment for perjury did not shew that the matter, alleged to be falsely sworn to, was material. *Rex* v. *Tremearne*, 1 R. & M. 147. [Garrow]

Indictment, "that one E L was publicly executed at &c., and that one G C, of &c. was retained and employed by W W, the keeper of the jail in and for the said county, to bury the body of the said person so executed, for certain reward, to be therefore paid to the said G C by the said county; and in pursuance of the said retainer and employment, the dead body of the said person so executed was then and there delivered to the said G C, for the purpose of being so by him buried as aforesaid, and it then and there became the duty of the said G C to bury the same accordingly; but that the said G C being &c., and having no regard to his said duty, nor to &c., did not, nor would bury the said body, but, on the contrary thereof, unlawfully &c., and for the sake of riches, lucre, and gain, did take and carry away the said body, and did sell and dispose of the same, for the purpose of being dissected &c., to the great scandal &c.:" Held, that the indictment was good, although framed in the language of a declaration in assumpsit. *Rex* v. *Cundick*, 1 D. & R. N.P.C. 13. [Graham]

An indictment charging the defendant with obstructing another in the execution of an office, or the performance of a duty, must shew that the person obstructed was lawfully executing the office, or performing the duty in question; and the mere statement, that the defendant "unlawfully" did the act complained of, will not be sufficient. The facts which constitute the obstruction must be distinctly stated, and not their amount by inference. The stating that the obstruction was caused by "threats" and "menaces" will not be sufficient. *Rex* v. *Chere*, 4 Law J. K.B. 79, s. c. 4 B. & C. 902, s. c. 7 D. & R. 461.

An indictment against a person for not taking upon himself the office of constable, was quashed, on the ground that it did not shew, 1st, that he was an inhabitant; 2d, that the court leet was holden within the jurisdiction; 3d, that the allegation, that the defendant had due notice, amounts only to a general *notitiam habuit*, which is ill; and, 4th, that

it is defective for stating that the said A B, at a court leet there holden, the inquest duly sworn, &c. did present, &c. *Rex* v. *Boycot*, 1 Ken. 318.

The word "from," as applied to a parish, in the description of a road, does not of necessity exclude the parish. The word may, after verdict, be treated as inclusive, if, from the whole context of the sentence, it must fairly be understood as being so used, and so understood by the jury.

Indictment for obstructing a highway, charging, "that defendant removed a culvert in the parish of S, opposite to a mill there, in a highway there, leading from S to K: Held good, on motion in arrest of judgment. *Rex* v. *Knight*, 6 Law J. M.C. 19, s. c. 7 B. & C. 413, s. c. 1 M. & R. 217.

An indictment charged that A B, on &c., being the servant of J H, on the same day &c., one gold ring, &c. then and there being in the possession of J H, and being his goods and chattels, feloniously did steal: Held, that the fair import of the charge was, that A B was the servant of J H, at the time when the theft was committed, and that the indictment therefore warranted judgment of transportation for fourteen years. *The King* v. *Mary Somerton*, 6 Law J. M.C. 92, s. c. 7 B. & C. 463.

Where, in an indictment, a fact is stated, from which another fact is also stated, as a legal inference from the first, a verdict of guilty will not support the indictment, unless there be sufficient on the face of the indictment to shew that the second fact is a legal and necessary inference from the first.

Accordingly, where an information stated, that one R H was employed in the service of the Customs, and that it was his duty, *as* such person so employed, to seize certain goods, and it then went on to charge the defendant with offering to bribe R H to violate his duty,—it was held, after verdict, that the mere employment of R H by the Customs did not create a duty to seize goods; and, none of the acts of parliament relating to the Customs creating such a duty from such an employment alone, judgment was arrested. *Rex* v. *Everett*, 6 Law J. M.C. 83, s. c. 8 B. & C. 114, s. c. 2 M. & R. 35.

### (C) EVIDENCE.

[See VARIANCE.]

Though an indictment aver an assault with intent to abuse and carnally know, it is supported by proof of an assault with intent to abuse only. *Rex* v. *Dawson*, 3 Stark. 62. [Holroyd]

An indictment charging the defendant with having published a libel, with intent to defame certain magistrates, and also to bring the administration of justice into contempt, is supported, if either of those intentions be proved. *Rex* v. *Evans*, 1 Stark. 35. [Bayley]

Where a certain parish is named in an indictment for felony, as being in a particular county, it is not necessary to prove that the parish is in that county. *Rex* v. *Dowling*, 1 R. & M. 433. [Littledale]

The circumstance of evidence shewing the prisoner guilty of another felony, is no objection. *Rex* v. *Moore*, 2 C. & P. 235. [Burrough]

To support an indictment for publishing an obscene snuff-box, the identical box must be produced: shewing a similar one is insufficient. *Rex* v. *Rosenstein*, 2 C. & P. 415. [Park]

Where, on an indictment for larceny, the prosecutor rests his case on the prisoner's recent possession of the property, and the prisoner calls a witness to prove that he bought such property of A B, and the prosecutor then calls A B,—A B can only give evidence, which goes to destroy the prisoner's case; and consequently, evidence shewing that he saw the prisoner commit the robbery, will be rejected. *Rex* v. *Stimpson*, 2 C. & P. 415. [Garrow]

An indictment against persons for disobedience of an order of justices, to restore a member of a benefit club, stated that the rules of the club had been duly inrolled at the Sessions. The order of the justices recited that they had been so inrolled; but on the trial of the indictment, there being no evidence of the fact, except the recital of the justices themselves, —it was held, that the fact which was necessary for the jurisdiction of the justices was not proved. *Rex* v. *Gilkes*, 6 Law J. M.C. 118, s. c. 8 B. & C. 439.

Although, in general, the evidence on the trial of an indictment for felony, shall be confined to the felony in question; yet, if the transaction relating to the prisoner's conduct be so connected in its facts as to render it necessary that the whole shall be laid before the jury, the whole shall be received in evidence, although it may include other felonies for which the prisoner may yet afterwards be called to account. The question whether the transaction is or is not so connected in its facts, is a question to be decided by the judge on the trial, in his discretion; and it seems the Court will not afterwards review his decision. *Rex* v. *Ellis*, 5 Law J. M.C. 1, s. c. 9 D. & R. 174, s. c. 6 B. & C. 145.

Where an indictment for a conspiracy alleged "at the Court of Quarter Sessions holden, &c., an indictment against A B was preferred to, and found by the grand jury:" Held, that this allegation must be proved by a caption regularly drawn up of record, and that the minute book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been in fact drawn up. *Rex* v. *Smith*, 6 Law J. M.C. 99, s. c. 8 B. & C. 341.

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## INFANT.

[See GUARDIAN AND WARD, PARENT AND CHILD, and PROCHEIN AMY.]

(A) RIGHTS AND INCAPACITIES.
(B) LIABILITIES.
(C) MAINTENANCE.
(D) ACTIONS AND SUITS BY AND AGAINST.

### (A) RIGHTS AND INCAPACITIES.

An infant, for his own benefit, may carry on trade and business, and, by his *prochein amy*, may maintain an action for slanderous words in respect of such trade and business. *Wild* v. *Tomkinson*, 5 Law J. K.B. 265.

It is a maxim in law, that whoever enters land of an infant does so for the benefit of the infant. *Ingledew* v. *Richardson*, 5 Law J. K.B. 246.

If an infant pays money with his own hand with a valuable consideration, he cannot recover it back again in an action for money had and received. *Holmes* v. *Blogg*, 8 Taunt. 508.

An estate descending to an infant heir, subject to trust to sell for payment of certain incumbrances: Held, that it could not be resorted to for the payment of other specialty debts during the minority of the heir. *Searth* v. *Cotton*, 1 Jac. 635.

On a bill by an executor to recover a fund belonging to a testator, it appearing that the testator's debts were paid, and that the fund was bequeathed to infants, the Court refused to have it transferred to the executor, but secured it in court for the benefit of the infants. *Crick* v. *Binney*, 1 Jac. 523.

An objection to a sale in court in execution of a will, that there were infants interested under the will, who could not join in the conveyance, was overruled. *Powell* v. *Powell*, 6 Mad. 53.

An infant dying seised of an equitable estate, which descended *ex parte maternâ*, his capacity to call for a conveyance of the legal estate (by which course the descent might have been broken), is not a sufficient reason to induce the Court to view the case, as if a conveyance had been really made. *Langley* v. *Sneyd*, 1 S. & S. 45.

An infant of the age of sixteen may enter into a recognizance to prosecute a criminal charge. *Ex parte Williams*, M'Clel. 493.

(B) LIABILITIES.

If any portion of goods, supplied to an infant to trade with, be consumed by his family as necessaries, he is liable for that portion. *Turberville* v. *Whitehouse*, 1 C. & P. 94. [Hullock]

If proper clothes are supplied to an infant by his father, any others furnished in addition cannot be considered as necessaries; and it is the duty of a tradesman when applied to by an infant for clothes, to make inquiries of his friends, before he gives him credit. *Cook* v. *Denton*, 3 C. & P. 114. [Best]

If an infant be tenant in tail, he is as much to keep down the interest of debts charged upon the entailed estates, as any person who is not a minor. *Burges* v. *Mawbey*, 1 Turn. 167.

Whether an infant can be bound by a submission to arbitration entered into on his behalf by his guardian—*quære*.

But a submission to arbitration entered into by himself alone, or by any other person than his guardian on his behalf, is clearly void. *Cox* v. *Dowse*, 5 Law J. K.B. 128, s. c. 6 B. & C. 255.

An infant administratrix may be compelled in equity to account. *Hindmarsh* v. *Southgate*, 1 Law J. Chanc. 24.

Articles under which A had served his clerkship to an attorney, contained a proviso, that A should not practise within a certain district; and also a covenant on the part of his father, that A should, within a month after he came of age, execute a bond in a specified penalty to ensure his fulfilment of the proviso; A, who was an infant at the time of the execution of the articles, served under them for three years after he attained his full age, but was never called on to execute any bond, and, with the knowledge of the purport of the articles, completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him; a motion for an injunction to restrain him from practising within that district was refused, with costs. *Capes* v. *Hutton*, 2 Russ. 357.

A commission of bankrupt cannot be supported against a person under age. *O'Brien* v. *Currie*, 3 C. & P. 283. [Burrough]

A boy under the age of 14, cannnot be convicted of an assault with intent to commit a rape. *Rex* v. *Aldershaw*, 3 C. & P. 396. [Vaughan]

(C) MAINTENANCE.

Maintenance allowed to infants out of a fund in which they had only contingent interests. *Prater* v. *Prater*, 6 Law J. Chanc. 90.

Where there are two funds absolutely given by different persons for the maintenance of an infant, the infant's interest determines which of the two shall be appropriated first. *Foljambe* v. *Willoughby*, 2 S. & S. 165.

(D) ACTIONS AND SUITS BY AND AGAINST.

The tutors of an infant Scotchman executed an agreement *inter partes* for a lease, whereby they let a salmon fishery for four years. The rent was reserved, payable to the tutors, or to any other person duly authorized to receive it: The Court held, without proof of the infant being of age, that he might sue upon the instrument in his own name. *Fitzmaurice* v. *Waugh*, 3 D. & R. 273; *Carnegie* v. *Waugh*, 1 Law J. K.B. 89, s. c. 2 D. & R. 277.

If an infant appear and defend by attorney, the Court will order the appearance to be struck out of the filacer's book, and direct, that if the defendant should appear by guardian, the plea should be framed accordingly. *Francis* v. *Thompson*, 4 Law J. C.P. 192, s. c. 3 Bing. 609, as *Paget* v. *Thompson*.

If an infant is sued for a debt, which he has contracted in the *course of trade*, and has suffered judgment to be signed by default, the Court will not set it aside. *Wright* v. *Hunter*, 1 Law J. K.B. 248.

An infant bought goods. He made a promise to pay after he became of age, but after the commencement of an action against him: The Court held, that such a promise did not support the replication (to a plea of infancy), that the defendant ratified the contract after he became of age. *Thornton* v. *Illingworth*, 2 Law J. K.B. 175, s. c. 2 B. & C. 824, s. c. 4 D. & R. 545.

An entry made as to the time a child was born, in the register of the christening, is not of itself sufficient evidence, in an action against an infant, to prove his infancy. *Wihen* v. *Law*, 3 Stark. 63. [Bayley]

A person, who makes an adverse entry into, and take an adverse possession of an infant's estate, cannot be treated as the bailiff of that infant; nor can a bill for an account against him in that character be sustained. *Hagley* v. *West*, 4 Law J. Chanc. 63.

Where an application is made for a reference, to inquire whether any proceedings will be for the benefit of infants, the interest of the infants must be stated to the Court. *Anon.* 1 Law J. Chanc. 33.

An inquiry, whether a suit is beneficial to an infant, unless upon a strong case of no benefit, or improper motive, will not be directed by the Court. *Stevens* v. *Stevens*, 6 Mad. 97.

The Court will not grant an application to stay proceedings in a suit commenced on behalf of infants for accounts of their property, upon affidavits that the suit was not for their benefit. *Lyons* v. *Blenkin*, 1 Jac. 259.

Where an infant had put in his answer by guardian, and a supplemental bill was filed—On motion, an order was made, that the guardian who put in this answer to the original bill, might put in the answer to the supplemental bill. *Lushington* v. *Sewell*, 6 Mad. 28.

An estate descending to an infant heir, subject to a lien or equitable charge: Held, that the parol does not demur in a suit instituted by other creditors.

Infants being added as parties to a cause after the report had been made, it was referred to the Master to inquire, whether it would be for their benefit that the report should be adopted as to them. *Brookfield* v. *Bradley*, 1 Jac. 632.

## INFORMATION.

[See CRIMINAL INFORMATION, and SMUGGLING.]

(A) WHEN GRANTED.
(B) FORM.
(C) PRACTICE.

### (A) WHEN GRANTED.

An information lies against overseers for assisting in the promotion of a marriage, in order to relieve the parish of a pauper, by burthening him on another settlement. *Rex* v. *Herbert*, 2 Ken. 466.

So, for a conspiracy to raise the price of salt, by several entering into an agreement not to sell salt under a certain price. *Rex* v. *Norris*, 2 Ken. 300.

The Court will not grant an information against a party for not accepting a corporate office, in absence of some obstinacy, &c. on the part of the person elected. *Rex* v. *Denison*, 2 Ken. 259.

A justice of the peace cannot be criminally proceeded against, until an action for the same offence is discontinued. *Rex* v. *Fielding*, 2 Ken. 386, s. c. 2 Burr. 720.

An information lies against justices for refusing to relieve burgesses appealing against a poor-rate. *Rex* v. *Phelps*, 2 Ken. 570.

### (B) FORM.

[See INDICTMENT.]

An information against a brewer for alleged frauds in mixing beer, contrary to the statute of the 42 Geo. 3, c. 12, contained a count stating, that the defendant being such brewer, after the passing of the said act, and before the exhibiting of this information, to wit, on the 21st day of October, 1819, and on each and every of divers, to wit, twenty days between that day and the day of exhibiting this information, did mix, and cause to be mixed, a large quantity, to wit, 52 gallons of strong beer with a large quantity, to wit, 24 gallons of table beer, in each and every of divers, to wit, five other casks, contrary to the form of the statute, whereby, &c. the said defendant, being such brewer so offending, hath, for each of his said offences, forfeited the sum of 200*l.*, amounting in the whole to a further sum of 21,000*l.* On a motion in arrest of judgment, the Court held this to be a good and sufficient count. *Attorney General* v. *Freer*, 11 Price, 183.

A *videlicet* in an information laying the number of things seized, is conclusive as to the number so laid; therefore a verdict and judgment cannot be beyond the number so specified.

If an information for forfeitures of machinery, under the 21 Geo. 3, c. 37, does not contain an averment of the quantity of things seized, it cannot be supported. *Attorney General* v. *Jefferys*, 13 Price, 545, s. c. M'Clel. 270.

An information upon the statute 11 Geo. 1, c. 30, s. 30, against a candle-maker for mixing unweighed with weighed candles, must charge the act to have been done with intent to deceive His Majesty of his duties. *Attorney General* v. *Barrell*, 1 Y. & J. 495.

An information stating that the defendant imported or caused to be imported foreign silks, is bad for uncertainty. *Rex* v. *Moorley*, 1 Y. & J. 221.

### (C) PRACTICE.

A rule *nisi* for an information cannot be served on a clerk in court, who has been formerly employed by the defendant. *Anon.* 2 Ken. 496.

The commencement of a suit by information by the Attorney General on the part of the crown, for the recovery of forfeitures under a penal act of parliament, must, with reference to the Statute of Limitations, be taken to be the issuing of process, and not the actual filing of the information. *Attorney General* v. *Hall*, 11 Price, 760.

## INHIBITION.

[See PRACTICE IN THE ECCLESIASTICAL COURTS.]

## INJUNCTION.

[See COPYRIGHT.]

(A) WHERE GRANTED OR REFUSED, IN GENERAL.
(B) TO STAY OR RESTRAIN PROCEEDINGS.
(C) WASTE. } See these Titles.
(D) PATENTS. } See these Titles.
(E) PARTNERS. } See these Titles.
(F) EXTENDING AND CONTINUING.
(G) BREACH OF.
(H) DISSOLVING.
(I) REVIVAL.
(K) PRACTICE.
(L) COSTS.

### (A) WHERE GRANTED OR REFUSED, IN GENERAL.

Where a plaintiff states upon his bill a case entitling him to be relieved against a bond, and the defendant protects himself from answering several of the circumstances which are essential to the plaintiff's equity, on the ground that the discovery of them would expose him to pains and censures in the Ecclesiastical Court, but admits other circumstances connected with these; if the Court, comparing what is admitted with what is refused to be answered, sees reason to think that the case is one which is fit for inquiry in equity, an injunction will be granted. ——— v. *Donovan*, 2 Law J. Chanc. 56.

A, being the owner of two adjoining houses, demises one to B, and afterwards demises the other to C. Neither A nor C can make such alterations on the premises demised to the latter as will prevent the comfortable enjoyment of the house demised to B.

If C threatens and begins to make alterations which the Court is satisfied will prevent the comfortable enjoyment of B's house, an injunction will be granted. *Palmer* v. *Paul*, 2 Law J. Chanc. 154.

Injunction granted to restrain the disclosure of secrets come to the defendant's knowledge in the course of a confidential employment. *Evitt* v. *Price*, 1 Sim. 483.

*Semble*—An injunction may be obtained *ex parte* to stay the negotiation of bills of exchange. —— v. *Bozon*, 3 Law J. Chanc. 57.

Under an act of parliament, any owner of mines, &c. lying within a certain distance of a canal, was authorized to apply to the commissioners of the navigation, to have a railway made over the lands of other proprietors, intervening between them and the canal, for the purpose of communicating with it; and if it should appear to the major part of the commissioners, that such road was fitting or necessary, it was to be lawful for the proprietor of the mine, &c. to make it, subject to certain restrictions expressed in the act; and it was provided, that if any person should think himself aggrieved by anything done in pursuance of the act, he might within six calendar months appeal to the quarter sessions: under this act, the commissioners, by their award, authorized the defendant to make a railway over the lands of the plaintiff;—the plaintiff having filed his bill to restrain the execution of the work, on the ground that the railway was not fitting and necessary, an injunction was granted. *Dudley* v. *Horton*, 4 Law J. Chanc. 104.

Where persons, who were merely hirers and occupiers of seats or pews in a dissenting meeting-house, which was held in trust for the use of the congregation, but who did not take the sacrament there, had been excluded from voting at the election of a minister to officiate in the meeting house, an application for an injunction to restrain the individual so elected from acting as minister, or receiving the emoluments attached to his office, was refused. *Leslie* v. *Birnie*, 2 Russ. 114.

French stock, which, there was reason to believe, belonged to a bankrupt, was transferred into the name of his wife; she transferred it into the name of B, and died, having previously appointed to B certain sums in the English stocks, which she had a power of disposing of; and B, who generally resided in France, took out administration to her in England: in a suit by the assignee of the bankrupt to recover the French stock, an injunction was granted to restrain the transfer of the English stock. *Stead* v. *Clay*, 6 Law J. Chanc. 138, s. c. 1 Sim. 294.

An injunction will not be granted to a landlord, who has relaxed, in favour of some of his tenants, a covenant entered into for the benefit of all, to restrain the other tenants from infringing the covenant. *Roper* v. *Williams*, 1 Turn. 18.

Where there is a fair doubt, whether the law would give damages for the piracy of a work, a court of equity will not maintain an injunction granted *ex parte*, but will leave the plaintiff to establish his legal right, before it interferes in his behalf. *Lord Byron* v. *Dugdale*, 1 Law J. Chanc. 239.

A tenant having violated the conditions of an agreement for a lease of a farm, under which he had taken possession, the landlord brought an ejectment against him, upon a bill being filed by the tenant, for a specific performance of the agreement, and to restrain proceedings at law, the Court refused an injunction, on the ground that the tenant had himself violated the agreement. *Porrett* v. *Barnes*, 2 Law J. Chanc. 141.

### (B) To stay or restrain Proceedings.

In ejectment between two defendants, the Court refused an injunction, where the plaintiff as landlord might have made himself defendant at law. *Moses* v. *Lewis*, 1 Jac. 502.

The Court will grant an injunction to stay proceedings in the Common Pleas at Lancaster. *Hine* v. *Fiddes*, 2 S. & S. 370.

The Court granted an injunction against a party residing abroad, to restrain proceedings in an action at law, and refused a motion to allow the defendant to proceed to trial before the defendant had answered. *M'Cullum* v. *Beale*, 10 Price, 130.

Injunction granted *ex parte* to stay proceedings at law in a court of great sessions of a Welch county, where the action was commenced at so late a period as to render it impossible for the plaintiff in equity to obtain the common injunction in time to serve any useful purpose. *Jones* v. *Bassett*, 2 Russ. 405.

An injunction may be obtained to stay an infant from proceeding at law upon admissions contained in the infant's answer. —— v. *O'Donovan*, 2 Law J. Chanc. 56.

To an action brought by a creditor, after a decree for the administration of assets, against the executor, who pleaded a false plea in order that he might have an opportunity to apply for an injunction to restrain the action, the Court granted the injunction, and held that the creditor was not entitled to a judgment against the executor *de bonis propriis*. *Fielden* v. *Fielden*, 1 S. & S. 255.

Motion by a plaintiff for an injunction to restrain an action brought by one defendant against a co-defendant, granted. *Kingham* v. *Maisey*, 2 Sim. 41.

To entitle a party to an injunction to stay execution on a verdict passed against him at law, he must pay the sum recovered into court, though he has since obtained a rule calling on the plaintiff to shew cause why a new trial should not be granted. *Austen* v. *Thomson*, 11 Price, 1.

On a bill stating, that since a verdict had been obtained against the plaintiff, he had acquired an amount against the defendant, exceeding that for which the verdict had been given, the Court will not grant an injunction to restrain proceedings on the verdict. *Whyte* v. *O'Brien*, 1 S. & S. 551.

The Court will not grant an injunction to stay proceedings, and thereby repeal letters of administration, if it appear that a judgment will consequently be released, &c. *Kennedy* v. *Kennedy*, 2 Ken. Chanc. 26.

Where a bill has been filed to obtain a discovery from a defendant proceeding at law, to recover against the plaintiff, the amount of a bill of exchange, whether the defendant did not know that it was accepted by one of the partners, in the name of the firm, for his own private debt, and on an injunction to restrain further proceedings, and that the bill of exchange might be declared to be fraudulently accepted, and ordered to be delivered up to be cancelled; to which the defendant, the plaintiff at law,

bringing the action, answered, that he had such knowledge; the Court refused to grant an injunction to stay proceedings, because there was a defence at law; but as there was a prayer for relief, requiring the bill of exchange to be delivered up to be cancelled, and as one of the defendants had not answered, and there was a direct charge of fraudulent collusion in the bill, which was not sufficiently denied, they ordered the injunction to stay execution. *Houlditch* v. *Nias*, 8 Price, 689.

The injunction on an interpleading bill prevents (unlike a common injunction) the plaintiff from proceeding any further. *Warington* v. *Wheatstone*, 1 Jur. 203.

The injunction in the Court of Exchequer restrains all proceedings, unless issue is or can be joined; which is, unless the record be in such a state that, by an act of the plaintiff, issue can be joined. *Relfe* v. *Burke*, 1 Y. & J. 404.

In an action of ejectment, a party having obtained a verdict, the defendant obtained an injunction to stay execution, and nothing was done in the suit for many years; during which time, the term in the declaration expired. The Court of K.B. would not amend the declaration by enlarging the term, because it was not shewn, that, by so doing, they should not do any injustice to the opposite party. *Barchey* v. *Simmons*, 1 Law J. K.B. 38, a. c. 1 B. & C. 121, s. c. 2 D. & R. 237.

(F) EXTENDING AND CONTINUING.

Where some directors of an insurance company, constituted by deed, filed a bill against another director, alleging misconduct, the Court refused to interfere, by continuing an injunction, the plaintiffs not having made use of the powers of regulation given them by the deed. *Ellison* v. *Bignold*, 2 J. & W. 465.

An injunction will not be extended to stay trial, where the bill sets forth mere matter of equity, and does not make a case which will afford the plaintiff in equity a defence at law. *Cole* v. *Shelley*, 1 Law J. Chanc. 183.

A chartered and loaded a vessel from E, consigned to a house at H, to be loaded there with produce from T, out of the proceeds of H's shipment, and to be consigned to B, on whom A drew bills on the credit of the cargo, which B agreed to accept, and the bills were drawn and endorsed by C, and sent to H, who accepted them under protest as to A, for the honour of C, and they were paid when due. In consequence of a disagreement between A and H, A disclaimed the cargo proceeding to T, and apprised H that he had done so, directing him to attach so much of it as would be sufficient to cover what was due to him from H, on account of H's shipment, and which was more than enough to repay B the amount of the bills so accepted and paid by him; H agreed to do so, and required a power of attorney to be sent out to him for that purpose, which was accordingly sent; H afterwards employed B to dispose of the cargo at T, on their account, and B wrote to A, stating, that he had agreed to do so, on account of the large commission, whereupon A gave him notice that he should hold him responsible. Under these circumstances, B having brought an action against C, the indorsee of the bills,—it was held, that B was the accredited agent of A, and had so bound himself by what he had done, as to have made it his duty to act for A as directed; that as he might have paid himself out of the goods which, he would have had in his possession, if he had done so, but had, in breach of his trust, neglected to do so, to the prejudice of his principal, he ought, in conscience, to be suffered to proceed in his action at law against the indorser, in which he must necessarily succeed; and then the indorser would be entitled to recover the amount from the drawer, who had an equity against the plaintiff at law, although at law he had a clear right to recover, and that, therefore, he ought to be enjoined from proceeding further in the action; but the plaintiff at law having a legal right against the indorser, and there being some doubt on the case of the plaintiff in equity, with respect to the question in whose favour the balance was, the injunction was continued on the terms of his paying the amount into court, with such interest as would be recoverable at law. *Selby* v. *Moore*, 8 Price, 631.

After judgment suffered by default, the plaintiff at law proceeding to assess damages under a writ of inquiry, an injunction will not be extended to stay trial. *Monteiro* v. *Bannister*, 3 Law J. Chanc. 177.

A bill was filed by a person in possession of certain lands for the specific performance of an alleged parol agreement to grant him a lease for seven years, and for an injunction to restrain an ejectment; the defendant, by his answer, admitted that he had been disposed to permit, and would have permitted the plaintiff, if he had been satisfied with his conduct, to remain in possession for the time and on the terms alleged to have been specified in the supposed agreement; and that the plaintiff probably expected to remain in possession for that time and on those terms; but he expressly denied that any such agreement had been made; and he insisted that the plaintiff was tenant only from year to year, and had done many acts which would have been breaches of the covenants of the lease supposed to have been contracted for: The Court, upon this answer, refused to make the order *nisi* absolute, and continued the injunction upon terms. *Attwood* v. *Barham*, 2 Russ. 186.

The Court refused to grant a motion made *ex parte* to extend an injunction to stay trial, till two or three defendants, who had not appeared to the bill, and were in contempt, should have appeared and answered; observing that *non constat*, if they had been served with notice of the motion, that they might not have shewn that they had appeared and cleared their contempts. *Highham* v. *Antwis*, 11 Price, 759.

In an affidavit in support of a motion to extend an injunction to stay trial, it is not sufficient for the plaintiff to swear, "*that it is believed*, that the answer will afford discoveries material to the defendant at law." *Anon.* 1 Law J. Chanc. 120.

Where an answer is filed on the seal day, it is too late to prevent a motion to extend the common injunction, although the motion was not made until the following day, on account of the pressure of business. *Whitehouse* v. *Hickman*, 1 Law J. Chanc. 34, a. c. 1 S. & S. 102.

Motion to extend the common injunction, granted, where the answer, which was filed on the same morning, was insufficient, and the trial was coming

a the next day but one. *Munnings* v. *Adamson*, 1 im. 510.

The insufficiency of an answer cannot be made vailable upon shewing cause for the continuance r dissolution of an injunction. *Anon.* 2 Ken. 23. hanc.

It is not necessary for a party who seeks to conue an injunction to the hearing, to shew an inefeasible right to the decree prayed by the bill.

Where, therefore, assignees of a bankrupt sought specific performance of an agreement for a lease, gainst a party who was herself a lessee, and retained from assigning without the consent of the ssor in writing thereto obtained; the Court conued the injunction to restrain proceedings at law; ere being a probability of obtaining the consent f the lessor to the assignment. *Powell* v. *Lloyd*, 1 . & J. 427.

The Court having ordered an injunction to be ontinued, refused to impose the terms of paying oney into court, where the parties were attorney nd client. *Goddard* v. *Carlisle* 9 Price, 169.

(G) Breach of.

It is a breach of a common injunction, obtained ter four proclamations had been made under a writ f *exigent*, to sue out a writ of *allocatur exigent*. *Iarack* v. *Bailey*, 4 Law J. Chanc. 205, s. c. 2 . & S. 597.

Where an injunction has been extended to stay ial, it is a breach of the injunction to give notice f trial, even though the notice be accompanied ith an intimation that it is to be held nugatory, nless the injunction is dissolved before the day of ial. *Bird* v. *Branker*, 3 Law J. Chanc. 84, s. c. 2 . & S. 186.

If a plaintiff who has obtained an injunction, isrepresents to the public what has been done by e Court, and the defendant, to correct that mispresentation, does an act, which, in strictness, is breach of the injunction, the Court will not entain any complaint against him on the part of e plaintiff, for such a breach. *Barfield* v. *Nicholn*, 2 Law J. Chanc. 90.

(H) Dissolving.

Impertinence in an answer is a good ground for ssolving an injunction. *Joseph* v. *Simpson*, 10 rice, 25.

Where exceptions to the Master's report, that a rther answer to an injunction bill was not impernent, were overruled, and the report confirmed: he Court, under special circumstances, dissolved e injunction immediately, without allowing a reence back for insufficiency, and putting the defenmt to a new order *nisi*. *Robertson* v. *Le Mercier*, 'Clel. 343.

The order *nisi* for dissolving the common injunon, cannot be obtained after exceptions to the swer have been filed. *Williams* v. *Davis*, 1 Law Chanc. 121.

Where all the defendants have not answered, one ho has answered cannot obtain an order *nisi*, to ssolve generally an injunction which, for want of swer, issued against all. *Todd* v. *Desmore*, 4 Law Chanc. 95, s. c. 2 S. & S. 277.

It is not competent to a party, supporting a motion to dissolve an injunction, to state anything from the bill, however well supported it might be on the hearing by the evidence, if it be not admitted by the answer. *Maxwell* v. *Ward*, 11 Price, 14.

The common injunction having been obtained for want of answer, an answer is subsequently put in, to which exceptions are taken; the Master having found the answer sufficient, exceptions are taken to his report, and the order to argue them is served upon the defendant; afterwards the defendant obtains an order *nisi* to dissolve the injunction: Held, that this order is irregular, as the defendant ought to have obtained an absolute order in the first instance. *Merest* v. *Coster*, 2 Law J. Chanc. 46, s. c. 1 S. & S. 486.

If, on a bill for a discovery only, an injunction be obtained, and the plaintiff file exceptions to the defendant's answer, but omit to set them down for argument, and they are upon the usual order overruled, the defendant may, in the first instance, move to dissolve the injunction, though he has not obtained the usual previous order. *Mellish* v. *Richardson*, 13 Price, 23.

After a subpœna has been sealed, no alteration can be effected; therefore, where an injunction had been obtained for want of appearance to a writ altered by changing the return—On motion, the Court quashed the subpœna, and set aside the attachment and injunction which had been granted, on the ground of irregularity. *Parker* v. *Ewart*, 9 Price, 441.

On the allowance of a demurrer to a bill, an injunction will not be dissolved as of course, but an application must be made to the Court. *Barclay* v. *Curtis*, 11 Price, 661.

It is sufficient if exceptions be filed at any time during the day on which they are to be shewn for cause against dissolving an injunction. *Norton* v. *Kerr*, 3 Law J. Chanc. 89.

In a suit for a commission abroad, a discovery, and injunction, if the common injunction have issued before trial, against the defendant, a foreigner, in contempt for want of an answer on the usual affidavit; the defendant may be heard on motion to dissolve the injunction, before answer, so far as to shew, on the face of the affidavit itself, that it issued erroneously; but he cannot read another affidavit to the merits in support of the motion. And *semble*, that an application to pay into court the money sought to be recovered at law, before a commission has been applied for, is premature. *Keeling* v. *Sellick*, 1 M'Clel. & Y. 359.

*Semble*—Where the instruments creating the plaintiff's title, and the facts giving him title under those instruments, are neither admitted nor denied in the answer, it is sufficient for him, upon a motion to dissolve an injunction, to verify by affidavit the instruments; and it is not necessary for him to state by affidavit, all the circumstances constituting his personal title under those instruments. *Hodgson* v. *Dean*, 3 Law J. Chanc. 95, s. c. 2 S. & S. 221.

Though affidavits are admissible at law, they may not be on motion to dissolve an injunction. Hence, affidavits containing documents of which the defendant is ignorant, cannot be received. *Barrett* v. *Tickell*, 1 Jac. 155.

On shewing cause on the merits against an order *nisi*, for dissolving an injunction, the plaintiff is not

Notice of executing a writ of inquiry must state, that it will be executed between two certain hours of the day. *Morris* v. *Lane*, 5 Law J. C.P. 76.

A notice of executing a writ of inquiry, *left at defendant's house in the country* during a temporary absence, is a good service. *Knibbs* v. *Hopcraft*, 10 Price, 147.

Where the notice of executing a writ of inquiry was served upon the defendant personally, and not upon his attorney or clerk in court, the service was held to be insufficient. *Brooks* v. *Till*, 2 Y. & J. 276.

*Semble*—That a notice of executing a writ of inquiry can be continued or countermanded but once; but after several notices and countermands have been served, a fresh, and not a continuing notice, is regular. *Burgess* v. *Royle*, 2 Chit. 220.

A motion to set aside an inquisition for excessive damages, must be supported by affidavits at the time the application for the rule is made. *Williams* v. *Rowe*, 2 Chit. 213.

In an action for work and labour, the jury, on the execution of a writ of inquiry, cannot give interest. The affidavits of jurymen may be received on an application for setting aside their inquisition, on the ground of their having allowed interest, where the facts were as above stated, and formed the subject matter of the affidavit. *Milsom* v. *Hayward*, 9 Price, 134.

The Court will not allow minutes taken before the under-sheriff, on a writ of inquiry for an assault, to be admitted on an application to set aside the inquisition for excessive damages;—and an application for such a purpose cannot be supported on affidavits by the defendants parties themselves. *Lathbury* v. *Brown*, 3 Law J. C.P. 81.

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## INSOLVENT DEBTOR.


(A) OF THE COURT FOR THE RELIEF OF INSOLVENT DEBTORS.
- (a) *Commissioners and Officers.*
- (b) *Powers.*

(B) OF THE PETITION.
- (a) *In general.*
- (b) *Who may petition.*
- (c) *Contents.*
- (d) *Filing.*

(C) OF THE ASSIGNMENT.
- (a) *Effect of.*
- (b) *Estate Paper.*

(D) OF THE ASSIGNEES.
- (a) *Appointment.*
- (b) *Powers, Rights, and Duties.*

(E) OF THE SCHEDULE.

(F) OF THE HEARING.
- (a) *Order for.*
- (b) *Notice of.*
- (c) *Evidence.*

(G) OPPOSITION.
- (a) *Notice of.*
- (b) *Falsification of Books.*
- (c) *Fraudulently concealing or making away with Property, and Fraudulent Preference.*
- (d) *Breach of Trust.*
- (e) *Debts fraudulently contracted.*
- (f) *Waiver of Fraud.*
- (g) *Vexatious Actions.*
- (h) *Vexatious Defence or Delay of Suit.*
- (i) *Damages.*

(H) PRIOR INSOLVENCY OR BANKRUPTCY.

(I) REMOVAL OF PRISONERS.

(K) DISCHARGE.
- (a) *Who entitled to.*
- (b) *How obtained.*
- (c) *Rights, Privileges, and Liabilities of*
- (d) *Pleading and Evidence.*

(L) ALLOWANCE AFTER ADJUDICATION.

(M) RE-HEARING.


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### (A) OF THE COURT FOR THE RELIEF OF INSOLVE DEBTORS.

#### (a) *Commissioners and Officers.*

An insolvent debtor applied to be discharged of of prison. He was remanded by the justices, to confined in actual custody for two years. A cer ficate of such adjudication was sent to the Court the Relief of Insolvent Debtors. The clerk of th Court falsely and maliciously sent an order of th Court to the gaoler, for his discharge out of custod

The Court of King's Bench, on error from t Common Pleas, held, that an action on the case recover compensation, would lie against the clerk the suit of the detaining creditor. *Whitelegg* *Richards*, 1 Law J. K.B. 231, s. c. 2 B. & C. s. c. 3 D. & R. 237.

#### (b) *Powers.*

The Court, under the 1 Geo. 4, c. 119, s. 13, no power to permit the assignees of an insolvent compound a suit in equity. *In re Truss*, 1 Cre 150.

Although an insolvent be unopposed, the Co will (if fraud appear) exercise a discretionary pow vested in it by the act of parliament, and prolo the imprisonment of the party. *In re Lewis*, 1 Cre 89.

An insolvent debtor may be brought before commissioner of the Insolvent Debtors Court, b rule or order of, and signed "by the Court," bu signed by the commissioner, it is a nullity. *A* 2 Chit. 225.

The Court has the power of appointing an ass nee so long as the estate is vested in the provisio assignee. *In re Bradbury*, 1 Cress. 71.

An opposing creditor whose debt does not amo to 20*l.* must first get execution before the adjudi tion can be carried into effect: the Court, howev has the power of remanding the case to such a per as would enable the creditor to attain his object. *re Uungblut*, 1 Cress. 81.

The direction of the Court that the insolvent sl be confined within the walls of the prison, forms part of the adjudication, and, therefore, it may s sequently be rescinded without altering the ju ment. *In re Cadogan*, Co. 110.

To sustain an indictment for conspiring by fa oath, &c. the Ecclesiastical Court will, on pray order its officer to attend with the papers in cause. *Westmeath* v. *Westmeath*, 2 Ad. 830.

(B) OF THE PETITION.

(a) *In general.*

'he insolvent's husband was a convicted felon, had been sentenced to fourteen years transpor- on, but was detained under an order of council 'ortsmouth, on board the hulks. The insolvent traded for some years on her own account, and some time before been declared a bankrupt, but was in frequent communication with her hus- d: Held, that she must petition as a feme covert. *re Franks*, Co. 135.

f an insolvent have at the time of his arrest two ces of residence, one in London, and one in the ntry, more than 20 miles distant from the Court ise in Portugal-street, both of which places of dence he uses indiscriminately, as it may suit his asure or convenience; and if he be arrested at country residence, and remove himself by *habeas pus* to a London prison, he may file his petition m the London prison and proceed to hearing and e his discharge in London. *Seal's case*, Co. 21.

Where the insolvent was arrested at his usual ce of residence, at Chigwell, in Essex, which s not distant more than 20 miles from the Court use in Portugal-street, and was committed to elmsford gaol, and while there petitioned the urt for relief, and filed a schedule, but afterwards oved himself by *habeas corpus* to a London prison, was allowed to file a new petition. *In re Gabbi-* Co. 117.

When the affidavit for leave to file a petition is ved, on the hearing of the insolvent, to be false, substantially defective, the Court will dismiss petition. *In re Thornhill*, 1 Cress. 16.

Petition allowed to be amended, the error not ng in favour of insolvent. *In re Treble*, 1 Cress.

Lands and tenements not within the meaning of 6th rule of Court. *In re Arnott*, 1 Cress. 76.

(b) *Who may petition.*

Leave given to file a petition, notwithstanding olvent had been some years in custody, and had the meantime disposed of all his property; such mission not determining the merits of the case. *re Remsden*, 1 Cress. 59.

Insolvents under attachments for non-payment of ney, may petition. *In re Philpott*, 1 Cress. 12.

An insolvent's petition dismissed, he having gone of the rules of the prison after filing his petition, residence within the walls having been dispensed h on the plea of ill health. *In re White*, 1 Cress.

(c) *Contents.*

Where the insolvent had been a bankrupt, and l obtained his certificate, some years before, but not state this fact in his petition, it was dismis- , with leave to petition *de novo*, and to re-execute schedule and other papers already filed. *In re lbell*, Co. 22.

So, where the insolvent was declared a bankrupt November 1822, and had obtained his certificate July 1824, and the petition stated the fact of the kruptcy, but omitted to set forth that he had ob- ned his certificate, the petition was dismissed with ilar leave. *In re Noakes*, Co. 22.

If the insolvent, on one petition being dismissed, proceed *instanter* to file a new petition, he must state the fact therein of his having filed the former petition. *In re Walker*, Co. 22.

Where the fact of bankruptcy was omitted to be stated in a petition, Commissioner Law dismissed only the order for hearing, and allowed the insolvent to amend, requiring him to serve notices again upon all his creditors. *In re Lucas*, Co. 23.

But the Court on consultation dismissed a petition, wherein a bankruptcy twenty years previous was omitted to be stated. *In re Sherman*, Co. 24.

A sequestration in Scotland, although similar to bankruptcy in England, not coming within the words of the act of parliament, need not be inserted in the petition. *In re Hutton*, 1 Cress. 104.

When an insolvent omits to set forth his name correctly, the Court will dismiss his petition. *In re Forster*, 1 Cress. 157.

The transposition of a christian name for a surname is not a sufficient ground for dismissing a petition. *In re Wolff*, 1 Cress. 138.

(d) *Filing.*

*Semble*—That it is not necessary to dismiss a petition filed under 53 Geo. 3, c. 102, before filing another petition under 7 Geo. 4, c. 57, s. 10. *In re Bardouleau*, Co. 27.

(C) OF THE ASSIGNMENT.

(a) *Effect of.*

Insolvent having petitioned, but discharging the debt, and not taking the benefit of the act, applies to the Court for books, papers, &c. to be delivered up to him, they having been filed in this court. *In re Bruerton*, 1 Cress. 9.

An assignment of the property of an insolvent debtor, under the statute 1 Geo. 4, c. 119, only transfers the property the insolvent was possessed of at the time of presenting his petition for his discharge, and does not pass any after-acquired property to his assignee. *Hepper* v. *Marshall*, 3 Law J. C.P. 45, s. c. 2 Bing. 372, s. c. 9 B. Mo. 710, s. c. 2 C. & P. 79.

A B, being possessed of a copyhold estate, agreed to surrender it to C D, but it had been by mistake previously conveyed to the trustees of E F.—A B afterwards became insolvent, and was discharged under the act; and after his discharge, the trustees of E F re-conveyed the premises to A B, who on the same day surrendered them to C D, who paid the purchase-money to G H on account of A B: Held, that the assignee of A B under the Insolvent Debtors Act might recover the money from G H, in an action for money had and received; but that the latter was entitled to deduct the amount of his bill of charges incurred in making the surrender. *Twiss* v. *White*, 4 Law J. C.P. 165, s. c. 3 Bing. 486.

The assignment to the provisional assignee of the Insolvent Debtors Court, is not made void by the death of the insolvent before his petition has been heard; and such provisional assignee may, after such death, assign to the assignee for the creditors; and they may bring actions in respect of the insolvent's property. *Willis* v. *Elliott, sen.*, 3 C. & P. 117. [Best]

The lessor of the plaintiff had been discharged under the Insolvent Act, having previously made

[illegible] assignment to the provisional assignee [illegible] and effects: Held (*dissentiente* [illegible]) that, notwithstanding the provisional [illegible] not been possession, nor assigned to any other assumed assignee, and that the rent had always been paid to the lessor of the plaintiff, the assignment could not be maintained: the property [illegible] by the assignment, absolutely divested out of the insolvent. *Doe d. Palmer* v. *Laurence*, 5 Law J. C.P. [illegible], s. c. 4 Bing. 548, s. c. 2 C. & P. 593.

In a suit against a clerk of the peace, as owner of an office, under an insolvent act, it was deemed [illegible] that an assignment should be obtained from him, and his assignee made an additional party. [illegible] v. [illegible], 1 [illegible] 425: and see 1 Geo. 4, c. 119.

### (v) Bank Paper.

Where the insolvent had a negotiable bank paper, [illegible] 19s.; and [illegible] property on his own benefit after the [illegible] the Court held, that this was [illegible] an assignment. *In re Drysdale*, [illegible].

An insolvent will not be discharged forthwith, [illegible] a bank notes paper, he being [illegible] beyond his enumerated articles [illegible] petition. *In re Drakeford*, 1 [illegible].

### (vi) Fraudulent making away of property. *In re* [illegible].

[illegible] creditor intrusted furniture [illegible] to the care of the insolvent during his absence on a voyage, and on his return [illegible], wishing to remove the furniture, [illegible] the insolvent [illegible] but he remanded it, and [illegible] to see it, and the creditor [illegible] him for the value thereof; and the insolvent swore he had disposed of the whole of this property since his commitment to prison. He could not tell to whom, or for what sum [illegible]. But omitted all notice of it in his [illegible] and in his special balance sheet, did not account for the proceeds of the sale: Commissioners [illegible] dismissed the petition. *In re* [illegible].

## (3) Of the Assignees.

### (a) Appointment.

On an application for the appointment of an assignee to the estate of an insolvent discharging himself out of custody prior to adjudication, the Court refused to grant the motion on account of the inadvertency of the affidavit in support thereof. *In re* [illegible], 1 Cress. 71.

Where forty years had elapsed since the appointment of an assignee, whose conduct was the subject of the application, the Court refused to interfere, by appointing a new assignee; nor would they call for an account under the 16 Geo. 3, c. 17. *Ex parte* [illegible], 8 Taunt. 403.

An application by a creditor to be appointed assignee before hearing, refused.

A creditor not named in the schedule, not entitled to vote for the appointment of assignee. *In re Day*, 1 Cress. 8.

### (b) *Powers, Rights, and Duties.*

Under the 18th section of the Insolvent Debtors Act, 53 Geo. 3, c. 102, the provisional assignee, as a public officer, has no power to accept or reject, at *his discretion*, the property of the insolvent. *Croft* v. *Pick*, 2 Law J. C.P. 20, s. c. 1 Bing. 354, s. c. 8 B. Mo. 348. [but see 7 Geo. 4, c. 57, s. 23.]

The provisional assignee of the Insolvent Debtors Court may maintain an action of ejectment under the statutes 1 Geo. 4, c. 119, and 3 Geo. 4, c. 123; and it is not necessary for him, previously to commencing the suit, to obtain the consent of the major part of the creditors of the insolvent, or approbation of one of the commissioners, or order of the Court, as provided by the 11th section of the former, and 2nd section of the latter act.

Where the provisional assignee of the Insolvent Debtors Court brought an action of ejectment, and did not shew that he had previously obtained the consent of the major part of the creditors of the insolvent, or approbation of one of the commissioners, or order of the Court, to proceed as required by the statutes 1 Geo. 4, c. 119, s. 11, and 3 Geo. 4, c. 123, s. 2, the Court, after verdict, refused to stay the proceedings, on the ground that an application should have been made to the Insolvent Debtors Court, to restrain such assignee from going on in the action. *Doe d. Clarke* v. *Spencer*, 4 Law J. C.P. 101, s. c. 3 Bing. 370.

The statute 1 Geo. 4, c. 119, s. 11, enacts, that no suit in law be proceeded in further than an arrest on mesne process, by any assignee of an insolvent estate, without the consent of creditors and approbation of one of the commissioners of the Insolvent Court: Held, in an action brought by an attorney to recover his bill of costs incurred in an action at the suit of such an assignee, that it was incumbent on the attorney to prove that the consent of creditors and the approbation of one of the commissioners of the Insolvent Court had been obtained, or at all events that he had informed his client that such consent was necessary. *Allison* v. *Rayner*, 6 Law J. K.B. 85, s. c. 7 B. & C. 441, s. c. 1 M. & R. 241.

Unclaimed dividends remaining in the hands of an assignee, allowed to be distributed rateably amongst the creditors named in the insolvent's schedule; they having proved their debts, due notice having been previously given by advertisement. *In re Yeates*, 1 Cress. 12.

Executors becoming possessed of property accruing to an insolvent after his discharge, ordered to retain it, and upon insufficient cause being shewn, one moiety thereof directed to be delivered over to the insolvent's assignees, under 1 Geo. 4, c. 119, s. 30. *In re Hewlett*, 1 Cress. 34.

Where an insolvent dies after petition and assignment to provisional assignee, but before examination and assignment to his assignees in chief: Held, that the assignees in chief take, nevertheless, all the property assigned by the provisional assignee. *Willes* v. *Elliott*, 6 Law J. C.P. 8, s. c. 4 Bing. 392, s. c. 1 M. & P. 19.

If one of two co-plaintiffs takes the benefit of the Insolvent Act, his assignee cannot sustain a supplemental bill to which the other co-plaintiff is not a party. *Lester* v. *Meddowcroft*, 2 Law J. Chanc. 181.

The assignee of an insolvent debtor must be con-

sidered as standing in the same situation as the assignee of a bankrupt. Where, therefore, the former accepted a lease of premises occupied by the insolvent, from the provisional assignee, and retained it five months, and endeavoured to let the premises, but failed in so doing: Held, that this did not amount to an absolute acceptance of the lease by him; and the jury having found, that he had not retained it an unreasonable time, the Court refused to disturb their verdict. *Lindsay* v. *Limbert*, 5 Law J. C.P. 52, s. c. 2 C. & P. 526.

Assignees of an insolvent's estate are bound to file an account prior to the declaration or payment of a dividend. *In re Smith*, 1 Cress. 73.

### (E) OF THE SCHEDULE.

Where the insolvent had been known by several other names than that in which he petitioned, during the period averred by his schedule and balance sheet, none of which were set forth in his description, although he swore he had not contracted any debts under any of these false names, and that he had assumed them solely for the purpose of avoiding arrests—the Court dismissed the order for hearing, with leave to amend the description in the schedule, to advertise in the Gazette again, and to give seven days notice of the further hearing, to his opposing creditor. *In re Spittle*, Co. 63.

Insufficient description of insolvent. *In re Loader*, 1 Cress. 142.

The last usual place of abode must be inserted in an insolvent's schedule. *In re Staves*, 1 Cress. 56.

The Court at any time prior to adjudication will adjourn a case, if there be found any error in an insolvent's description. *In re Cooper*, 1 Cress. 168.

Insolvent's case adjourned for want of a sufficient description of residence. *In re Thompkins*, 1 Cress. 85.

Insolvent omitting to give a proper description of all his places of residence, where he may have contracted any of his debts, remanded. *In re Worster*, 1 Cress. 80.

Where an objection is raised as to the misdescription of the residence of an insolvent, and held to be good, the insolvent may insist upon the opposing creditor going on with his individual case. *In re Say*, 1 Cress. 168.

An insolvent, who described a debt in his schedule, as due to an agent of a society of persons, who were the real creditors, was held to be protected by his discharge, where the real creditors were so referred to in the schedule, as to give their agent notice of a debt stated to be due to him in that capacity. *Wood* v. *Jowett*, 3 Law J. K.B. 277.

Sect. 6, of stat. 1 Geo. 4, c. 119, (the Insolvent Act,) must be construed liberally; and a description, by the prisoner in his schedule, sufficient to point out to a creditor that he the prisoner had applied to be discharged in respect of his debt, will suffice, though the name of a mere agent be inserted as the actual creditor, under circumstances which might have fairly been supposed to have induced the insolvent to consider him a principal. Nor will the difference of 2*s*. 6*d*. between the debt actually due and that stated in the schedule, invalidate the insolvent's discharge, where no intention to mislead the creditor appears. *Forman* v. *Drew*, 3 Law J. K.B. 129, s. c. 4 B. & C. 15, s. c. 6 D. & R. 75.

Where an insolvent, in his schedule, stated that "he was indebted to A for goods, and that A held his acceptance for the amount, which became due in October 1823,"—it was holden a sufficient description within the meaning of the 1 Geo. 4, c. 119, although A had indorsed the bill, the insolvent being ignorant of the fact; therefore, in an action by the indorsee against the insolvent, it was decided, that he might plead his discharge under the act. *Reeves* v. *Lambert*, 4 B. & C. 214.

An insolvent's schedule must include sums to which he supposes he has even an erroneous right. *Memorandum*, 7 D. & R. 235.

In describing a bill of exchange in a schedule, it is sufficient to shew what the bill is, and through whom it passed.

If in the schedule the insolvent state a bill as drawn by himself on M, whereas it was drawn by M on him, it is for the jury to say, whether the mistake was wilful or not: and, if they think the misdescription happened through mistake, it is a good discharge. *Nias* v. *Nicholson*, 2 C. & P. 120, s. c. 1 R. & M. 322. [Abbott]

An executrix who had become insolvent, had set forth in her schedule, not only her own debts, but also the debts of the testator: The Court held, that as she was not personally liable, and as her private estate was not responsible for those debts, they ought to be struck out of her schedule. *In re Smith*, 1 Cress. 69.

Insolvent's balance sheet, commencing at the time of his commitment, instead of his arrest, a ground for the dismissal of petition. *In re Bear*, 1 Cress. 41.

An insolvent having been once discharged and having omitted to insert a debt in his former schedule, owing prior to such discharge, on coming up a second time remanded to obtain the consents of three-fourths of his creditors. *In re Rawlings*, 1 Cress. 32.

### (F) OF THE HEARING.

#### (*a*) *Order for.*

If an insolvent has two christian names, and has taken his discharge by only one of these names, abandoning the other, the Court will dismiss the order for hearing, and require a re-advertisement in both names. *In re Newman*, 1 Cress. 161.

#### (*b*) *Notice of.*

Insolvent obliged to re-advertise notice of hearing, in consequence of an error by accident in the first advertisement. *In re Cooper*, 1 Cress. 4.

The solicitor to the assignee of a bankrupt is not competent to give a consent to waive notice of the hearing of an insolvent's petition, although delivery of notice to the solicitor, is equivalent to personal service on the assignee. *In re M'Carthy*, 1 Cress. 56.

#### (*c*) *Evidence.*

Should any deed, will, paper, or writing, be in the possession of the insolvent, or under his control, and it be proved to the Court, by sufficient evidence, that it relates to his or her estate and effects, the Court will not proceed to hear the case until it shall be delivered into the office of the Court, so as to enable the creditors to examine it. *In re Serves*, Co. 79.

An attorney not being paid the usual fee of one guinea on the service of the subpœna, may object to give evidence. Wives of creditors and insolvents are competent to give evidence in support of their husbands' testimony. *In re Parker*, 1 Cress. 4.

The evidence of a married woman will be received against an insolvent, the debt being contracted with her, and an action thereon, with a verdict in her favour recovered, with costs, during the time she was a feme sole, notwithstanding proceedings were had by scire facias to make the husband a party to charge the defendant in execution, she having married between the verdict and execution. *In re Wolf*, 1 Cress. 13.

Counsel for an opposing creditor may examine an insolvent as to the disposition of his property, for the purpose of establishing a case of fraud, notwithstanding such property would be affected by a prior bankruptcy of the insolvent. *In re Mad*, 1 Cress. [illegible]

An opposing creditor, on an application to the Court to cause the insolvent's schedule and accounts to be review[illegible] at the Court, is bound to prove the assignment of that debt at the hearing—notice having been given him to that effect. In failing therein, the Court will reject the application.

[illegible] the opposing creditor of his debt, as required by the 48th section, he will be entitled to [illegible] and the fact cannot be overruled either by the Statute of Limitations, or upon the stamp act [illegible] evidence can only be taken advantage of in a court of law. *In re Winter*, 1 Cress. [illegible]

In cases of fraud, although the opposing creditor [illegible] to make out his case, the Court will, upon the petition of the insolvent alone, exercise the discretionary power vested in it under the 47th section. *In re [illegible]*, 1 Cress. 147.

(b) Opposition.

1. Leave of [illegible]

[illegible] in all cases of opposition the [illegible] volumes in the hand book in the office to be [illegible], upon failure to meet the creditors [illegible] to appear. *In re Figgins*, [illegible]

[illegible] a provincial attorney in the country is not [illegible] a creditor to appear in London. *In re [illegible]*, [illegible]

[illegible] of an insolvent by a wrong [illegible] has altered, when any [illegible] to the [illegible] should be the last address. *In re Bacon*, [illegible]

[illegible] on behalf of one [illegible] the insolvent creditor [illegible] to appear [illegible] nature of [illegible] when the case was [illegible] to appear. *In re [illegible]*, [illegible]

2. Resistance to Rules.

[illegible] hearing, being taken [illegible] to settle with his [illegible] without the [illegible] having had his books [illegible] hearing, on coming up a second time, it being discovered he had obtained those books from the office of the court, and had assigned them to a creditor; the Court ordered that they should be produced, together with the assignment, on pain of having his petition dismissed. *In re Hulme*, 1 Cress. 23.

(c) *Fraudulently concealing or making away with Property, and Fraudulent Preference.*

[See *In re Turner*, 1 Cress. 54; *In re Presley*, ib. 163; *In re Gould*, ib. 130.]

Where a verdict, with 500*l.* damages, had been obtained against the insolvent, and immediately afterwards, but before the judgment was entered, he assigned his property to his mother and sister, in consideration of debts previously owing to them, and of some money paid by them at the time of the assignment, which he immediately employed in discharge of several other debts: the Court decided, that this disposition of the insolvent's property was fraudulent, and that the party who had obtained the verdict, upon which a judgment was in fact subsequently entered, was entitled to be considered a creditor competent to oppose the insolvent's discharge. *In re Thompson*, Co. 89.

Where insolvent twice obtained leave to amend his schedule, inserting therein the second time property which he was apprised had been discovered by his creditors to have been left in the hands of another person, this was held a fraudulent concealment. *In re Husson*, Co. 91.

Insolvent had concealed the furniture of one of several lodging-houses of bad character, of which she was the keeper, and fraudulently made away with the furniture of another. Her husband was a sailor serving on the Jamaica station: Held, no objection to her discharge, inasmuch as this property could not be made available, under her assignment, for the payment of any debts incurred by her during her husband's absence. *In re Abbott*, Co. 140.

The disposal of any property that would benefit an insolvent's creditors, between the period of arrest and render to prison, is a ground for the dismissal of such insolvent's petition. *In re Tuckey*, 1 Cress. 162.

An insolvent having taken up a business, and obtained money for the purpose of carrying on that business, is bound, on failing, to deliver up his property for the general benefit of his creditors, and the delivery of such property to the party who supplied the money, will be considered an undue preference to that creditor, and a fraudulent making away with property to the detriment of his other creditors. *In re Johncock*, 1 Cress. 170.

Where the insolvent had borrowed from one of the opposing creditors a sum of money for which he gave him a note of hand payable with interest, and two years afterwards, without any apparent necessity, gave his brother a bill of sale for the amount of his share of a legacy, which he had promised to pay to his brother two years before borrowing the money of the creditor, but continued to pay interest upon the note of hand for four years subsequently, when he was arrested thereon, and the bill of sale was then put in operation against all his property: this was held not to be a fraudulent preference. *In re Bartlett*, Co. 93.

### (d) *Breach of Trust.*

Receiving money for a specific purpose, and applying it to another purpose, constitutes a fraudulent breach of trust. *In re Egler*, 1 Cress. 5.

In cases of fraudulent breach of trust by confidential servants, the Court in pronouncing its judgment will act with greater severity than in ordinary cases. *In re Davis*, 1 Cress. 143.

Notwithstanding a breach of trust be of such a nature as to expose the insolvent to a criminal prosecution, the Court will order him to be imprisoned under the 49th section, with liberty to the opposing creditor to discharge him if he think fit. *In re Langley*, 1 Cress. 43.

### (e) *Debts fraudulently contracted.*

The opposing creditor agreed with the insolvent to purchase the lease, fixtures, and furniture of a public house, at the time of which agreement he paid a deposit, and subsequently from time to time paid him various sums of money on account. At the time of the last payment, the insolvent was in treaty with another purchaser for the disposal of the public house, of whom he also received a deposit, and eventually gave him possession; the opposing creditor being kept in ignorance of the transaction: Held, that the debt was fraudulently contracted. *In re Crossley*, Co. 95.

Insolvent, a conveyancer, sold property for 1700*l.* as trustee under an assignment thereof to pay certain incumbrances, and to distribute the residue among the creditors of the assignees. After frequent applications, he delivered them an account of disbursements, which, together with the sum of 220*l.* claimed by himself, for his own charges, equalled the amount he had received. It afterwards appeared he had not paid several creditors, and on being applied to by one of them, he stated he had lent 117*l.* to a gentleman for a short time, which statement was false: Held, a fraudulent breach of trust. *In re Lawrance*, Co. 96.

A debt must be actually contracted by means of the offence charged, to give the Court a power of remand. Therefore, where the opposing creditor had bought a large quantity of wine of the insolvent, on his representation that it was port wine of the best quality, which, however, turned out to be light Spanish wine of an inferior kind, and the creditor had recovered damages in an action for this deceit: The Court held, that the insolvent could not be opposed as for a debt fraudulently contracted. *In re Moorhouse*, Co. 98.

The renewal of a debt after a bankruptcy, by a promise to pay it, will not expose the insolvent to the penalty attendant upon a fraud committed in the original contracting of the debt. *In re Palmer*, Co. 99.

In a case of gross fraud, the Court will dismiss an insolvent's petition, instead of delaying his discharge for a definite period. *In re Wolff*, 1 Cress. 138.

Where an insolvent had hired a horse, and during the period of the hiring, proposed to give to the owner of the horse a bill as the price of it, which was not agreed to, but the bill was left at the stables during the absence of the owner, and the horse was afterwards sold by the insolvent, and the bill dishonoured, the transaction was held to be fraud within the meaning of the act. *In re Bushman*, 1 Cress. 63.

Insolvent obtained goods of his opposing creditor, without mentioning to him that he had that day been arrested and the action settled by his bail: Held, this was a fraudulent contracting of a debt. *In re Bray*, 1 Cress. 89.

If an insolvent in confinement contract a debt and disguise, or even keep back the fact of his being imprisoned, this is a fraudulent contracting of a debt, within the meaning of the act. *In re Tolfrey*, 1 Cress. 48.

Where an insolvent had represented to a creditor that he had received an order for a watch from a particular person, and requested the creditor to let him have some watches for the purpose of enabling the person to make a selection, promising to return them all, that the one chosen might be completed, and it appeared that the representation was false, and the watch in its unfinished state was sold to some other person, and no money paid to the creditor: The Court remanded the insolvent. *In re Ogston*, 1 Cress. 105.

Fraudulent conduct in obtaining goods. *In re Sutter*, 1 Cress. 159.

Insolvent's petition dismissed, he having been discharged by this Court within five years of filing his petition, and having contracted several debts by false representations. *In re Chaffer*, 1 Cress. 1.

Contracting debts by means of false representations: judgment, twelve months. *In re Steer*, 1 Cress. 135.

In cases of fraud by false representations, the Court always requires the evidence of the party complaining to prove that the credit was given in consequence of the representation. *In re John Corlass*, 1 Cress. 116.

Obtaining goods without the probable means of paying for them, between the period of arrest and surrender, is a fraudulent contracting of a debt. *In re Stockford*, 1 Cress. 87.

The opposing creditor's debt was contracted by the insolvent's wife, during his absence at sea, but, the order not being quite completed on his return, and he suffering the same to be completed, the question was, whether there was such an adoption of the debt, as to deprive him of the benefit of the act; the value of the goods being so great as to leave it a matter of little doubt, that he would not have the probable means of paying for them: The Court, however, held, that there was no adoption in this case, and ordered his discharge. *In re George Wingham*, 1 Cress. 39.

### (f) *Waiver of Fraud.*

The acceptance of a security from an insolvent, subsequent to the contracting a debt with a knowledge of previous fraud, acts as a waiver of complaint. *In re Scotsan*, 1 Cress. 102.

Acceptance of a warrant of attorney from an insolvent with a knowledge on the part of the creditor of the fraud: Held to be a waiver of his complaint. *In re Streachan*, 1 Cress. 109.

A submission to arbitration with a subsequent award is a waiver of any fraud. *In re Ashley*, 1 Cress. 125.

And a reference to arbitration of "all matters in

dispute" is conclusive, as preventing an opposing creditor from going into a question of fraud. *In re Taylor*, 1 Cress. 155.

### (g) *Vexatious Action.*

If an insolvent wilfully puts his assignees to unnecessary expense, by instituting law proceeding against them, for acts done by them in the discharge of their duty, with intent to consume his property and diminish the fund to be distributed to his creditors, the Court will remand him until he obtain the consent of three-fourths of his creditors.

Notwithstanding an insolvent obtain a verdict in an action at law, the Court will still consider the action as frivolous and vexatious, if the verdict be afterwards set aside, and it appear from other circumstances, that the action ought never to have been brought. *In re M'Beath*, 1 Cress. 45.

### (h) *Vexatious Defence, or Delay of Suit.*

Where the insolvent had admitted the opposing creditor's claim to be just, pleaded the general issue, offered no defence at the trial, and the plaintiff obtained a verdict for the whole amount: Held, a vexatious defence. *In re Clayton*, Co. 104.

An insolvent, to an action brought against him by the opposing creditor, pleaded the general issue and the Statute of Limitations. There was no defence at the trial, and the plaintiff proved that the whole amount of his demand had been contracted within three years. By the plea of the Statute of Limitations, the plaintiff's expenses had been considerably increased, and the costs were taxed at 40*l.*: Held, a vexatious defence, although the insolvent swore that he believed he had a good defence under the statute, and that no part of the debt had been contracted within six years. *In re Bedford*, Co. 104.

The insolvent was arrested by the opposing creditor for the sum of 25*l.* part of an original debt of 43*l.* for mason's work, he having previously made a part payment of 20*l.* He pleaded the general issue, but there was no defence at the trial. The insolvent swore, that the whole of the work had been measured and valued, by a person employed by the plaintiff, at 23*l.*; that not more than 3*l.* was therefore justly due; and that he had, previous to the trial, offered to pay 20*l.* and half the costs, which was refused. The Court held that this defence was not vexatious. *In re Wood*, Co. 104.

The insolvent was supplied with goods by the opposing creditor, who at the end of three months twice wrote to him demanding payment, to which the defendant answered, "I have no money to send you, and if I had, I should not give you any, as you have put me to the expense of two letters;—if you write to me any more, you shall have it back double." The insolvent pleaded the general issue, but there was no defence at the trial. He asserted that the common credit given by the trade was seven months, and that, although no agreement was made as to time, he was always allowed discount if he paid within three months: Held, (*dissentiente* Commissioner Law,) not a vexatious defence. *In re Stone*, Co. 105.

Criminal issue, and writ of error, vexatious defence to an action on a bill of exchange. *In re Baker*, 1 Cress. 151.

What a vexatious defence. *In re Gills*, 1 Cress. 127; *In re Gould*, ib. 130.

Insolvent, being sued as one of the bail on a writ of *scire facias*, files a false plea, thereby delaying the opposing creditor, and putting him to unnecessary expense. Judgment, ten months. *In re Loving*, 1 Cress. 117.

### (i) *Damages.*

In cases of damages for *crim. con.*, seduction, breach of promise of marriage, malicious prosecution, libel, slander, or malicious injury, the Court will give its judgment according to the verdict. *In re Palmer*, Co. 106; *In re Marsh*, Cress. 28.

But if the facts of the case be let in, the Court will consider them. *In re Harrison*, Co. 107.

In cases of tort or trespass, the Court must hear the facts to judge of the malice. *In re Shepherd*, Co. 109.

In cases of slander, the Court will regulate its judgment by the amount of damages. *In re Jackson*, 1 Cress. 37.

Although the damages in a case of slander be small, the Court will go out of its regular scale and award its judgment according to the relative situation in life of the parties. *In re Allen*, 1 Cress. 100.

Slander of the grossest kind could not, under 1 Geo. 4, c. 119, be construed to mean a malicious injury.

But now the Court is empowered to pronounce an adverse judgment, according to the circumstances of the case, upon an insolvent against whom damages have been given in an action for libel or slander. *In re Thompson*, Co. 89.

## (H) PRIOR INSOLVENCY OR BANKRUPTCY.

The fact of a prior insolvency must be stated in the petition of an insolvent, notwithstanding such prior insolvency took place 17 years previous to the second insolvency. *In re Bradford*, 1 Cress. 149.

Insolvent's petition dismissed, he having omitted to state his previous bankruptcy in the petition. *In re Bentley*, 1 Cress. 134.

An omission in an insolvent's petition of his having been bankrupt even twenty years prior to his insolvency, is fatal to his petition. *In re Wall*, 1 Cress. 127.

If an insolvent has been a bankrupt more than once, that fact must be mentioned in his petition, notwithstanding the first commission issued during his minority. *In re Francis*, 1 Cress. 155.

The creditors consenting to an insolvent's discharge, under section 64 of 7 & 8 Geo. 4, must be duly entered in the schedule, and must be creditors from whom the insolvent seeks to be discharged.

Therefore, the consent of a mortgage or other security creditor, unless he will agree to give up his security, or of creditors on account of new contracts for debts which had been discharged by previous bankruptcy or insolvency, unless they have obtained judgment, will not be sufficient. *In re Rice*, Co. 112.

An insolvent will not be discharged without the consent of creditors, where a debt has been contracted by accepting accommodation bills. *In re Wilmot*, Co. 114.

An insolvent will not be discharged without consent of three-fourths of his creditors, where he omits

to insert the amount of warrants of attorney, existing and unsatisfied at the time of his former discharge, in his former schedule; or omits as claims against him, several debts to a considerable amount; or has renewed a debt subsequent to that discharge. *In re Woolrych*, Co. 114.

Consent of creditors must be obtained where the insolvent has contracted a debt fraudulently. *In re Eschman*, Co. 115.

An insolvent having been twice remanded to obtain the consent of three-fourths of his creditors, and omitting to comply strictly with that order, on his coming up for the third time has his petition dismissed. *In re Gadderer*, 1 Cress. 21.

An insolvent having been discharged within five years. is obliged to prove that his second insolvency has arisen from misfortune; on failure of such proof the consent of three-fourths in number and value of his creditors is required by the Court. *In re Woods*, 1 Cress. 97.

An insolvent discharged within five years, is bound to exercise a measured prudence in his dealings, and is not entitled to speculate upon promises made by other persons. *In re Tate*, Co. 114.

Provisional assignee under a commission of bankrupt against an insolvent, may apply for and receive assets out of the estate and effects of the insolvent, if the insolvent was declared a bankrupt within two months of his being heard on his petition, the assets of his estate having been previously assigned to the provisional assignee of this Court. *In re Tucker*, 1 Cress. 7.

If an insolvent neglect to deliver up to the assignee of his estate, leases to which he is entitled, and is then discharged, the Court, upon his coming up a second time to take the benefit of the act, will not discharge him until the leases are delivered up, they being the property of the assignee under the first assignment. *In re Cooper*, 1 Cress. 58.

Prior insolvency, *locus standi*. *In re Phippen*, 1 Cress. 126.

An uncertificated bankrupt, in consideration of having his certificate granted him, is induced to give bills of exchange to some of his creditors for debts due before the commission of bankrupt, they not having proved the debts under that commission, thereby renewing the original debts. On the bankrupt's coming up to be heard on his petition in this court, an objection was raised on behalf of an indorsee of one of the bills, that the insolvent had no *locus standi* under the 64th section, notwithstanding the indorsee knew that, at the time he took the bill, insolvent was uncertificated. The Court held the contrary. *In re Abraham*, 1 Cress. 123.

### (I) REMOVAL OF PRISONERS.

Any creditor may apply for an order for the removal of an insolvent, whether he has entered an opposition or not. *In re Hatten*, 1 Cress. 77.

Where an insolvent's creditors all reside in the country, the Court upon affidavits will order his removal. *In re Nokes*, 1 Cress. 164.

Insolvent removed to the country, upon affidavit of all his creditors residing there, as also proof that all the debts were contracted in the country. *In re Twine*, 1 Cress. 42.

The greater part of an insolvent's creditors residing in the country, the Court, upon motion unsupported by affidavit, will order such insolvent's removal at the expense of the opposing creditor. *In re Paine*, 1 Cress. 135.

Where it appears by an insolvent's schedule that all his debts and credits are in the country, the Court will order the removal of such insolvent upon the application of his creditors, supported by affidavits, at the insolvent's own expense. *In re Sigley*, 1 Cress. 134.

Where an insolvent removed himself from custody in the country to London by a writ of *habeas corpus*, and went out on bail two days: Held, that it did not take the case out of the 66th section, the change of custody on the surrender being immaterial. *In re Bancroft*, 1 Cress. 66.

A, being arrested by process out of a court of local jurisdiction, removes himself by *habeas corpus cum causâ* to London: Held, the removal being by his own procurement, he has no *locus standi* in this Court. *In re Rutter*, 1 Cress. 112.

A removal by *habeas corpus* sued out by a relative of an insolvent without her knowledge, procurement, or request—order for hearing dismissed, it being held as a removal by *habeas corpus* sued out on her behalf within the meaning of the 66th section. *In re Dunford*, 1 Cress. 144.

An insolvent arrested in the country, and committed to a county gaol—removes himself by *habeas corpus* to the King's Bench prison, where another detainer is lodged against him. Afterwards, the plaintiffs in the original action in which he had removed himself, discharge him, and at the same time lodge a detainer for a smaller sum, and a change of parties as plaintiffs: Held, by the Court, that this was a removal by *habeas corpus*, within the meaning of the 66th section, as from the first arrest he was never for a moment out of custody, and the subsequent detainers depended upon the prior arrest. *In re Carden*, 1 Cress. 152.

### (K) DISCHARGE.

[See PRISONER.]

#### (a) *Who entitled to.*

Insolvent entitled to his discharge, more than five years having elapsed from the date of his first discharge, notwithstanding he had *interim* petitioned the Court, and had been remanded to obtain the consent of three-fourths of the creditors. *In re Castell*, 1 Cress. 20.

Where insolvent is entitled to a share of the personalty of an intestate, but administration has not as yet been taken out, the Court will not delay the discharge till the assignee has been put in possession. *In re Burner*, 1 Cress. 33.

#### (b) *How obtained.*

The 41st section of the Insolvent Act confers on the Court of Exchequer a discretion to make or refuse an order for the insolvent's discharge, when the applicant is a crown debtor.

An insolvent, who is indebted to the Crown under an extent, must, in order to obtain his discharge, present a petition, containing a statement of his property, supported by an affidavit, praying an order, that he may be brought up to be examined on oath; and notice should be given to the Crown, (that is,

served on the Attorney General). *Rex* v. *Austen*, 9 Price, 142.

On a motion for the discharge of an insolvent debtor, under the statute 48 Geo. 3, c. 123, s. 1, the rule, in the first instance, is only a rule *nisi*, and the Court must be satisfied of the truth of the necessary facts, to bring the party within the act, by the record, and not merely by an affidavit of the prisoner. *Findon* v. *Horton*, 1 Law J. C.P. 64.

In cases of insolvent publicans, the Court strictly requires the licences shall be filed prior to the hearing. *In re Monk*, 1 Cress. 82.

(c) *Rights, Privileges and Liabilities after.*

A surety for an annuity is relieved, by the Insolvent Act, from arrears which may become due after his discharge, in consequence of failure in payment by the principal. And consequently, the annuity creditor in such a case may come in with the rest of the insolvent's creditors. *Collins* v. *Lightfoot*, 4 Law J. K.B. 274, s. c. 5 B. & C. 581, s. c. 8 D. & R. 491.

The discharge of an insolvent only relieves him from the specific debts described in his schedule, and the surplus of a debt, which he has stated in his schedule at less than its real amount, may be set off against any action by such insolvent. *Taylor* v. *Buchanan*, 3 Law J. K.B. 258, s. c. 4 B. & C. 419, s. c. 6 D. & R. 339.

Where a person has been discharged under the 53 Geo. 3, c. 102, he is still liable to an action of trespass; and therefore, where the cause of action arose before the insolvent went to prison, and the damages were unliquidated before the discharge: Held, that his discharge was no bar to the action. *Lloyd* v. *Neill*, 2 Chit. 222.

An insolvent may sue for goods sold and delivered while he was in custody under an order of the Insolvent Court, unless the assignee interferes. *Taylor* v. *Buchanan*, 3 Law J. K.B. 258, s. c. 4 B. & C. 419, s. c. 6 D. & R. 491.

An admission by a plaintiff, that he has been discharged under an insolvent debtors act, will not prevent him from recovering in an action for goods sold and delivered, prior to his release. *Summersett* v. *Adamson*, 1 Law J. C.P. 1, s. c. 1 Bing. 73, s. c. 7 B. Mo. 374.

A debt depending upon a contingency at the time of a party's dismissal, under the 18 Geo. 3, c. 52, is not discharged thereby. *Hilton* v. *Warrall*, 2 Chit. 448.

When an insolvent is taken in execution, after his discharge under 1 Geo. 4, c. 119, his acceptance of his liberation from custody from the plaintiff, out of the regular course pointed out by that act, section 19, viz. by application to a judge at chambers, operates as a waiver of costs, to which he would be entitled under that section. *Evans* v. *Wilson*, 2 Law J. C.P. 120.

The Court will not interfere in a summary way to stay proceedings against a person who has been discharged under the Insolvent Debtors Act. *Wall's case*, 2 Law J. K.B. 39.

Where a defendant gave a promise to pay a debt as to which he had been discharged under an insolvent act: Held, that he could not be arrested and held to bail upon such promise. *Butt* v. *Vine*, 4 D. & R. 154.

The Court refused to relieve an insolvent debtor, who had been arrested and given a bail-bond for a debt contracted before his discharge under 1 Geo. 4, c. 119, either by setting aside the proceedings, or ordering common bail to be filed, but said he must plead to the action: *aliter*, if he had been detained in custody. *Done* v. *Smith*, 3 D. & R. 600.

But now, if a defendant is arrested for a debt, in respect of which he has been previously discharged under the Insolvent Act, he will be relieved on motion, although he be not in actual custody; and if he has given a bail-bond to the sheriff, the Court will order it to be given up to be cancelled. *Norton* v. *Mosley*, 5 Law J. K.B. 45, s. c. 6 B. & C. 106, s. c. 9 D. & R. 107.

The Court refused to liberate, on motion, a discharged insolvent, who had been arrested by his surety for the arrears of an annuity accruing subsequently to the insolvent's discharge, and paid by the surety. *Freeman* v. *Burgess*, 6 Law J. C.P. 34, s. c. 4 Bing. 416, s. c. 1 M. & P. 91.

A *cognovit* given by an insolvent after his discharge upon proceedings commenced before, constitutes a new promise, upon which he becomes liable, notwithstanding his discharge. *Sweenie* v. *Sharp*, 5 Law J. C.P. 88, s. c. 4 Bing. 37.

Where the defendant applied for his discharge under the Insolvent Debtors Act, 1 Geo. 4, c. 119, and was threatened to be opposed by the plaintiff's intestate, (who was a creditor,) and the defendant gave him a promissory note for the amount of the debt, in consideration of his not being opposed; and the plaintiff, as administratrix of the creditor, sued the defendant on the note, and the action was abandoned on his giving a warrant of attorney as an additional security to pay the amount of the note by instalments: The Court set aside the warrant of attorney, and ordered an instalment paid to the plaintiff by the defendant to be returned to him, on the ground that the note and warrant of attorney were founded on a corrupt and illegal consideration. *Rogers* v. *Kingston*, 3 Law J. C.P. 77, s. c. 2 Bing. 441.

An agreement between an insolvent debtor and his assignee, by which an estate of the insolvent is to be held in trust by the assignee, to pay out of the rents and profits annuities to the insolvent and his wife, and the surplus towards the extinction of the debt owing to the assignee, is a transaction which being brought before a court of equity, at the instance of the insolvent himself, must be rescinded on the ground of public policy. *M'Neill* v. *Cahill*, 2 Bligh, 229.

An agreement made in consideration that a creditor shall withdraw his opposition to an insolvent, is illegal, unless the same be made with the consent of the rest of the creditors. *Murray* v. *Reeves*, 6 Law J. K.B. 348, s. c. 8 B. & C. 421.

An insolvent debtor is an incompetent witness in an action by his assignees, to recover a sum due to his estate. *Rudge* v. *Ferguson*, 1 C. & P. 253. [Littledale]

In assumpsit by the assignee of an insolvent, for work done by him previous to his insolvency, the insolvent is not a competent witness. *Wilkins* v. *Ford*, 2 C. & P. 344. [Abbott]

An insolvent having possession of property belonging to another, and exercising a control over it for a long period of time: Held, that such pos-

ession constitutes a reputed ownership, and that therefore that property of right belongs to the creditors of such insolvent, and must be delivered up before he can obtain his discharge. *In re Fensham*, 1 Cress. 165.

The Court dismissed the petition of an insolvent who had no other debt upon his schedule, except that which was due to his attorney for business done in respect of obtaining his discharge the year preceding, by an attorney of the court, by whom he had been arrested and detained. *In re Dyson*, Co. 15.

### (d) *Pleading and Evidence.*

To support a plea of discharge under an insolvent act, (1 Geo. 4,) it will suffice, if the defendant prove the adjudication for his discharge. *Pascall* v. *Brown*, 3 Stark. 54. [Abbott]

An original order for the discharge of a prisoner, made by the Court for the relief of insolvent debtors, and delivered to the jailor in whose custody he was, who thereupon discharged him, and produced the order at the trial—held evidence of his discharge, according to 53 Geo. 3, c. 102, s. 10, so as to make his future property liable to creditors upon his subsequent bankruptcy, where his estate did not pay 15s. in the pound; though no copy of such order of discharge, signed and certified by the officer of the Court, was produced, according to 53 Geo. 3, c. 102, s. 24, or 1 Geo. 4, c. 119, s. 45. *Neale* v. *Isaacs*, 3 Law J. K.B. 237, s. c. 4 B. & C. 335, s. c. 6 D. & R. 464.

### (L) ALLOWANCE AFTER ADJUDICATION.

On an application under the 56th section, notice must be served on the creditor. *In re Langley*, 1 Cress. 66.

An order for an allowance under the 56th section, may be rescinded and the payment of the allowance stopped, if it appears that such order was obtained by false representation. *In re Marsh*, 1 Cress. 158.

An insolvent receiving debts after his imprisonment, and previous to adjudication, not allowed relief out of his estate. *In re Gilbert*, 1 Cress. 3.

### (M) RE-HEARING.

An insolvent, upon a re-hearing, will not be required by the Court to answer any questions which would tend directly to falsify the schedule, and expose him to the danger of being indicted for perjury. *In re Smith*, Co. 161.

But the insolvent may be examined upon collateral points, the questions not directly tending to falsify his schedule. *In re Underwood*, Co. 162.

Application for re-hearing refused, the right of the opposing creditor having been decided in a superior court. *In re Marsh*, 1 Cress. 74.

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## INSPECTION.

[See PRODUCTION AND INSPECTION OF DEEDS, BOOKS, AND PAPERS.]

Order for inspection of a lace-machine, on proceedings for infringement of a patent. *Brown* v. *Moore*, 3 Bligh, 178.

In case of an agreement between landlord and tenant, that the value of timber used in repairs should be allowed at the end of a lease, a right would exist, and, as incident to the right, a power in a court of equity to compel inspection, for the purpose of valuation. *East India Company* v. *Kynaston*, 3 Bligh, 162.

The owner of a coal-mine having wrought under and taken coal from a neighbouring mine, and being about to destroy the pillars under the neighbouring mine to prevent detection, an order was made to restrain the destruction of the pillars, and that the owner of the neighbouring mine should be at liberty to inspect the workings, &c. By a subsequent order, in consequence of the obstructions to the inspection, it was ordered that the obstructions should be removed, *Lonsdale* v. *Curwen*, 3 Bligh, 168.

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## INSURANCE.

(A) INTEREST.
(B) VOYAGE.
(C) POLICY.
(D) WARRANTIES.
(E) REPRESENTATIONS AND CONCEALMENT.
(F) LOSS.
(G) ABANDONMENT.
(H) BOTTOMRY BONDS.
(I) INSURANCE ON LIVES.
(K) INSURANCE AGAINST FIRE.
(L) INSURANCE BROKER.
(M) ACTIONS.
(a) *In general.*
(b) *Pleadings.*
(c) *Evidence.*

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### (A) INTEREST.

An East India captain having borrowed money of A, in order to secure him, arranged with B that he (the captain) should draw bills on C, (B's agent at Calcutta,) in favour of A, payable thirty days after the arrival of the ship; which bills A was to indorse to B, who was to negotiate on Calcutta, upon the captain's consigning to their agent there, goods to double the amount of the bills: Held, that B had no insurable interest in the bills; and that even if he had, he was not entitled to recover upon a policy describing them as bills of exchange. *Palmer* v. *Pratt*, 3 Law J. C.P. 250, s. c. 2 Bing. 185, s. c. 9 B. Mo. 358.

A policy of insurance stipulated, "that the goods insured were and should be valued as five tierces coffee, valued at 27*l.* per tierce, say 135*l.*; the policy to be deemed sufficient proof of interest:" Held, that this was in effect, an insurance "interest or no interest," within the statute 19 Geo. 2, c. 37, and consequently void. *Murphy* v. *Bell*, 6 Law J. C.P. 118, s. c. 4 Bing. 567, s. c. 1 M. & P. 493.

A seaman cannot insure his wages. *Neptune*, 1 Hag. 239.

Although a party, by effecting a double insurance, shall not be allowed to recover a double satisfaction for the same loss; yet several persons may insure various interests on the same thing; and such a contract does not fall within the meaning of a double insurance. *Godin* v. *Royal Exchange Assurance Company*, 2 Ken. 254, s. c. 1 Burr. 489.

## (B) VOYAGE.

A policy of insurance was effected on a ship and her cargo, at and from Grenada to London. The ship took out supplies to different estates in that island, and had arrived there, and discharged part of the outward cargo, at three different bays in the island. In the meantime, the master had made arrangements for the homeward cargo. Whilst the ship was proceeding, with part of the homeward cargo on board, to a fourth bay, for the double purpose of unloading part of her outward cargo, and to take in some of her homeward cargo, she was lost by perils of the sea. There is but one custom-house at Grenada:—The Court (on error) held, that there had not been a deviation from the voyage insured. *Warre* v. *Miller*, 4 Law J. K.B. 3, s. c. 4 B. & C. 538, s. c. 7 D. & R. 1.

A ship sailing under a policy, which protects her in her voyage from one given extreme to another, "with liberty to sail backwards and forwards, and forwards and backwards," must, in availing herself of this liberty, proceed with the view to her ultimate destination.

And therefore, where a ship sailing under such a policy, towards a port not within the policy, was lost at a place which happened to be within the line covered by the policy: it was held, that the underwriters were not liable, because the voyage upon which she was proceeding was out of the policy, though the place at which she was lost was within it. *Kemble* v. *Scott*, 4 Law J. K.B. 237, s. c. 5 B. & C. 910, s. c. 7 D. & R. 702.

Where the captain of a ship, at the time of his sailing, has no intention to go at all to the port described in the policy, the underwriters will not be answerable, though the loss happen while the ship was in a course which she would have taken if the port in question were her intended destination.

But, where the port described in the policy is really intended as the destination, but a deviation is intended, and a loss happen before the deviation take place, the underwriters will be liable. *Hare* v. *Travis*, 3 Law J. K.B. 343, s. c. 7 B. & C. 15.

Unless there be an original intention to proceed on the voyage insured against, the policy of insurance will not protect a loss happening at a place expressly mentioned in the policy; and which place, had there been such an intention, would not have been inconsistent with the course of the intended voyage.

Accordingly, where a policy was in terms, "from Sydney to Otaheite, with leave to call at M'Quarrie Island," and it appeared from the facts, that there never was any intention to go to Otaheite,—it was held, that the underwriters were not chargeable, although the loss happened at M'Quarrie Island. *Lord* v. *Robinson*, 6 Law J. K.B. 212.

The Mauritius belongs to the Madagascar Archipelago, and is not an Indian island within the terms of a policy on freight of a vessel, from the termination of her outward voyage at New South Wales and Van Diemen's Land, to her port or ports of discharge and loading in India, and the East India islands, during her stay and loading there, and from thence to her port or ports of discharge in Europe. *Robertson* v. *Clarke*, 9 Law J. C.P. 71, s. c. 1 Bing. 445, s. c. 8 B. Mo. 699.

A vessel being insured from A to B and back, and having remained forty-eight hours at B, has finished her outward voyage; and if she goes afterwards to other parts in B, to deliver outward cargo, and receive homeward freight, and is lost, it must be deemed a loss on her homeward voyage. *Miller* v. *Warre*, 1 C. & P. 237. [Park]

If a new ship is insured, "on a voyage from Bristol to New York, during her stay there, and back to her port of discharge," and on her passage back from New York to England, sustains an injury, which requires her to be repaired, the underwriter is not entitled to deduct one-third new for old, as the whole is to be considered only one voyage. *Fenwick* v. *Robinson*, 3 C. & P. 323. [Tenterden]

## (C) POLICY.

An usage respecting insurances, which does not appear to be an usage general, but confined to Lloyd's Coffee-house, does not bind the assured in a policy effected there, unless it is proved that he was in the habit of effecting policies of insurance at that place. *Gabay* v. *Lloyd*, 3 Law J. K.B. 116, s.c. 3 B. & C. 793, s. c. 5 D. & R. 641.

An insurance is void if effected on a vessel which has not a crew sufficient to meet the ordinary contingencies of its voyage: Held, therefore, that on a voyage from Mauritius to London, where there was no one able to do the duties of the captain if he was ill, the underwriters were not liable for a loss. *Clifford* v. *Hunter*, 1 M. & M. 103. [Tenterden]

Where the assured inserted these words, "with leave to call at Jamaica, without the consent of all the underwriters:" Held, that this was a material alteration, and the policy thereby vitiated. *Forshaw* v. *Chabert*, 6 B. Mo. 369, s. c. 3 B. & B. 158.

On an open policy of insurance on freight, when there is a total loss, the assured is entitled to recover for the gross freight, free of all deductions. *Palmer* v. *Blackburn*, 1 Law J. C.P. 1, s. c. 1 Bing. 61, s. c. 7 B. Mo. 339.

Where the owner of a vessel has insured for freight to an amount not equal to the gross freight likely to be earned, and the freighter stipulates in the charter party to pay all wages and sailing-charges in the course of the voyage, as part payments of the freight and also insures for those wages and sailing-charges and such payments are accordingly made; the insurers, in the event of a total loss, will not be entitled to consider the insurance of the owner to have been effected upon gross freight.

Accordingly, J S let his ship to one A, under a charter-party, stipulating that A should pay "in full for the freight and hire of the same, at the rate of 100*l.* per month; the sum of 50*l.* to be paid immediately upon the sailing of the vessel, as much cash as might be from time to time required and sufficient to pay all *wages and sailing-charges*, and the residue of such freight as might be due at the completion of each voyage," &c. The probable duration of the intended voyage was eight months, but J S effected an insurance on *freight* for 400*l.* only, and A, at the same time, *on money advanced for sailing-charges*, for 350*l.* The vessel was lost at the end of six months: Held, that J S was entitled to recover the whole amount of the sum insured. *Etches* v. *Aldan*, 6 Law J. K.B. 65, s. c. 1 M. & R. 157.

The East India Company having hired A's ship to carry goods and 40 invalids, agreed, in concurrence with the government at Madras, to increase the number to 200, provided A would make certain proposed alterations in his ship, and she should be found, on the usual military survey, capable of accommodating so many. A agreed to the terms proposed, commenced the projected alterations, received the greater part of the goods on board, and had shipped for 100 invalids, when, before the alterations were completed, the provisions shipped, or the invalids embarked, the vessel was so much disabled by a gale that she could not perform her homeward voyage: Held, in an action on a policy of insurance at and from Madras to the United Kingdom, on freight and passage-money, that there was a sufficient contract, and a sufficient inception of the risk, to render the insurers liable for the freight, and also for the passage-money of 200 invalids. *Truscott* v. *Christie*, 2 B. & B. 320, s. c. 5 B. Mo. 33.

(D) WARRANTIES.

A policy of insurance was made on goods to be put on board ship or ships, warranted to sail from Demerara on or before the first of August 1823. A small ship was loaded with the goods near the town of Demerara. The captain having obtained his clearances, unmoored on the 1st of August, and sailed about two miles to the mouth of the river; but as the tide was low, the pilot thought it would not be well to attempt to cross a shoal, which, beginning about three miles from the mouth of the river, extended six miles. On the 3d of August the ship passed the shoal, and on the 8th she was lost.

*Large* ships are accustomed to take in part of their cargo on the outside of that shoal, and their papers are left at the custom-house until the loading is completed: The Court held, that the ship had sailed from Demerara on the 1st of August, and that the warranty had been complied with. *Lang* v. *Anderton*, 3 Law J. K.B. 62, s. c. 3 B. & C. 495, s. c. 5 D. & R. 393, s. c. 1 C. & P. 480.

The implied warranty of sea-worthiness in a policy on a ship, does not extend to her being seaworthy at every port which she leaves in the course of her voyage. *Holdsworth* v. *Wise*, 6 Law J. K.B. 134, s. c. 7 B. & C. 794, s. c. 1 M. & R. 673.

In an action on a policy on a ship at and from H to V, with a warranty that the ship was "in port" on a given antecedent day, it is not sufficient that she was safe in some other port than H on that day; the meaning of this policy is, that she was safe in the port of H. *Colby* v. *Hunter*, 1 M. & M. 81. [Tenterden]

(E) REPRESENTATIONS AND CONCEALMENT.

It is not necessary to give the underwriters notice in what part of the ship the goods are stowed, whether on deck or otherwise. *Dacosta* v. *Edmunds*, 2 Chit. 227.

Agents of the owners of a ship, by a letter, saying, "*The Brilliant* will sail from Nassau for Clyde on the 1st of May, a running ship," instructed their correspondents to effect an insurance on the ship, which was done accordingly by their shewing this letter to the underwriters. There being a favourable opportunity of convoy, the ship sailed on the 23rd of April; on the 11th of May she was captured: Held, in the court below, and on appeal, that the expression of the letter was positive, and not the statement of an expectation; and that the exhibition of the letter being a representation material to the risk covered by the policy, which was not true in fact or in the event, vitiated the policy. *Denniston* v. *Lillie*, 3 Bligh, 202.

A person alarmed at not hearing any intelligence of his ship, stated it as a reason for insuring her. According to the usual time taken in a voyage, she could not be considered as a missing ship; and the Court held, that he was not bound to express his fears to the underwriters at the time he effected the insurance. *Morgan* v. *Pryor*, 1 Law J. K.B. 224, s. c. 2 B. & C. 14, s. c. 3 D. & R. 215.

(F) LOSS.

A loss occasioned by the detention of the captain of a ship at a foreign port, on account of an incorrectness in the manifesto, is not a loss within the policy of insurance, there being no suit against the ship. *Bradford* v. *Levy*, 2 C. & P. 137. [Abbott]

Where, on an insurance on goods in a ship warranted free from capture and seizure, the vessel sailed on her voyage and was stranded on a shoal, within a few miles of the port of destination, and disabled from proceeding further, and ultimately lost; but whilst she remained on the shoal, she was seized by the authority of the *Spanish* government, and the goods were confiscated: Held, that this was a loss by the perils of the sea. *Hahn* v. *Corbett*, 2 Law J. C.P. 253, s. c. 2 Bing. 205, s. c. 9 B. Mo. 390.

A policy of insurance contained a memorandum, that horses were warranted free of jettison and mortality. Three horses were put on board, and they died from kicking each other, in consequence of the partitions between them having been broken down by the rolling of the ship during a storm: The Court held, that this loss arose from the perils of the sea. *Gabay* v. *Lloyd*, 3 Law J. K.B. 116, s. c. 3 B. & C. 793, s. c. 5 D. & R. 641.

A ship was forced, by a storm, to make for a harbour, and on entering struck against an anchor under the water. She was moored in deep water, when it was discovered that she was sinking. She was then drawn into shallow water, and, on the return of the tide, touched the ground, and lay some time on it: The Court held, that the ship had been *stranded*. *Barrow* v. *Bell*, 4 Law J. K.B. 47, s. c. 4 B. & C. 736, s. c. 7 D. & R. 244.

Policy on goods "warranted free from average, unless general, or the ship be stranded." On the voyage, the ship was driven by necessity into a harbour, dry every tide, where she was moored along the quay, in a place usual for ships of her burthen, and in as safe a situation as could be found; and being sharp built, she was lashed to the pier by a rope from her mast head, which the mate insisted to be sufficient, though it was objected to by the pilot who had brought the ship in. When the tide ebbed, the rope broke, and the ship fell over and bilged, and the goods in consequence were damaged. If the rope had not broken, the accident would not have happened: Held, that the ship was stranded within the meaning of the policy.

Stranding, is where a ship, by an accident, and out of the ordinary course of her voyage, gets upon the strand, and receives injury in consequence.

Negligence of the crew does not discharge the underwriters, if the loss is occasioned by one of the perils insured against. *Bishop* v. *Pentland*, 6 Law J. K.B. 6, s. c. 7 B. & C. 219, s. c. 1 M. & R. 49.

Where a ship sprung a leak, and it became necessary, for the preservation of the lives of the crew, to run her on shore; and, after two surveys, it was reported by the surveyors that it would be prudent to sell the ship and cargo—in an action on the policy against the underwriters on freight for a total loss: Held, *first*, that, under these circumstances, the master was warranted in selling the ship and cargo: and, secondly, that an abandonment of the freight was unnecessary. *Idle* v. *the Royal Exchange Assurance Company*, 8 Taunt. 755, s. c. 3 B. Mo. 115.

When a ship is left by the crew under a fair and reasonable apprehension of her sinking, the right of the assured to recover for a total loss will not be affected by the circumstance of her afterwards being taken in charge and brought into port, by the crew of another vessel.

If in such a case the assured seek to discharge themselves from the claim of a total loss, by restoring the ship, they must restore her free from the burthen of charges brought upon her by the desertion and the subsequent recovery. *Holdsworth* v. *Wise*, 6 Law J. K.B. 134, s. c. 7 B. & C. 794, s. c. 1 M. & R. 673.

A ship was cast on a rock and left by the crew. The captain did not abandon, but sold her with her register, as a vessel which could not be of any further use as a ship. The purchaser afterwards floated and repaired her, and sent her on a voyage, in which she immediately became water-logged: the Court held, that the owner of the insured vessel might claim as for a total loss, although he had not abandoned but sold her, if she was in such a state that she could not be of any use as a ship: and the repairs required to be done to her would equal the value of the ship. *Cambridge* v. *Anderton*, 2 Law J. K.B. 141, s. c. 1 C. & P. 213, s. c. 1 R. & M. 60, s. c. 2 B. & C. 691, s. c. 4 D. & R. 203.

A policy of insurance had been effected on the freight of a ship, which, having been injured by a peril of the sea, was obliged to put back and re-land her cargo. Part of the cargo had been so wetted with sea-water that it required a process which would have lasted six weeks, and been attended with expense equal to the freight, before it could be re-shipped without danger of ignition. The master sold these goods, and not being able to get others to complete his cargo in a reasonable time, sailed and arrived at his destination with the rest of his cargo. His proceedings were such as a prudent man would have adopted if uninsured; but the underwriters were held not liable *pro tanto* for the loss of the freight of these goods. *Mordy* v. *Jones*, 3 Law J. K.B. 250, s. c. 4 B. & C. 394, s. c. 6 D. & R. 479.

Where, in an action on a policy of insurance on a ship, for a loss occasioned by striking on a rock, the jury found that the plaintiff had sustained a partial loss, but to what extent there was no evidence; and that the ship might have been repaired, had it not been for the negligence of the resident agents: It was holden, that the plaintiff was only entitled to nominal damages. *Tanner* v. *Bennett*, 1 R. & M. 182. [Abbott]

Although it was found by the jury, that the delay of the vessel in the port for repairs was longer than necessary, and for the purpose of barratry, the underwriters were holden liable. *Roscow* v. *Corson*, 8 Taunt. 685.

Policy of insurance "on a ship until she shall have arrived at London, and hath there moored at anchor twenty-four hours in good safety; and upon the goods, until the same be there discharged and safely landed." The master, on his arrival at Deptford, on the 18th of February, was under orders to take the vessel into the King's Dock there; but no directions had been there given to receive her, nor did any arrive until the 21st. From the 18th to the 27th, the ice in the river prevented the ship entering the dock: on the latter day she was lost: Held, that the King's Dock was the place of her destination; and that, as she could not, by reason of the ice, have entered before the 27th, there had been no unreasonable delay, although if there had been no such impediment, she could not have entered until the 21st, for want of permission to do so. Therefore the underwriters remained liable. *Samuel* v. *the Royal Exchange Assurance Company*, 6 Law J. K.B. 315, s. c. 8 B. & C. 119.

Upon a policy of insurance upon goods, where the ship was driven by tempestuous weather into a foreign port, and the captain was obliged, in order to defray the expenses of repairs of the ship, (without which she could not have proceeded on her voyage,) to sell part of the cargo: Held, that the underwriter was not answerable for this loss. *Sarguy* v. *Hobson*, (in error,) 1 Law J. K.B. 222, s. c. 1 Y. & J. 347, s. c. 4 Bing. 131, s. c. 2 B. & C. 7, s. c. 3 D. & R. 192.

A ship having suffered a partial loss on the voyage insured, and having been repaired by its proprietors, —it was holden, that the underwriters were only liable to pay two-thirds of the cost of repair in the absence of special circumstances. *Poingdestre* v. *Royal Exchange*, 1 R. & M. 378. [Best]

### (G) ABANDONMENT.

Abandonment is not necessary upon a loss in an insurance on freight. *Mount* v. *Harrison*, 6 Law J. C.P. 6, s. c. 4 Bing. 388, s. c. 1 M. & P. 14.

The circumstance of a ship having been re-captured, after a capture by an enemy, does not preclude the insured from making an abandonment. *Goss* v. *Withers*, 2 Ken. 325, s. c. 2 Burr. 683.

Where a vessel was wrecked on the 21st December, and three-fourths of the cargo either spoiled or lost, and the insured, on the 23rd, gave notice of abandonment as for a total loss, that being the day on which they were apprised of the wreck, and before the remains of the cargo were landed: It was holden, that the notice of abandonment was duly given.

After a notice of abandonment has been given, the underwriters, if they intend to object to the abandonment, must do so within a reasonable time; hence, where the assured, four days after notice, called a meeting of the underwriters, some of whom attended and gave authority to the assured to act for the benefit of all concerned, but others did not attend or take any measures for nearly three months, which was just before the sale of the cargo: Held, that as they had permitted so long a period to elapse before

hey made any objection, it amounted to an acceptnce of the notice of abandonment. *Hudson* v. *Harrison*, 6 B. Mo. 288, s. c. 3 B. & B. 97.

Where the captain of a vessel arrived at L on the 5th of April, the owner of the ship received the apers, &c. on the 23d of May, and verbal notice of bandonment was given on the 5th of May:—The otice was holden to have been given in due time.

Where the ship, having received considerable amage, put back into Calcutta, the port she had ailed from, and the captain gave immediate notice, o the agents of Lloyd's, of abandonment, who relied, that they had no authority to accept abandonents; and after several surveys of the ship, by ompetent persons, at which the agents were present, nd attempts made by the captain to raise money by ypothecation of the ship ineffectually, she was old,—and the jury found, that what had been done as for the benefit of all concerned; after verdict or plaintiff for a total loss, the Court (*dubitante* Richardson, J.) held, that, under the circumstances, he sale was justifiable, and refused a new trial.

*Semble*—that even if an avowed agent of Lloyd's an be permitted to say he has no authority to accept n abandonment, he is bound, at all events, to inform is principal of what has passed.

Where the captain has communicated with the wner, it is not necessary that he should wait for the hip's papers in order to make abandonment. *Read* v. *Bonham*, 6 B. Mo. 397, s. c. 3 B. & B. 147.

### (H) BOTTOMRY BONDS.

A bottomry bond given by a master to a foreign nerchant who appointed him, "binding the owners f the ship," and indorsed "as a collateral security or bills of exchange," pronounced valid.

The Court of Admiralty does not hold, that a ond bad in one part vitiates the rest. *Tartar*, 1 Hag. 1.

Validity of a bond is not affected by the conduct f a third party.

A bottomry bond, reciting "that the outward fleet as insufficient to pay the just charges of the British onsul, and the necessary disbursements on the essel;" and which bond was proved to have been iven for a loan of money in *great part* required for he payment of the consul's commission, upheld.

Whether the consul himself could have taken the ond—*quære*.

On a report as to certain deductions, a rate of inrest at 14 *per cent.* sustained. *Zodiac*, 1 Hag. 20—22.

Sufficient description of sea risk by the terms, after the arrival at her port." *Nelson*, 1 Hag. 177.

The Court will not permit parties, who have abanoned a former suit instituted by them to enforce he payment of certain alleged bottomry bonds, to stitute proceedings a second time to compel a deand founded on the same securities, unless strong rounds are shewn. *Fortitude*, 2 Dods. 58.

Upon the admitted validity of a bottomry bond, question as to the propriety of incidental charges ferred. *Albion*, 1 Hag. 333.

### (I) INSURANCE ON LIVES.

A person having borrowed money on annuities, fected policies of insurance on his life, for the nefit of a trustee of the persons who had advanced the money. It turned out, that his representations to the insurance office, as to the state of his health, were incorrect. The party interested was not privy to the incorrectness of those representations.

The Court held, that there was no difference, whether a policy effected by a man, was for his own benefit or for that of a stranger; and declared the policies to be void. *Maynard* v. *Rhode*, 3 Law J. K.B. 64, s. c. 5 D. & R. 266, s. c. 1 C. & P. 360.

If A, being indebted to B, die, and C agree to pay the debt by instalments, in five years, A has an insurable interest in the life of C for those five years.

If the assured, at the time of effecting the policy, conceals anything which is material for the insurer to know, the policy is void; and it makes no difference whether the assured considered it material or not: and what amounts to a misrepresentation, or to a material concealment, is a question for the jury.

The fact, that, on a life policy, an unusually high premium was paid, is quite immaterial, and is therefore not to be taken as proof that the office considered the party to be a bad life. *Von Lindenau* v. *Desborough*, 3 C. & P. 353. [Tenterden]

A female, upon whose life it was proposed to effect an insurance, was represented to the insurers in December 1822 by A, a medical man, as enjoying ordinarily a good state of health; the same representation was repeated by A in March, and the insurance was effected in April 1823. Between December 1822 and March 1823 she had been ill with a pulmonary attack, and was attended by B, but no disclosure of these circumstances was made to the insurers. In April 1824 she died of pulmonary disease: Held, on motion for a new trial, that the jury ought to have been called on to consider whether the illness in 1823, and the attendance of B, ought to have been disclosed to the insurers; and that it was not sufficient to direct them generally, to consider whether or not there had been any misrepresentation. *Morrison* v. *Muspratt*, 5 Law J. C.P. 63, s. c. 4 Bing. 60.

### (K) AGAINST FIRE.

Where three persons, being trustees and directors of a fire insurance association, executed a policy to indemnify A and others from loss by fire, whereby they ordered, directed, and appointed the directors for the time being to pay the loss which A and others should sustain in the event of a fire happening; and the policy, among other clauses, went on to recite certain provisions containing the words, "conditions and agreements"; and A and others having sustained a loss: It was held, that the policy was not an instrument or agreement upon which an action could be maintained, and, therefore, that neither the executing parties nor the directors for the time being were liable at law. *Alchorne* v. *Saville*, 6 B. Mo. 202, n.

A house, which had been erected before the Building Act, being consumed by fire, the officers of the company with whom it was insured, instead of paying the sum at which it was insured, elected to rebuild the premises; the Building Act, however, prevented them from re-erecting the house in exactly the same manner in which it was before the fire, and particularly from making the site and the building project into the street beyond the line of the adjacent houses: Held, that the insured were entitled

to maintain a bill in equity against the directors for the time being of the insurance company, for a compensation for the injury which they had sustained by reason of the inferior value of the premises erected by the insurance office, instead of the old premises. The amount of the damage, in respect of which compensation is due, will be ascertained by means of an issue. *Alchorne* v. *Savill*, 4 Law J. Chanc. 47.

In a policy of insurance on premises of a certain description, "where no fire is kept, and no hazardous goods are deposited," these words must be understood of the *habitual* use of fire and deposit of hazardous goods. Where, therefore, the loss on such a policy happened in consequence of the making a fire and bringing a tar-barrel on the premises for the purpose of repairing them, it was held that the insured was entitled to recover. *Dobson* v. *Sotheby*, 1 M. & M. 90. [Tenterden]

One of the conditions in a policy of insurance against fire, stated that if any difference should arise on any claim, it should be immediately submitted to arbitration, and after directing how the arbitrators should be chosen, added, that no compensation should be payable until after an award determining the amount thereof should be duly made: It was held, that the assured might maintain an action on such policy, notwithstanding the condition, where it appeared that the insurers denied the general right of the assured to recover anything, and did not merely question the amount of damage. *Goldstone* v. *Osborn*, 2 C. & P. 550. [Best]

### (L) INSURANCE BROKER.

An action of assumpsit may be maintained by a party assured against an insurance broker, for money paid to him by the underwriters, although notice has been given to the broker by other persons, that they were interested in the policy.

A broker cannot, as an agent, dispute the claim of his only known principal, on the ground that other persons were interested in the subject matter of the insurance; their claims would be a question between the assured and the person so claiming to be interested: thus, where the letters between the parties shewed that the broker had considered himself dealing with one of the owners only, and as having insured for him alone, they were held to be conclusive against the broker, as fixing him with an agency for his correspondent solely. *Roberts* v. *Ogilby*, 9 Price, 269.

### (M) ACTIONS.

#### (a) *In general.*

In an action on a policy, whether an urgent necessity exists for the sale of a ship, is a question for the jury to determine; and they are correct in drawing a conclusion in favour of the existence of such a necessity, where it is shewn that the expense of repairing her would exceed her original value. *Robertson* v. *Clarke*, 2 Law J. C.P. 71, s. c. 1 Bing. 445, s. c. 8 B. Mo. 622.

#### (b) *Pleadings.*

Where, by regulations indorsed on the back of a policy of insurance, it was provided that the rules of a certain association should be considered as binding as if inserted in, and made a component part of the policy: Held, that such regulatio ought to be set out in the declaration on the polic to shew the nature of the consideration for the i surance, and the mode of payment of the premiu *Strong* v. *Rule*, 4 Law J. C.P. 73, s. c. 3 Bing. 31

Where, according to one of several regulatio indorsed on the back of a policy, it was stipulate that, in case of loss or average, the same should paid for in two months from adjustment by the co mittee of the association: Held, that this was not condition precedent, and that it was sufficient f the plaintiff to aver, in a declaration on the polic that he was ready and willing to adjust, but th the committee refused to do so; and consequent that he had a right to sue on the policy, althou there had been no previous adjustment. *Strong* *Harvey*, 4 Law J. C.P. 57, s. c. 3 Bing. 304.

Three of the directors of a fire association, by policy under seal, admitted the plaintiff to a member of that society, upon the terms and co ditions prescribed by the deed of settlement of t association, and he subscribed a certain amount the consideration-money for one year's insuranc and it was declared, that he should be entitled t compensation out of the funds of the society, case of loss by fire occurring to any property there specified, not exceeding the sums set against ea article respectively; and it was further stipulat that neither of the directors who signed the polic nor the plaintiff, or the holder of it, should, members of the society, be subject or liable to a demand for loss, except under the articles establi ing the society, and as was provided by the sa A loss by fire having occurred to the plaintiff, then brought an action of covenant against the dir tors who signed the policy, and averred in his claration, that the funds of the society were su cient to satisfy the amount of such loss; and jury accordingly found a verdict for him: Held, t such declaration was good, and that the defenda were liable by the terms of the policy, and, the fore, the Court would not arrest the judgme *Andrews* v. *Ellison*, 6 B. Mo. 199.

#### (c) *Evidence.*

Where an action was brought against an und writer, upon goods which had sustained dam the Court held, that although the defendant mi be a subscriber to Lloyd's, a certificate granted their agent, who resided abroad, was inadmiss as evidence to prove the amount of loss. *Dre* *Marriott*, 1 Law J. K.B. 161, s. c. 1 B. & C. s. c. 3 D. & R. 696.

Under a policy of insurance, evidence that M *ritius* is considered, in mercantile contracts, as *East India Island*, although treated by geograp as an African island, is admissible. *Roberts* *Money*, 1 R. & M. 75. [Gifford]

To recover on a policy of insurance for the of *intelligence*, it must be proved that when vessel left the port of outfit she was bound upo voyage insured. *Koster* v. *Innes*, 1 R. & M. [Abbott]

A ship sailing in 1821 for her port of destina and never arriving, but reported a few days her departure to have foundered (crew survivi may reasonably be presumed to be lost by per the seas, in the absence of any proof to the

ary; and in such case the assured on goods is not ound to call any of the crew, assuming them to ve survived the loss of the vessel. *Koster* v. *eed*, 6 B. & C. 19, s. c. 9 D. & R. 2.

In defending an action on a policy of insurance ainst fire, on the ground that the plaintiff had mself wilfully set fire to the premises, the same idence must be adduced, as would be requisite to tablish a charge of arson against the plaintiff on indictment. *Thurtell* v. *Beaumont*, 2 Law J. P. 4, s. c. 1 Bing. 339, s. c. 8 B. Mo. 612.

The production of books kept by an insurance mpany, in which they charge themselves with the ceipt of a sum of money, as a premium to insure particular house, in the occupation of A B, from e, is evidence of his occupation. *Doe d. Smith* *Cartwright*, 1 C. & P. 218, s. c. 1 R. & M. 62. Abbott]

## INTEREST.

(A) WHERE PAYABLE.
(B) ON JUDGMENTS.
(C) MONEY PAID, &c.
(D) ON SALES. [See VENDOR AND PURCHASER.]
(E) HOW COMPUTED.
(F) ALLOWANCE OF IN ERROR.

### (A) WHERE PAYABLE.

*Interest* is only payable on a sum of money, where ere is an express promise to pay it, or where it is ne on a mercantile security, or has been paid by e usage of trade.

Therefore interest cannot be claimed on the amount a policy of insurance on a life, which has not en paid for a long time after it ought to have been scharged. *Higgins* v. *Sargent*, 2 Law J. K.B. 33, c. 3 D. & R. 613.

In an action of debt, interest is recoverable where ere is an express covenant for that purpose; at all ents, it should be given as damages for the detenon of the debt. The demand of principal and inrest by the declaration is divisible. *Verney* v. *ldings*, 2 Chit. 234.

A defendant, on being applied to for interest of aintiff's money, said, that he would bring her me on the following Sunday: Held to be an adission that something was due: but that, as it did t point out what the nature of the debt was, or in hat right it was payable to the plaintiff, or that sumpsit would lie for it, not even nominal damages ere recoverable; and a nonsuit was entered. *Green* *Davies*, 3 Law J. K.B. 185, s. c. 4 B. & C. 435, c. 6 D. & R. 306.

A customer deposited a sum of money with a nker, and received a note, by which the banker omised to pay the principal at ten days' sight, with ree per cent. interest to the day of acceptance. he banker paid interest on the note, but at the me time told the customer, that he would not in ture pay more than two and a half per cent., and his presence altered the terms of the note by riking out three and inserting two and a half: Held, at the payment of interest was evidence to shew at a principal sum was due; and that the note was lmissible in evidence to shew the terms on which the deposit was made. *Sutton* v. *Toomer*, 6 Law J. K.B. 49, s. c. 7 B. & C. 416, s. c. 1 M. & R. 125.

A court of equity will not interfere to enable an incumbrancer of parish rates to obtain payment of arrears of interest, which he neglected to claim at the time when they became due.

Interest decreed against the estate of an accounting party, who had dealt with certain funds in such a manner, that the Court would have given interest on the balances in his hands against him personally, but who had taken the benefit of the Insolvent Act, before there was any decree charging him with interest. *Moons* v. *De Bernales*, and *Kaison* v. *De Bernales*, 1 Russ. 301.

A borrower, who is bound to replace a certain amount of stock, and in the meantime to pay the lender the dividends, continues during many years to pay five per cent. interest on the sum which the stock had produced: he is entitled, when called upon to replace the stock, to deduct from it the excess of the interest thus paid beyond the amount of the dividends. *Tyler* v. *Manson*, and *Manson* v. *Tyler*, 5 Law J. Chanc. 34.

Where a solicitor, engaged in various suits, obtained payment out of court of a sum of money standing in trust in the cause, and retained it towards his costs; and upon a subsequent taxation of his bill it appeared that, at the time he obtained payment of the money, he had, in fact, been already over-paid; the Court refused, upon a motion for that purpose, to charge him with interest, the parties having made considerable delay before they taxed the costs, and there being no fraud or laches imputable to the solicitor. *Wright* v. *Southwood*, 1 Y. & J. 527.

A simple contract debt does not carry interest because provision for its discharge is made by a deed of trust; such a deed *per se* does not import a contract or trust for the payment of interest, especially where the creditors have not signed the deed, and no agreement is made to charge the land and discharge the person.

The mere direction by deed to pay debts does not infer either contract or trust to pay interest upon debts by simple contract. *Hamilton* v. *Houghton*, 2 Bligh, 170—86.

### (B) ON JUDGMENTS.

A foreign judgment is *primâ facie* evidence of a debt; and unless it be impeached, or the contrary be shewn, it must be presumed that everything has been done which was necessary to support it. Where, therefore, in an action on a judgment obtained in the Court of Admiralty in Scotland, by which interest was decreed to be paid to the plaintiff, for a debt due to him on a contract for work and labour up to the time when the principal debt should be discharged, but the defendants withheld the payment, although the plaintiff endeavoured to obtain it: Held, that the jury might give interest in the shape of damages for the unjust detention of the money, although the debt arising out of the original contract did not carry interest. *Arnot* v. *Redfern*, 4 Law J. C.P. 89, s. c. 3 Bing. 353.

In an action on an Irish judgment, the question, whether any and what interest is recoverable, is a question for the jury, under all the circumstances of the case. And in deciding this question they will have to consider whether the plaintiff has taken

[illegible] steps to find his debtor and follow up his judgment by an execution, or whether he has been [illegible] *Bunn* v. [illegible], 3 C. & P. 376. [illegible]

[illegible] ON MONEY PAID, &c.

If A [illegible] 3 to lay out and expend money, B is not [illegible] interest, unless there be a special agreement to that effect. [illegible] v. *Emmerts*, 3 Stark. [illegible]

If A [illegible] 3 to lay out money for him in government [illegible] and [illegible] instead of doing so, B lays it out for himself, or for his own partnership, he is [illegible] to pay to A the common rate of interest. [illegible] 180.

[illegible] on a sum of money lent, unless there be an express contract to pay it, or an implied one [illegible], either by the usage of trade, or from the transactions of the party. *Shaw* v. [illegible], 4 Law [illegible] 3, 28, s. c. 4 B. & C. 715, [illegible]

The Courts have so often decided that interest is [illegible] money had and received, that the Court of Exchequer will not allow [illegible] *Mann*, 3 [illegible]

[illegible] ON SALES.

[See VENDOR AND PURCHASER.]

[illegible] CONVERTED.

It is [illegible] the practice of the Master's office to make [illegible] as the Court orders them to be made. [illegible] Law J. Chanc. 188.

The practice of the Master's office, with respect to the application of payments to the discharge of interest, is, that when an account is by the decree of the Court directed to be taken with interest, and payments are made exceeding the amount of the interest due, the course is to apply these payments, first, to the discharge of the interest, and then by striking a balance to constitute a new capital bearing interest. [illegible] v. *Heaton*, 1 Law J. Chanc. 197.

Where a decree pronounced by the Court of Session in Scotland, ordains interest to be paid, without fixing the time for its commencement, the decree bears interest from the date of the citation of the defendant. *Douglas* v. *Forrest*, 6 Law J. K.B. 157, s. c. 4 Bing. 686, s. c. 1 M. & P. 663.

The question as to interest, whether simple or compound, at what rate and from what times to be charged upon monies which ought, according to the trust, to have been applied or reserved at given periods, is a matter to be reserved for further directions. *Attorney General* v. *Corporation of Dublin*, 1 Bligh, N.S. 312.

K, having left East India bonds in the hands of a mercantile firm at Calcutta, with directions to apply the interest and principal, when received, to a specific purpose, by his will appointed G, a partner in the firm, one of his executors. After the death of K, the will was proved by G, and the firm, acting under his authority as executor, assigned the bonds, and used in their trade the money received upon the assignments. G ceased to be a partner in the firm before all the bonds had been assigned. Upon suit, by the residuary legatee of K, against G, and on appeal, it was held, that he was accountable to the residuary legatee of K, for the monies received upon the bonds, with 8 per cent. from the time of the deposit to the dates of the respective assignments by the firm; and with interest at 12 per cent. (being the current rate at Calcutta) from the time of the assignments and receipt of the money to the date of the judgment upon appeal in the original suit; and with interest at 5 per cent. upon the accumulated sum, composed of principal and interest, from the last-mentioned judgment till payment; but the costs of remittance from India and the property-tax, were held to be charges on the fund payable.

Upon a general account subsisting between K and the Calcutta firm: Held, that G, as partner and executor was liable for the balances of account, and interest at 12 per cent. upon all such balances as should appear to be stated and signed by the parties; such interest to be calculated from the date of the statement and signature of the account at the time of the final judgment on appeal.

In appellate proceedings, interest upon the accumulated sum of principal and interest is chargeable on the debtor, from the date of a judgment in the Court of Session to the date of judgment in the Court of Appeal, although the respondent has obtained an inhibition against the lands of the appellant before the date of the original judgment. *Graham* v. *Kelly*, 2 Bligh, 126-7.

(F) ALLOWANCE OF, IN ERROR.

The allowing of interest upon affirmance in error is discretionary.—Refused, in a case wherein the original debt did not carry interest, and the writ of error was not vexatious. *Buckeridge* v. *Flight*, 1 Law J. K.B. 21, s. c. 6 B. & C. 49, s. c. 9 D. & R. 113.

## INTERPLEADER.

[See PLEADING, and PRACTICE, IN EQUITY.]

## INTERROGATORIES.

[See PRACTICE, IN EQUITY.]

## ISSUE.

(A) WHERE DIRECTED.
(B) PRACTICE.

(A) WHERE DIRECTED.

Unless there is reasonable doubt as to a fact court of equity will not direct an issue. *Short* v. [illegible] 2 J. & W. 464.

A court of equity having before it sufficient evidence to decide a cause, ought not to direct an issue to a court of law, especially in a case where fraud charged in a bill is denied by the answer, and not proved in the cause.

Where the witnesses who could explain a transaction are dead, it would be unjust to send a case to a jury at the risk of deciding against the judicial presumptions arising from the expressions of an instrument, the oath of the defendant in his answer, and in the absence of evidence to affect an answer. *Whaley* v. *Whaley*, 3 Bligh, 16.

Where the case of the plaintiff is denied by the fendant, and there is no evidence against the swer, the Court will not direct an issue to be ied, and the defendant to be examined, though the nsaction be of such a kind as to be exclusively ithin the knowledge of the defendant. *Pritchard Gee*, 3 Law J. Chanc. 222.

An issue directed to try a plaintiff's right, though adverse claim is set up, and strong uncontradicted idence is produced on his part. *Moons* v. *De Berles*, and *Kaison* v. *De Bernales*, 1 Russ. 301.

It is the habit of the Court to direct, not a referce, but an issue, wherever a question of legitimacy raised. *Graham* v. *Whitmarsh*, 2 Law J. Chanc. 42.

Where defendants residing in Ireland, have filed eir bill in England, as being some of the next of n, and a defendant insists on their illegitimacy, the ourt will direct an issue to be tried in an English unty, though the plaintiffs are poor, and their itnesses are resident in Ireland. *Graham* v. *Whitarsh*, 2 Law J. Chanc. 42.

(B) PRACTICE.

[See PRACTICE, IN EQUITY.]

If an heir-at-law, who is a married woman, does t, at the hearing of the cause, ask an issue to try e validity of a will, the Court will not afterwards ant her a re-hearing, in order to enable her to obn an issue. *White* v. *Vitty*, 1 Law J. Chanc. 188.

When the Court directs a feigned issue to be tried, e applicant to the Court is made the plaintiff, alough the affirmative of the issue may be on the posite party. *Storey* v. *Roche*, 2 Law J. K.B. 153.

Where issues are directed by the Court of Exequer, it is not an essential part of the decree t they shall be tried by a special jury. *Stuart* v. *eenall*, 9 Price, 480.

Where an issue has been sent from Chancery, the urt of King's Bench will, after decision pronced on the special verdict, order the *postea* to be urned as of the term in which it was first drawn *Wyndham* v. *Chetwynd*, 1 Ken. 253.

Where the Court of Exchequer directed an issue be tried at the next assizes, and the decree s not drawn up or passed in sufficient time, the ntes were varied by directing the trial of the ue at the subsequent assizes. *Willis* v. *Farrar*, . & J. 241.

*uære*—Whether the Court of Chancery, as against heir-at-law, will bind the inheritance by the dict given on one trial of an issue. *Earl of Winsea* v. *Wauchope*, 5 Law J. Chanc. 167.

, from time to time during his life, prepared inctions for his will, and caused drafts to be pred upon those instructions. At his death he es various testamentary papers, executed so as ass his property, under which papers his son, by rst wife, and the issue of that son, his widow second wife), his daughter, with her children, ulterior remainder-men, might severally claim rests. By the last of these testamentary papers provision for the widow and the daughter and children was considerably increased. The tesr died in 1813. In 1814, the daughter, with her band and children, filed a bill in equity to estah the last will, and effectuate the charge in their ur. In the same year the widow filed a bill in same court to establish the same will and her interests under it. In 1816, the son and heir filed a bill in the same court, impeaching the will as obtained by fraud and the improper influence of the widow, and praying a declaration of its invalidity, and an issue at law to try the question.

In the first of these causes (the suit on behalf of the daughter and her children), by a decretal order, an issue was directed to inquire, by a trial at bar, whether the last testamentary paper was the will of T. The widow, with her husband, were to be the plaintiffs in the action; the son and heir to be the defendant; and the daughter, with her husband, were to be at liberty to appear in the action and defend their rights and that of their children. Upon the trial of the issue, the jury found a verdict for the defendant. In the course of the trial several testamentary instruments, executed by the testator, were produced in evidence, but the only point submitted to the consideration of the jury was the general question of the validity or the invalidity of the last testamentary paper. Application being made to the court of equity for a new trial, upon the grounds, 1st, That the evidence given by two of the witnesses upon the former trial had been improperly admitted; 2nd, Of misdirection by the judge; 3rd, That the verdict was contrary to evidence; the Lord Chancellor having required of the judges who tried the issue, a report of only part of the evidence, the judges returned a report confined to the evidence of two witnesses; upon consideration of which, the Court refused the application to set aside the verdict.

Against this decision there was an appeal to the House of Lords, who remitted the cause to the Court below, with directions to call for a full report of the notes of the judges upon the trial of the issue. In consequence of this remit, a full report having been required and returned, the application for a new trial was re-considered, and thereupon a new trial was granted, and the issue was varied by adding to the original inquiry, "whether the testamentary paper (the subject of the first issue,) was the last will of the testator;" a further inquiry "whether any and what paper writing is the last will of," &c. Against this new order the son and heir appealed to the House of Lords.

Held, that the variation of the issue, not resting upon any allegation in the pleadings of any other testamentary instruments, but that which was the subject of the first issue, was unauthorized; that the issue was defective in not directing a specific inquiry whether any part of the last testamentary paper, *e. g.* under which the daughter and her children took interests, was valid, although the provision for the wife was void, which point ought to have been submitted to the jury by the judge at the trial, but was not, so that the order was erroneous in directing that the widow should be the plaintiff in the issue, leaving to the daughter, the plaintiff in the cause in which it was directed, only liberty to appear and defend, &c.; that the order and issue were defective for want of parties taking interests under the several testamentary papers—the issue ought to have been directed upon a decree in the three causes; and that, whether the new trial was granted or refused, no effective decree could be made in the cause in its actual state. Upon these and other grounds the cause was remitted to the Court below, with directions to enable the Court and

parties to rectify the proceedings. *Trimlestown* v. *Lloyd*, 1 Bligh, N.S. 427.

## JOINT-TENANCY.

A conviction of a joint-tenant for felony severs the joint-tenancy. *Doe d. Evans* v. *Evans*, 4 Law J. K.B. 322, s. c. 5 B. & C. 584, s. c. 8 D. & R. 399.

One of several joint-tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others expressly dissent. *Robinson* v. *Hoffman*, 6 Law J. C.P. 113, s. c. 4 Bing. 562, s. c. 1 M. & P. 474, s. c. 3 C. & P. 234.

## JOINT-STOCK COMPANY.

[See Company.]

## JUDGMENT.

(A) In general.
(B) Of Non Pros.
(C) For want of a Plea. [See Pleading, and Practice.]
(D) Entering up.
(E) Judgment Roll.
(F) Arrest of.
(G) Setting aside.
(H) Judgment recovered.
(I) As in Case of a Nonsuit.
(K) In Criminal Cases.

### (A) In general.

[See Interest.]

Where the barons are divided in opinion, no judgment can be given. *Atkins* v. *Drake*, 1 M'Clel. & Y. 213.

Where a judgment would, according to the strict letter of the law, work injustice, and the Court is called on by the circumstances of the case to use its discretion in doing something; they will not grant it, unless the party having the strict legal right will consent to perform what they think will be fair and equitable between all the parties. *Doe d. Boyle* v. *Bonsor*, 1 Law J. K.B. 46.

Final judgment is not complete on the officer's marking the record, but is only perfected on the taxation of the costs. *Butler* v. *Bulkeley*, 1 Law J. C.P. 77, s. c. 1 Bing. 233, s. c. 8 B. Mo. 104.

During the existence of a judgment, all persons who act in pursuance of it are protected. *Ives* v. *Lucas*, 1 C. & P. 7. [Park]

A judgment signed on any day in term relates back to the first day of the term, so as to entitle the plaintiff to prove under a commission of bankruptcy issued against the defendant during the term; and it seems to be immaterial whether the commission has issued before or after the day on which judgment was actually signed.

As a consequence of the above, the defendant, in such a case, cannot lawfully be taken in execution; and if he be, the Court will discharge him out of custody.

This rule applies also to a judgment for costs, recovered by a defendant against an unsuccessfu plaintiff. The costs, when taxed, become a debt relating back to the first day of the term in whic judgment is signed. *Boyer* v. ——, 5 Law J K.B. 71.

Where a matter is by the pleadings specificall made the subject of demand, and the judgment i general for the demandant; yet if a particular pa of the demand, as the rate of interest, was not di cussed or specifically decided in the suit, it is not r *judicata*. *Graham* v. *Keble*, 2 Bligh, 127.

The order inserted in the margin of the pape book is peremptory, and, therefore, the paper-boo must be returned within the twenty-four-hours sp cified; and though it be returned before judgme signed, yet the judgment is regular if signed aft the expiration of the twenty-four hours. Simm v. *Cope*, 2 Chit. 242.

### (B) Of Non Pros.

To authorize signing judgment of *non pros.* t defendant must take out a rule to reply, as of t term in which the judgment is signed; but wh repeated applications had been made to him the replication, without effect, and after orders c tained for time to reply, the defendant signed ju ment of *non pros.* without taking out a rule to rep as of the term in which judgment was signed; t Court would not set aside the proceedings, otherw than on the terms of the costs being costs in t cause. *Brook* v. *Lawrence*, 2 Chit. 283.

The declaration was on a promissory note: t plea was *non assumpsit*. The plaintiff was ruled enter the issue; he did so, with a plea of not gui and the defendant signed a judgment of *non pr* the Court set aside that judgment for irregular but without costs. *Aaron* v. *Chaundy*, 2 Law K.B. 113, s. c. 2 B. & C. 562, s. c. 4 D. & R. 4

A replevin suit was removed, by the defenda from an inferior court, by a writ of *certiorari*. T plaintiff did not appear: the Court held, that defendants were not entitled to sign a judgmen *non pros.* *Clark* v. *the Mayor of Berwick*, 4 Law K.B. 36, s. c. 4 B. & C. 649, s. c. 7 D. & R. 10

Where a latitat, issued in 1823, returnable Trinity term, against three defendants, one of w was served with process before the return the but the others were not brought into court u Easter term 1824, of which term an appearance entered for all the defendants; and the plaintiff having declared in Trinity term, the defen signed judgment of *non pros.*: Held, that such ju ment was properly signed under the 13 Car. 2, c s. 2. *Inwood* v. *Mawley*, 3 B. & C. 553, s. D. & R. 350.

Where defendant having omitted by mistak plead the general issue to one count, after rep tion had amended, and plaintiff, not having re to the amended plea, had signed judgment of *pros.* to the whole: the Court held it irreg *Dordsy* v. *Cook*, 4 B. & C. 135.

Where a common informer had been guil such a mistake as to entitle the defendant to en *non pros.* against him, the Court refused to exe its discretionary power in setting aside this *pros.* in order to give the common informer an portunity of proceeding for the penalties. B v. *Smith*, 2 Ken. 82.

### (D) ENTERING UP.

[See WARRANT OF ATTORNEY.]

On application to enter up final judgment in an action of account—where defendant had pleaded that he had fully accounted, and the plaintiff had the verdict. The judgment *quod computet* had been entered; the account of what was due to the plaintiff had been taken, and declared by the auditors, and returned into court. No notice having been given to the other side that the auditors had returned their account, a rule to shew cause why final judgment should not be entered was granted. *Anon.* 3 Law J.K.B. 289.

Where, at the *Spring Assizes*, 1826, a cause was referred, a verdict having been taken for the plaintiff, subject *as to damages* to the award, and the arbitrator published his award, which, in the *Michaelmas* Term following, was set aside; after which, in *Hilary* term, plaintiff obtained a rule *nisi* to issue execution unless the defendants would consent again to refer the cause, which rule was discharged: Held, the plaintiff having died in *Sept.* 1826, that the Court had no power to grant an application made in this term, that judgment might be entered up as of the *Michaelmas* term preceding.

If the plaintiff die after verdict for him, and no judgment is entered up within two terms after the verdict, the Court will not interfere, and permit it to be entered *nunc pro tunc*, where laches is imputable to the party interested in the judgment. *Lawrence* v. *Hodgson*, 1 Y. & J. 368.

The defendant in an action having died intestate, after interlocutory judgment and a writ of inquest of damages executed; but, before it was returned, the plaintiff declared, in *scire facias* against the administrator, who pleaded *plene administravit*, and set forth in his pleas divers specialties due and owing from the intestate, and charging the estate. The plaintiff having replied, admitting the truth of the pleas, and praying judgment and execution of the goods of the intestate *quando acciderint*, entered up final judgment "to have execution against the defendant as administrator, according to the force, form and effect of the said recovery," no recovery having been before stated in any part of the proceedings on the record, and no final judgment having been given in the original action, and no provision being made by the judgment for the payment of the specialty debts: Held, that the judgment was erroneous, and it was reversed, with costs. *Poulett* v. *Wightman*, 1 Bligh, N.S. 138.

### (E) JUDGMENT ROLL.

A roll of a judgment, entered up thirty years before, allowed to be brought in, and docketed conditionally. —— v. *Spelman*, 2 Ken. 442.

A judgment roll, signed and docketed 4th February 1799, viz. of Hilary term in that year, and carried in under a judge's order in December 1824, is entitled to priority over a judgment roll signed 1st of February, but not docketed till 21st February 1799, when it was carried in. *Barrow* v. *Croft*, 3 Law J. K.B. 223, s. c. 4 B. & C. 388, s. c. 6 D. & R. 386.

If, after judgment by default, a writ of inquiry executed, and final judgment signed, in an action of trespass, where the venue is laid in Lancashire, the defendant assign error for want of an original, the Court will order the plaintiff to docket and carry in the judgment roll, in order that the transcript may be made out. *Mason* v. *Grundy*, 6 B. Mo. 567.

### (F) ARREST OF.

A motion in arrest of judgment, on an indictment for disobeying an order of sessions, may be made after a *quod capiatur*. *Rex* v. *Robinson*, 2 Ken. 467, s. c. 2 Burr. 799.

A motion in arrest of judgment, on the mis-trial of an issue directed by a court of equity, cannot be entertained. *Moseley* v. *Davies*, 11 Price, 162.

An application in arrest of judgment must be founded on the Nisi Prius *record*, and not on an apparent error in the copy of the declaration. *Newball* v. *Adams*, 8 Taunt. 335.

The courts above have no jurisdiction, by the *Welsh* judicature act, 5 Geo. 4, c. 106, s. 2, to arrest the judgment in a cause tried in *Wales*—(*Vaughan*, B. *dubitante*). *Powell* v. ——, 1 Y. & J. 391.

### (G) SETTING ASIDE.

Oyer is not grantable of a deed which operates under the Statute of Uses; and where, in a judge's order, oyer was required to be given on or before a certain day, the Court ordered it to be set aside, and, the plaintiff having signed judgment for want of such oyer, the Court also ordered it to be set aside, as the order was merely interlocutory, and would not warrant the plaintiff in signing judgment. *Denman* v. *Bull*, 3 Law J. C.P. 15.

A rule to set aside interlocutory judgment will not be granted on the last day of term, even on payment of costs, if it be shewn that the party has lost an opportunity of going to trial. *Norman* v. *Day*, 13 Price, 225.

Where, during the question as to the validity of a security for costs, interlocutory judgment was signed for want of a plea; the Court set it aside, on the ground of a breach of good faith, though no order had been previously obtained by the defendant for the purpose of compelling security for costs. *Drury* v. *Johnson*, 13 Price, 489.

An inferior court may, in order to try the *merits*, set aside a regular interlocutory judgment. *Cavil*, v. *Burnaford*, 2 Ken. 290, s. c. 1 Burr. 568.

### (H) JUDGMENT RECOVERED.

If, after pleading in abatement, the defendant, without leave of the Court, pleads another plea of judgment recovered, the plaintiff may sign judgment. *Palmer* v. *Dixon*, 5 D. & R. 623.

The plea of judgment recovered, even after considerable delay and promises to pay the debt, will not be set aside. *Young* v. *Gadderer*, 2 Law J. C.P. 30, s. c. 1 Bing. 380, s. c. 8 B. Mo. 437.

The Court having granted the defendant an order for staying proceedings, upon payment of debt and costs which had been taxed, the defendant subsequently abandoned the order, and pleaded a judgment recovered: Held, that the plaintiff was at liberty to sign judgment, as the plea filed was a fraud upon the judge's order. *Hill* v. *Dyball*, 2 Chit. 292.

A advances to B 875*l.* bank stock, for which B

executes a bond, conditioned for the replacing the stock on a day certain, and the payment to A of all dividends, bonuses, and profits, which would have arisen from the same in the meantime. B makes default. A recovers judgment with damages assessed upon both breaches: Held, that the plea of judgment recovered is a good bar to a *sci. fa.*; and that A is not entitled to further dividends, &c. after verdict, whatever delay there may be in his suing out execution. *Savile* v. *Jackson*, M'Clel. 377.

Where plaintiff sued his steward in an inferior court for 4,000*l.*, which on the investigation of accounts he found was a less sum than was really due; and, upon judgment by default, verified for 3,400*l.* only: Held, upon a plea of judgment recovered, in answer to a second action in this court for the balance due, that the plaintiff was concluded by the action brought in the inferior court. *Bagot* v. *Williams*, 3 B. & C. 235, s. c. 5 D. & R. 87.

The plaintiff declared in trespass for breaking and entering his dwelling-house and taking away his goods. The defendant justified under a judgment recovered in a court baron. The plaintiff replied that there was no memorandum of the judgment remaining in the court baron: the Court held, that the replication was bad in law, because there might be a judgment capable of being proved, although there was not any entry of it. *Dyson* v. *Wood*, 3 Law J. K.B. 72, s. c. 3 B. & C. 449, s. c. 5 D. & R. 295.

To a plea of judgment recovered in an inferior court, for the same cause of action as the one brought in this, [C.P.] the plaintiff may reply that he and the defendant resided out of the jurisdiction, and that the cause of action did not accrue therein. *Briscoe* v. *Stephens*, 3 Law J. C.P. 257, s. c. 2 Bing. 213, s. c. 9 B. Mo. 413.

A plea of judgment recovered for the same cause of action may be given in evidence in assumpsit under the general issue. *Stafford* v. *Clark*, 3 Law J. C.P. 48, s. c. 2 Bing. 377.

### (I) As in Case of a Nonsuit.

A rule for judgment as in case of nonsuit, may be obtained by one of several joint defendants. *Jones* v. *Gibbons*, 5 B. & C. 768.

Where issue has been joined, and a rule to enter the issue and notice of trial given in the same term for the sittings, and the plaintiff does not proceed to trial, the defendant is entitled, in the following term, to judgment as in case of a nonsuit. *Walter* v. *Buckle*, 4 Chit. 244.

The fact of the plaintiff not having proceeded to trial in the subsequent term after issue joined, does not entitle the plaintiff to judgment as in case of a nonsuit, in the absence of laches on behalf of the plaintiff, as if the plaintiff had given notice of trial. *Rotherwood* v. *Hay*, 13 Price, 453.

In a writ of entry, the demandant took the record down to the assizes for trial, but the cause was made a *remanet*; and the tenant appeared at the next assizes, but the demandant did not proceed to trial: Held, that the tenant could not sign judgment as in case of a nonsuit. *Doeman, demandant*; *Bull, tenant*, 4 Law J. C.P. 179, s. c. 3 Bing. 499.

The Court will not give the defendant judgment as in case of a nonsuit, where a special jury issue has been standing in the paper for three years, without any application being made to have it tried. *Racker* v. *Ansley*, 2 Chit. 243.

The rule requiring a term's notice of proceeding, does not extend to a motion for judgment as in case of a nonsuit. *Hockin* v. *Reece*, 2 Y. & J. 275.

Rule for judgment as in case of a nonsuit, after a peremptory undertaking, set aside on rule to shew cause, good cause being shewn why the plaintiff did not proceed to trial. *Hutchinson* v. *Hutchinson*, 9 Price, 389.

After a rule for judgment as in case of a nonsuit has been discharged, a rule for costs for not proceeding to trial may be obtained. *Thomas* v. *Williams*, 4 B. & C. 260, s. c. as *Lewis* v. *Thomas*, 6 D. & R. 217.

On a rule for judgment as in case of a nonsuit being discharged, the costs, on a peremptory undertaking being given, were ordered to be costs in the cause, against the usual practice. *Brown* v. *Tanner*, M'Clel. 593.

### (K) In Criminal Cases.

A sentence depending upon time, passed for a period longer than the law authorizes, cannot be reduced so as to carry it into effect for the prescribed legal time.

Nor can the judgment in such a case, when impeached upon error, be remitted to the inferior Court to amend; it must be reversed. *Rex* v. *Ellis*, 5 Law J. M.C. 1.

Upon a conviction at the Chester Assizes for perjury, the following entry was made upon the record: "It is therefore ordered, that the said L K be transported to &c., for and during the term of seven years." Upon error—Held, that the entry was merely an order, and not a judgment; and a *procedendo* was awarded, commanding the court below to proceed to give judgment.

The prisoner was, in the meantime, admitted to bail. *Rex* v. *Kenworthy*, 1 B. & C. 711.

The rule, that the defendant must be present when judgment is to be pronounced against him, is not inflexible. According to special circumstances the Court will deal with a motion for relaxing the rule. *Rex* v. *Bolts*, 4 Law J. K.B. 262, s. c. 5 B. & C. 334. s. c. 8 D. & R. 65.

The Court will pronounce judgment on a magistrate who has been convicted of a misdemeanor, in his absence, upon an affidavit stating that he is eighty years old, and extremely infirm. *Rex* v. *Constable*, 7 D. & R. 663.

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## JURISDICTION.

[See Appeal.]

A court of equity has no jurisdiction to try the validity of a will. *Jones* v. *Frost*, 1 Jac. 466.

Courts of equity derived no new jurisdiction from the 7 Geo. 2, c. 20. *Prœd* v. *Hull*, 1 S. & S. 332.

If a tribunal interferes with that over which it has no jurisdiction, its decision is absolutely a nullity, and therefore renders an appeal superfluous. *Attorney General* v. *Hotham*, 1 Turn. 219.

An interlocutory order of a court of competent jurisdiction in Ireland, does not bind a court of concurrent jurisdiction in England. *Ball* v. *Storie*, 1 Law J. Chanc. 214, s. c. 1 S. & S. 210.

A concurrent jurisdiction vests in the Exchequer and Duchy Court of Lancaster. *Cheetham* v. *Crook*, 1 M'Clel. & Y. 318.

Matters arising within the county palatine of Lancaster are within the jurisdiction of the Court of Exchequer. *Cheetham* v. *Crook*, 1 M'Clel. & Y. 307.

The Vice Chancellor of England has no authority to disturb or alter any order or decree made in Scotland. *Cruickshank* v. *Robarts*, 6 Mad. 105.

Where an injunction is obtained from the Lord Chancellor for want of answer, the Vice Chancellor has jurisdiction, upon the coming in of the answer, to dissolve that injunction upon the merits. *Hope Insurance Company* v. *Drinkwater*, 2 Law J. Chanc. 25.

*Semble*—That the Court has jurisdiction to order a reference to the Master, even upon a point which goes to destroy entirely the title of the plaintiffs to maintain the suit. *Graham* v. *Whitmarsh*, 2 Law J. Chanc. 42.

The Court has no authority to advance part of the fund in the cause to enable indigent parties to prosecute their claims to it. *Peck* v. *Beachey*, 2 Sim. 40.

*Quære*—Whether the Court has not jurisdiction to impound the whole sum, when the right only to a moiety of it is in dispute.

*Semble*—Where the Court has not power to impound the whole fund, it has not power to impound part of it to answer costs. *Kerrod* v. *Lawless*, 2 Law J. Chanc. 195.

Courts of equity proceed indirectly by process of contempt in all cases except in decisions upon a title to lands, in which they decree possession, and direct the sheriff to execute the decree.

What was the origin of the power of the Court, it might be difficult to determine; it now stands upon usage, and is not confined to cases precisely similar to those which have preceded, but is adapted to emergencies, to make the jurisdiction of the Court effectual.

Courts of equity giving judgment on the peculiar subjects of their jurisdiction, in cases of trusts, fraud and other cases, direct possession to be given, or direct tenants to attorn and pay rents, or compel the specific execution of agreements. In the case of chattels they frequently order specific delivery of the article demanded, but express their decrees and orders only by process of contempt.

In the case of realty, the Court orders the failing party to deliver possession; if he disobeys the order, the sheriff is directed to put the party in possession, for whom the decree is made. In the case of personal chattels, the Court operates on the person by process of contempt, and effects the end indirectly, which, according to their practice in such cases, is not permitted to be done *per directum*.

The substantial question is, whether such a power is necessary for the purposes of justice? If there were no precedent for the exercise of such a power, it would not be a substantial objection. *East India Company* v. *Kynaston*, 3 Bligh, 166-7.

A court of general gaol delivery has power to make an order prohibiting the publication of a trial, pending the proceedings, until the whole trial is completed; and as a court of record, to fine a party for contempt in disobeying such order. *In re Clement*, 11 Price, 68, s. c. 4 B. & A. 218.

And if the party, who *incurred* the contempt, be ordered to attend to answer the same, and neglect so to do, the Court will in his absence impose a fine upon him; and deem the order well served, if it be left at the newspaper-office, with the servant of the party who was the sole proprietor of the work. *In re Clement*, 11 Price, 68.

The jurisdiction of the Court of Common Pleas does not extend to bring a defendant up, out of a criminal custody, in order to remand him. *Freeman* v. *Weston*, 1 Law J. C.P. 72, s. c. 1 Bing. 221, s. c. 8 B. Mo. 81.

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## JURY.

(A) SPECIAL.
(B) VIEW.
(C) CHALLENGING, WITHDRAWING AND DISCHARGING JURORS.

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### (A) SPECIAL.

A motion for a special jury, directed by a decree, to try issues, is a motion of course. *Stuart* v. *Greenal*, 9 Price, 480.

After a cause had been entered to be tried by a common jury, a few days before the trial, a rule for a special one was taken out. On its being sworn to have been done for the purposes of delay, the Court discharged the rule for the special jury. *Buckle* v. *Hooper*, 1 Law J. K.B. 155.

In all cases where a rule for a special jury shall have been obtained for the trial of any cause in the county of Middlesex, and notice for summoning the same shall be given; such notice, together with the *distringas*, shall be left at the office of the sheriff of the said county, before seven o'clock in the evening next but one before the day on which such jury shall be required to attend, unless such jury shall be required to attend on a Monday, and then before seven in the evening of the preceding Friday; and all notices of countermand for summoning special juries shall be left at the said office, before 12 o'clock at noon of the day immediately preceding the day for which the jury was to have been summoned. *Reg. Gen.* 3 B. & C. 177, s. c. 4 D. & R. 836.

Where the defendant moves for a special jury, the plaintiff has a right to lodge a writ of special distringas, (and to be allowed the same in costs,) lest the defendant should fail to lodge the writ. *Anon.* 6 Law J. K.B. 33.

Held at Nisi Prius, that in a special jury cause the plaintiff's counsel cannot have a *tales* without the consent of the counsel for the defendant. *The Trustees of the British Museum* v. *White*, 3 C. & P. 289. [Park]

Where a special jury had not been duly summoned, —it was holden, that, on some of the special jurors appearing, the plaintiff might pray a *tales*. *Snook* v. *Southwood*, 1 R. & M. 429. [Littledale]

Talesmen can only be taken from the panel of the jury summoned to try the other causes, and not from the bystanders, since the 7 & 8 Wil. 3, c. 32. *Rex* v. *Hill*, 1 C. & P. 667. [Garrow]

Nor can they be taken from the crown side, to serve as talesmen in civil cases. *Rex* v. *Tipping*, 1 C. & P. 668. [Garrow]

The defendant was indicted for a libel. The nominal prosecutors were The Constitutional Association. Two of the special jurors appeared. The Crown prayed a *tales*. The defendant challenged it, because one of the sheriffs was a member of that association: and the Court held the objection to be good.

The jury process was then directed to the coroners, who summond the special jury. When called upon to fill up the jury, by selecting *de circumstantibus*, only one of the coroners appeared, and the Court said, that they must all be present.

The trial being put off again, the coroners summoned, not only the same special jury, but also persons to be in readiness in case a full special jury did not attend. There were two writs of *venire facias* to the record. The coroners, upon being called to select *de circumstantibus*, made up the jury out of the panel of the persons whom they had summoned to attend: The Court held, that two writs of *venire facias* were correct; that the coroners acted properly in summoning the same special jury as had been summoned by the sheriff; and that they were justified in procuring the attendance of persons in court from whom they might choose the *tales* to supply the places of the absent special jurors. *Rex* v. *Dolby*, 1 Law J. K.B. 241, s. c. 2 B. & C. 104, s. c. 3 D. & R. 311.

A fine, for not attending as a special juror at the Court of Common Pleas, at Westminster, having been imposed upon a gentleman, having a house in London and in Brighthelmstone, but who had resided the twelve months preceding at Brighthelmstone, the Court refused to remit it. *Ex parte Sir Thomas Clarges, Bart.*, 1 Y. & J. 399.

But where the party summoned had let his house, and was abroad, which fact was communicated to the summoning officer, the Court remitted the fine. *Ex parte Ford*, 1 Y. & J. 401.

Where the summons of a special juryman had by mistake been left at a wrong house, the Court remitted the fine, but required the affidavit of the summoning officer to that fact. *Ex parte Brown*, 1 Y. & J. 401.

The statute 24 Geo. 2, c. 18, s. 2, by which special jurors are allowed their fees for attendance and service, does not extend to a case where the record is withdrawn. *Clements* v. *George*, 4 Law J. C.P. 192.

*Reg. Gen.* Fees: 5 Law J. K.B. 328; s. r. 5 B. & C. 795.

If, in an action for large penalties, the plaintiff be nonsuited on account of the non-appearance of witnesses, the judge will not certify for a special jury merely on viewing the record, or because the witnesses seem to be persons of rank. *Orme* v. *Crockford*, 1 C. & P. 537. [Abbott]

Where a case turned solely on a question of law, and there was no fact in dispute between the parties, the Lord Chief Justice refused to certify for the special jury. *Wemys* v. *Greenwood*, 2 C. & P. 483. [Abbott]

### (B) VIEW.

A view in a criminal case cannot be obtained without consent. *Rex* v. *Redman*, 1 Ken. 304.

In an indictment for perjury, the Court will only under particular circumstances grant a view; and if there be any risk of its misleading the jury, it will be refused. *Anon.* 2 Chit. 422.

Neither party, nor either of the showers, should hold any communication with such of the jury who view the *locus in quo*, touching the matter in issue. *Griffith* v. *Thomas*, 5 Law J. K.B. 126.

### (C) CHALLENGING, WITHDRAWING, AND DISCHARGING JURORS.

That which is matter of challenge to a juror cannot be offered as an objection, after the trial, though not known to the party until afterwards.

Even that which, in general, is matter of challenge, cannot be taken on the trial in the case of a special jury. The time for taking the objection is on the striking of the jury.

Alienage is a ground of challenge to a juror; and if the party has an opportunity of making his challenge, and neglects it, he cannot afterwards make the objection. *Semble*—That since the 7 Geo. 4, c. 60, s. 27, alienage is not a ground even of challenge to a special juror. *Rex* v. *Sutton*, 6 Law J. M.C. 102, s. c. 8 B. & C. 417.

The circumstance of a juror being withdrawn, is no bar to another action for the same cause. *Sanderson* v. *Nestor*, 1 R. & M. 402. [Abbott]

If, after the trial of an issue out of Chancery, the jury are locked up for many hours and are not likely to agree when the judge is about to leave the town—the judge will discharge them of his own authority, if the parties decline consenting to their discharge; but if a jury be under such circumstances, in a cause depending between party and party, *semble*, that the judge would order that the jury should follow him in a cart. *Morris* v. *Davies*, 3 C. & P. 427. [Gaselee]

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## JUSTICES OF THE PEACE.

(A) JURISDICTION.
(B) POWERS AND DUTIES.
(C) PRIVILEGES.
(D) ACTIONS AGAINST.

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### (A) JURISDICTION.

Where a statute gives a discretionary power of mitigating penalties, it is a general rule, that there the legislature must be taken to have intended to place the matter under the jurisdiction of the justices of the peace. *Reeve* v. *Pool*, 4 B. & C. 155, s. c. as *Thompson* v. *Poole*, 6 D. & R. 29.

By 30 Geo. 2, c. 22, justices of the peace in London are authorized to make regulations respecting carts or cars let to hire.

They ordered, that if any cart or car was found in a place not appointed for a standing-place, or more carts were there than they allowed, that the owners should be liable to a penalty, and that the carts might be seized and impounded; and also, that no carman should come to the appointed places before a given hour, under a penalty; and then they ordered that all the penalties might be levied by distress and sale of the offender's goods.

The plaintiff came to an appointed place *too early* in the morning. The defendant seized his carts and horses, and impounded them until he paid a sum of money: The Court held, that the defendant had no right so to do. *Mold* v. *Clitherow*, 2 Law J. K.B. 26.

Where borough magistrates have a concurrent urisdiction with county magistrates, they may commit to the county gaol for trial, and may command hat the prisoner be brought before the borough urisdiction for trial, provided the place within their urisdiction, and in which the offence is charged to ave been committed, contributes to the county rate.

Borough magistrates, acting exclusively for their orough, which does not contribute to the county ate, and concurrently for the liberties of the borough, hich do contribute to it, may make the usual order n the county treasurer for expenses incurred on rosecutions touching offences committed within he contributory liberties. *Rex* v. *Musson*, 5 Law . M.C. 28, s. c. 6 B. & C. 75, s. c. 9 D. & R. 172.

Where a proceeding depends upon the question, hether justices of the peace had or had not jurisliction over the subject matter, their own order, reiting a fact which would give them jurisdiction, is ot sufficient evidence of the fact. *Rex* v. *Gilkes*, 6 Law J. M.C. 118, s. c. 8 B. & C. 439, s. c. 2 M. & R. 454.

(B) POWERS AND DUTIES.

A positive oath that a felony has been committed, s not necessary to justify a magistrate in granting warrant to search the premises, and apprehend the erson, of a party suspected of felony. *Elsee* v. *Smith*, 2 Chit. 304.

A magistrate seeing a person riding on a cart, ithout any person being with the horses to guide hem, requested to know the name of the owner of he cart. The person not only refused the informaion, but placed himself before the board, on which he owner's name was painted, so that the magistrate ould not read it. The magistrate then removed im from his situation and read the name. In an ction for the assault, the Court held, that the magisrate was not justified, by the 13 Geo. 3, c. 78, s. 60, n removing the driver of a cart from one part of it o another, in order to obtain the name of the owner f the cart, by reading it on the board attached to he cart. *Jones* v. *Owen*, 1 Law J. K.B. 139, s. c. D. & R. 600.

It is the duty of a magistrate to admininister the ath to the witness previous to his examination. herefore, where he examined witnesses first, and hen administered the oath, the Court held it very regular. *Rex* v. *Kiddy*, 4 D. & R. 735.

During the examination of a prisoner before ustices of the peace under a charge of felony, the risoner is not entitled, as a matter of right, to have person skilled in the law present as an advocate in is behalf. *Cox* v. *Coleridge*, 2 D. & R. 86, s. c. 1 . & C. 37.

It is unsettled, whether a magistrate has a right o commit a person who refuses to give evidence. nd if he does commit, and the warrant does not hew that there had been a person charged before im with an offence, it will be no bar to an action f trespass. *Cropper* v. *Horton*, 8 D. & R. 166.

The statute of 11 Geo. 2, c. 19, s. 16, does not equire that the magistrates, giving possession of eserted premises, should act on information given them on oath.

If the record of their proceedings states sufficient rcumstances to shew, that they followed all the equisites of the act, then it is evidence of itself, and is an answer to any action that may be brought against them. *Basten* v. *Carew*, 3 Law J. K.B. 111, s. c. 3 B. & C. 649, s. c. 5 D. & R. 558.

(C) PRIVILEGES.

The statute 43 Geo. 3, c. 141, extends protection only to magistates when the conviction has been quashed, and not when it is bad on the face of it, without being quashed. *Rogers* v. *Jones*, 3 Law J. K.B. 40, s. c. 3 B. & C. 409, s. c. 5 D. & R. 268, s. c. 1 R. & M. 29.

An acting justice of the peace is not bound to serve as an overseer of the poor, where there are other sufficient persons within the parish. *Rex* v. *Gayer*, 1 Ken. 492, s. c. 1 Burr. 245.

(D) ACTIONS AGAINST.

Under the 24 Geo. 2, c. 41, s. 1, a justice of the peace is entitled to notice of action when he acts as a justice of the peace, though what he does is not strictly within the scope of his office. *Bird* v. *Gunston*, 2 Chit. 459.

Although a magistrate exceeds his jurisdiction, he is entitled to the notice required by the 24 Geo. 2, c. 44, s. 1, before the party injured can commence his action. *Prestridge* v. *Woodman*, 1 B. & C. 12, s. c. 2 D. & R. 43.

Where the mayor of a borough, a justice of the peace in right of his office, took a fee for granting a licence to sell ale: Held, the same might be recovered back in an action for money had and received, without notice of action. *Morgan* v. *Palmer*, 2 Law J. K.B. 145, s. c. 2 B. & C. 729, s. c. 4 D. & R. 283.

A particular act of parliament, giving certain additional protection to a magistrate in the case of action against him, but not mentioning notice of action, does not thereby deprive him of the right to notice, under the general act, 24 Geo. 2, c. 44.

Accordingly,—where an act (2 Geo. 3, c. 28,) was confined in its operation to four counties; and declared that every action against a magistrate for anything done under that act should be brought within six months from the time the cause of action accrued; that the venue should be laid only in London or Middlesex, and that if the defendant obtained judgment, he should have treble costs; but did not mention notice of action:—in an action under this statute, the plaintiff was nonsuited, he not having given a proper notice under the general act, 24 Geo. 2, c. 44. *Rogers* v. *Broderip*, 5 Law J. M.C. 49.

A notice of action to a magistrate, under 24 Geo. 2, c. 1, must fully describe the cause of action; but need not state the *form* of action intended to be brought.

But if it mention one form of action, the plaintiff cannot resort to any other, even though the notice shew that the mention of that particular form of action is under a mistake. *Ford* v. *Abdy*, 5 Law J. K.B. 66, M.C. 41.

In the notice of action, to a justice of the peace, for illegally issuing a distress-warrant against the goods of the plaintiff, the warrant was stated to have been directed to J B, and, on its being produced at the trial, it was found to have been directed to E H: Held, bad. *Aked* v. *Stocks*, 6 Law J. M.C. 62, s. c. 6 Law J. C.P. 100, s. c. 4 Bing. 509, s. c. 1 M. & P. 346.

A magistrate, after he has pleaded, and issue is joined, and notice of trial given, may withdraw his pleas, pay money into court under 24 Geo. 2, c. 44, s. 4, and then plead the general issue again. *Nestor* v. *Newcombe*, 3 Law J. K.B. 211, s. c. 3 B. & C. 159, s. c. 4 D. & R. 476.

## KING'S BENCH PRISON.

[See PRISON.]

## LANDLORD AND TENANT.

[See DISTRESS, EJECTMENT, LEASE and INJUNCTION.]

(A) RIGHTS AND LIABILITIES OF LANDLORD.
(B) RIGHTS AND LIABILITIES OF TENANT.
(C) CONTRACTS BETWEEN.
(D) RENT.
(E) REPAIRS.
(F) NOTICE TO QUIT.

### (A) RIGHTS AND LIABILITIES OF LANDLORD.

As the right to possession revests in the landlord after the expiration of a regular notice to quit, he may, where the tenant has abandoned the premises, locked up the door, and left only a few articles of furniture therein, break open the door and take peaceable possession. *Turner* v. *Meymott*, 1 Law J. C.P. 13, s. c. 1 Bing. 152.

If a lessor wrongly cut trees, he cannot maintain trespass against the lessee, for taking them after they have been severed. *Channon* v. *Patch*, 4 Law J. K.B. 315, s. c. 5 B. & C. 897, s. c. 8 D. & R. 651.

A tenant, whose lease expired at Midsummer, continued in possession after that day, but no agreement was made as to the kind of tenancy which was to exist between him and his landlord. He paid a quarter of a year's rent at Michaelmas, and then gave notice that he should quit at Christmas, which he did. The landlord brought an action for a quarter of a year's rent, said to become due at Lady-day;—and the Court held, that if a tenant held over, the landlord has a right to waive the trespass, and consider him as a tenant for a year. *Bishop* v. *Howard*, 1 Law J. K.B. 243, s. c. 2 B. & C. 100, s. c. 3 D. & R. 293.

A landlord having dispossessed his tenant, under the 4 Geo. 2, c. 28, is not bound afterwards to shew that he complied with the injunctions of that act. *Doe* v. *Lewis*, 2 Ken. 320, s. c. 1 Burr. 614.

A landlord may maintain an action on the case, against his tenant, for obstructing a window which existed at the time of the demise, though the premises be of recent construction, and there be no express prohibition in the demise against the obstruction. *Riviere* v. *Bower*, 1 R. & M. 24. [Abbott]

A tenant having held over after the expiration of his term, his landlord, together with other things, took possession of crops severed from the land, under a writ of *habere facias possessionem*, executed six months after the expiration of the tenancy: The Court refused to exercise any summary jurisdiction, in referring it to the Prothonotary to ascertain the value of such crops, and require the landlord to pay over the amount to his tenant, after deducting the rent due from the latter to the former. *Doe d. Upton* v. *Witherwick*, 3 Law J. C.P. 126, s. c. 3 Bing. 11.

*Semble*—That a broker, who, when receiving rent under a distress, deducts a sum purporting to be for land-tax, is not to be considered as allowing the land-tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted. *Sanderson* v. *Hanson*, 3 C. & P. 314. [Tenterden]

A landlord's receiver allowed the tenant to make a deduction in respect of a payment for land-tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts: Held, that he could not distrain for the amount erroneously allowed, though the receipt given every year shewed the amount paid and the amount deducted. *Branston* v. *Robins*, 5 Law J. C.P. 13, s. c. 4 Bing. 11.

### (B) RIGHTS AND LIABILITIES OF TENANT.

It is doubtful whether limekilns built by a tenant for the purposes of trade, can generally be removed before the expiration of the tenant's term.

But if a lessee build a limekiln on the demised premises, and afterwards take a new lease, to commence from the expiration of the first, containing a covenant to repair and leave all erections and buildings belonging to the premises, he is liable to an action for pulling down the limekiln. *Thresher* v. *the East London Water-works*, 2 Law J. K.B. 100, s. c. 2 B. & C. 608, s. c. 4 D. & R. 62.

Where machinery had been affixed to a mill, and had been demised with the premises to a tenant, and without the landlord's permission, was wrongfully severed by the tenant, and seized under a *fi. fa.* by the sheriff and sold: Held, that no property passed to the vendee, and that the landlord might maintain trover for the recovery of the machinery. *Farrant* v. *Thompson*, 2 D. & R. 1, s. c. 5 B. & A. 826.

A tenant may assign manure, although he may thereby subject himself to an action. *Burbage* v. *King*, 2 Chit. 246.

Although a tenant cannot, in general, dispute his landlord's title, in an action for rent in arrear; yet under peculiar circumstances, this rule may be relaxed: hence, where a party distraining had acquiesced in the tenant paying over his rent to another claimant for six years, it was held, that the tenant in an action of replevin might deny the title of the party under whom he derived possession. *Neave* v. *Moss*, 2 Law J. Chanc. 25, s. c. 1 Bing. 360, s. c. 8 B. Mo. 389.

A party, who as tenant receives possession from another as landlord, is not allowed to dispute the title of the landlord.

But where a party is in possession, and attorns to another, from whom he did not receive possession, the attornment does not preclude the tenant from disputing the title of the persons to whom he attorns. *Cornish* v. *Searell*, 6 Law J. K.B. 255, s. c. 8 B. & C. 471.

If a person continue in possession of premises which he originally occupied under A B, and a stranger afterwards requires him to pay rent to him, if such payment be made through mistake or misrepresentation, the person so paying is not prevented under a plea of *non tenuit* in replevin, from shewing

hat the party making the demand had no right to all on him for the rent. *Gregory* v. *Doidge*, 4 Law . C.P. 159, s. c. 3 Bing. 474.

Evidence of the existence of a tenancy is conclusive in favour of the landlord's title; and, after such vidence, to the satisfaction of a jury, the tenant annot be allowed to prove even a title in himself to he premises in question, during any part of the me covered by the tenancy. *Doe d. Humphrisys* v. *Iawkes*, 4 Law J. K.B. 216.

*Semble*—That if a tenant pays taxes which he lleges ought to have been paid by his landlord, and fterwards pays rent for two years subsequently, ithout making any deduction, he cannot recover he amount in an action against the landlord. *Sanerson* v. *Harrison*, 3 C. & P. 314. [Tenterden]

The bailiff of a manor assigned to a servant in pril, pursuant to the terms of a lease, a tree for ouse-bote; the bailiff was discharged in July, and he tenant cut down the tree in October: Held, a ufficient delivery, and that the tenant was entitled o fell the tree in October. *Courtenay* v. *Fisher*, 5 aw J. C.P. 4, s. c. 4 Bing. 3.

A landlord and tenant entered into an agreement r renting a farm. The landlord covenanted that he the in-coming tenant should pay for the work and eds of the off-going crop. By the custom of the ountry the in-coming tenant was bound to pay for ich labour and seeds. The landlord did not pay r them.

The off-going tenant brought an action on the ustom, against the in-coming tenant, for a compenation.

The Court held, that the agreement did not furnish defence to the action; but that the in-coming tenit was liable. *Louth* v. *Enderby*, 3 Law J. K.B. 3.

An out-going tenant agreed to quit his farm, and sell his wheat crop, hay, manure, and other effects, a person, a friend of the in-coming tenant, who ok possession of them. There was not any agreeent in writing. Part of the effects were valued an appraiser appointed by the out-going tenant d the friend, who afterwards paid money on acunt; and the jury gave a verdict for the whole of e balance.

The Court held, that the plaintiff was clearly enled to hold the verdict for the amount of the effects us valued, and that he might appropriate the money id on account, to the reduction of the value of the heat crop.

The Court doubted whether the wheat crop was t such an interest in land, as prevented the plainf from recovering it.

But they said that it was the practice of the Court t to disturb a verdict where it was good for part; d the defendant was in conscience bound to pay e remainder. *Mayfield* v. *Wadsley*, 3 Law J. K.B. , s. c. 3 B. & C. 357, s. c. 5 D. & R. 224.

*Semble*—That where a fact is in the knowledge of party who is the proposer of a compact, and is act which, if known to the other, would be unfourable to him who proposes, the suppression of fact will be, in point of law, a fraud; although other party made no inquiry on the subject.

Accordingly, where a tenant proposed to his dlord another person to be tenant in his stead, he owing that the person he proposed had recently compounded with his creditors, and the landlord accepted that person as tenant, without making any inquiry,—it was held, that under these circumstances the surrender of the tenancy had been fraudulently obtained; and, the new tenant proving insolvent, the old one remained liable. *Bruce* v. *Ruler*, 6 Law J. K.B. 228, s. c. 2 M. & R. 3.

Where demised premises are burned down, and the lease does not provide for the case of accidental fire, the lessee has no equity to restrain the lessors from suing for the rent, or for the breach of covenants to repair, even though the lessor is bound to repair the outside of the premises.

Neither has he any equity to compel his lessor, who is so bound to repair, and who had insured the premises, to expend the money received from the insurance office in rebuilding any part of the premises. *Leeds* v. *Chestham*, 5 Law J. Chanc. 105, s. c. 1 Sim. 146.

### (C) CONTRACTS BETWEEN.

[See LEASE.]

If a tenant undertakes generally to pay "*all* taxes," he renders himself liable to the land-tax, though it be not specially named. *Amfield* v. *White*, 1 R. & M. 246. [Bayley]

A person took lodgings at a rent, which it was agreed should be paid half-yearly. He paid the first half year's rent. A day before the end of the next quarter, he offered to pay a quarter's rent, which was refused by his landlord. He then quitted the rooms. At the end of the year, a demand of half a year's rent was made, and he paid it: but he would not pay for the next half year.

The Court held, that these facts did not raise a presumption in law, of a taking from year to year. *Wilson* v. *Abbot*, 2 Law J. K.B. 215, s. c. 3 B. & C. 88, s. c. 4 D. & R. 693.

By memorandum under seal, A agreed to take and hire certain premises, and to purchase the fixtures, stock in trade, and such furniture as should be thought necessary, at a valuation to be made on a future day: Held, that this was not an absolute conveyance in the present fixtures. *Clayton* v. *Burtenshaw*, 5 B. & C. 41, s. c. 7 D. & R. 800.

If an agreement to let certain apartments and fixtures, be delivered over after signature, with an understanding, that the result shall be subject to the landlord's inquiries as to the sufficiency of the tenant: —*Semble*, that in an action for not performing the agreement, it is a question for the jury to say, whether the answer given by the parties referred to, were not sufficient to satisfy the condition, notwithstanding the landlord has deemed them insufficient, and refused to permit the tenant to enter. *Ward* v. *Smith*, 11 Price, 19.

Where a yearly tenancy has subsisted between a tenant for years and his under-tenant, it is no legal objection to the continuance of that tenancy, that the term of the tenant for years has run out, and that he continues to hold of the superior landlord as tenant from time to time for a shorter period than a year. If the under-tenant continue to occupy without any new agreement, he will be taken to have occupied as a yearly tenant. *Pearce* v. *Shard*, 6 Law J. K.B. 154.

The occupation of premises, and payment of a fixed annual rent, for the same, under a clause in an

agreement for a lease of other property "to accommodate" the tenant so occupying with such premises during the continuance of the intended lease, is a tenancy from year to year. *Doe d. Westmoreland* v. *Smith*, 6 Law J. K.B. 44, s. c. 1 M. & R. 137.

Upon an agreement made between plaintiffs and others with defendant, to grant him a lease of premises, upon which another person had a charge of an annuity, but who was no party to the lease which had been tendered to the defendant: Held, that the plaintiff was not entitled to recover rent, having shewn no authority to grant the lease; and, the agreement being wholly silent as to the payment of rent, he could not recover for use and occupation: Held also, that it was competent to the plaintiff to shew by parol that a signature to the agreement, purporting to be on behalf of another, was really made on his behalf. *Rumball* v. *Wright*, 1 C. & P. 589. [Best]

A parol tenancy may be waived by parol; and if the landlord agree to a tenant leaving in the middle of a quarter, and accept back the possession, he cannot recover either for the quarter which has been commenced, or for the tenant leaving without notice. *Grimman* v. *Legge*, 6 Law J. K.B. 321, s. c. 8 B. & C. 324, s. c. 2 M. & R. 438.

A party occupied premises, under an agreement for three years, at 45*l.* a-year, which expired at Midsummer, 1826; he did not then go out, nor did his landlord take any steps to compel him, but at the Michaelmas following, gave him notice to quit at Lady-day, 1827, or pay the rent of 50*l.* a-year. He continued in, but refused to pay more than the 45*l.* rent: Held, that, under the circumstances, he must be taken to have acquiesced with the new proposal, and was bound to pay the rent of 50*l.* *Roberts* v. *Hayward*, 3 C. & P. 432. [Best]

A tenant by his own act alone, and contrary to the terms on which he holds, cannot dissolve the relationship of landlord and tenant, and discharge himself from the liabilities to which he is thereby subject.

But where the landlord, by the express acceptance of a second tenant, or by acts which clearly shew such an acceptance, as the distraining upon the second tenant, and neglecting, during several years, to apply to the first tenant for payment of rent in arrear, indicates that he considers the first tenancy at an end, the first tenant is discharged from his liability.

Thus, where two persons, partners, occupied premises under an agreement for a lease to be granted to them jointly, but after some time dissolved partnership, when one of them quitted the premises, and the landlord subsequently received rent from, and several times distrained upon, the partner who continued to occupy, making no application to the partner who had quitted for five years, nor proceeding against him for twelve years; it was held, that there was good evidence for a jury to conclude that the relationship of landlord and tenant, with respect to the partner who had left the premises, had been determined, and that the landlord could not recover against him in an action for use and occupation. *Page* v. *Mann*, 6 Law J. K.B. 63.

Where the tenant is to enter upon the arable lands at the separation of the crop, and to quit at the corresponding period, and no special provision is made by contract, the law of custom may qualify the right of the in-coming tenant, and give to t out-going tenant certain privileges, as the right to e ter, for the purpose of threshing, after the expirati of his lease. *Roxburghe* v. *Robertson*, 2 Bligh, 1

## (D) RENT.

[See SHERIFF.]

A *net* rent is a sum to be paid to the landlord cl of all deductions; and if one agree to take a le at a *net* rent, he cannot object that the lease contai a covenant for him to pay the land and sewers tax *Bennett* v. *Womack*, 3 C. & P. 96. [Tenterden]

Rent arrear, either by deed or parol, ranks a specialty. *Thompson* v. *Thompson*, 9 Price, 471.

The rights of a landlord to distrain for rent arrear, is not superseded by his entering into agreement to accept interest upon the arre *Sherrey* v. *Preston*, 2 Chit. 245.

In covenant for five years' rent, due at the ex ration of a term of years, the rent day for the l half year not falling within it, the plaintiff may cover damages for all, except the last half yea rent. *Long* v. *Barronghs*, 1 Ken. 247.

A landlord avowing for double rent, cannot, un that avowry, (if he fail for the double,) take a ju ment for the single rent: the tenancy being differe *Johnstone* v. *Hudlestone*, 4 Law J. K.B. 71, s. c B. & C. 922, s. c. 7 D. & R. 411.

If a landlord, while his tenant is in the possess and use of apartments, enters and uses such premis or any part of them, that will deprive him of claim to rent. But where the tenant has left apartments vacant, and it is proper that fires sho be lighted in them—the landlord's merely light a fire, or even making use of it when lighted, not a sufficient taking possession to deprive him his rent. *Griffith* v. *Hodges*, 1 C. & P. 419. [Abb

On the issue, whether the plaintiff is tenan the defendant under a demise, for one year from 23d of April, 1821, and thence afterwards from y to year,—evidence, that the plaintiff has paid defendant rent, is not sufficient proof of the dem in issue. *Phillips* v. *Mosely*, 1 C. & P. 262. [Abb

Under process of outlawry, even in a civil acti the landlord of the defendant is not, in strictn entitled to rent by the stat. 8 Anne, c. 14, s The defendant's goods being forfeited in point law, the landlord's remedy is by motion to the eq able jurisdiction of the Court from which the pro issues; and not by action against the sheriff.

*Semble*—That the Court will give relief, by equity of the statute, where the Crown is not actu interested. *Brandling* v. *Barrington*, 5 Law K.B. 181, s. c. 6 B. & C. 467.

Where, in an agreement for the sale and ass ment of certain premises, there was a stipula "that in the meantime, and until the assign was made, the intended purchaser should pay allow the seller at the rate of 100*l.* per annum, the time of taking possession of the premises the completion of the purchase;" the intended chaser having taken possession, and one half-ye payment having become due before the completi the purchase: Held, that it was due as rent, that the sheriff levying on the goods of the occu under a *fi. fa.*, was bound by 8 Anne, c. 14, to it over to the seller, as landlord. *Saunders* v. *grave, bart.* 5 Law J. K.B. 192, s. c. 6 B. & C.

Under the 55 Geo. 3, c. 91, an act empowering a corporation to purchase subsisting interests in certain hereditaments, and directing that the purchase-money should be re-invested in land, and in the meantime be laid out in the funds, and the dividends paid to the persons entitled to the rents: Held, that neither persons who had taken leases after the passing of the act, nor the lessors in respect of their right to renew, were entitled to any compensation out of the purchase-money. *The Bishop of London's case*, 1 S. & S. 268.

The Court will not make an order upon a tenant to pay rent in arrear, though a receiver of the estate has been appointed. *Samuel* v. ———, 1 Law J. Chanc. 90.

Under a covenant in an indenture of lease, the Court will grant a rule for the Master to compute what is due for arrears of rent. *Wingfield* v. *Cleverley*, 13 Price, 53.

The assignee of a rent reserved by lease may maintain debt for the rent, although he may have no interest in the reversion. *Allen* v. *Bryan*, 4 Law J. K.B. 210, s. c. 5 B. & C. 512.

Whether a lessor can reserve rent to a stranger—*quere*.

But, where a lease was granted with rent reserved to a stranger, and the lessor and the stranger both joined in an action of covenant for the rent, it was held to be clearly bad. *Lord Southampton* v. *Brown*, 5 Law J. K.B. 253, s. c. 6 B. & C. 718.

### (E) REPAIRS.

A landlord, being threatened by his superior landlord with an ejectment for not repairing, gave his tenant, who was also bound to repair, notice to do some repairs. The latter person neglected to do them. The landlord entered, and, without the assent of the tenant, did the necessary repairs. The tenant afterwards sold his interest to a person who, before action brought to recover the amount of the sum thus laid out, had rebuilt the premises: The Court held, that the landlord had a right to insist that the premises should at all times be in repair, and that he might recover the sum of money so expended. *Colley* v. *Streeton*, 2 Law J. K.B. 25, s. c. 2 B. & C. 273, s. c. 3 D. & R. 522.

Where the house of a yearly tenant, not under an agreement to repair, became unsafe and useless from the want of repairs: It was holden—1st, that such tenant might quit without giving any previous notice; and 2nd, that the landlord was not entitled to any rent after the premises became so dilapidated as to be no longer inhabitable. *Edwards* v. *Etherington*, 1 R. & M. 268. [Abbott]

A took premises under a repairing lease, and underlet them to B, who also entered into a covenant to repair. The under lessee having suffered the premises to go out of repair, the original lessor sued the original lessee for his breach of covenant: The Court held, that the damages and costs of that action, and also the costs of defending it, might be recovered as special damages, in an action by the lessee against his under-tenant, for the breach of his covenant to repair. *Neale* v. *Wyllie*, 3 B. & C. 533, s. c. 5 D. & R. 442.

A covenant, that the tenant *should and would substantially repair, uphold, and maintain the said house*, renders the tenant liable to paint inner doors, inside shutters, &c. *Monk* v. *Noyes*, 1 C. & P. 265. [Abbott]

### (F) NOTICE TO QUIT.

Where tenant entered under an agreement for a lease for seven years, which was never executed: Held, that he was not entitled to notice to quit at the end of the seven years. *Doe d. Tilt* v. *Stratton*, 6 Law J. C.P. 50, s. c. 4 Bing. 446, s. c. 1 M. & P. 183, s. c. 3 C. & P. 164.

Where the landlords are partners in trade, a notice to quit, signed by one, on behalf of himself and the rest, will bind the tenant. *Doe d. Elliott* v. *Hulme*, 6 Law J. K.B. 344, s. c. 2 M. & R. 433.

On the 20th May 1824, A agreed to let to B certain rooms; B agreed to pay 61*l.* per annum rent, quarterly; and it was also stipulated that three months' notice by either party should terminate the tenancy. On the 20th August B served A with a written notice, that he should quit on the 20th of November following; two months after the expiration of the notice, B agreed to give up the keys, but soon afterwards refused, on the ground that the notice was bad: Held, first, that the agreement created a tenancy for a year certain, and that, therefore, the notice ought to have ended with the current year, unless there was a custom to the contrary; and, secondly, that B agreeing to give up the keys was no acquiescence in the notice. *Brown* v. *Burtinshaw*, 7 D. & R. 603.

A notice to quit, given by a tenant less than six months before the expiration of the current year of his tenancy, is not binding upon the tenant himself; and does not authorize the landlord, upon the tenant's refusing to quit, to charge him with the double rent under the statute 11 Geo. 2, c. 19, s. 18. *Johnstone* v. *Huddlestone*, 4 Law J. K.B. 71, s. c. 4 B. & C. 922, s. c. 7 D. & R. 411.

Six months before the end of the year, the tenant verbally gave his landlord notice of his intention to quit at the following Lady-day, which was accepted; and the premises were re-let by auction, at which the tenant attended and bid; but was out-bid by another, who was not let into possession: It was holden, that the tenancy was not determined, there being no regular notice to quit, nor a surrender within the Statute of Frauds. *Doe d. Huddleston* v. *Johnston*, 1 M'Clel. & Y. 141.

A party took possession of premises on the 1st of August, and at the Michaelmas following paid the half quarter's rent, and continued afterwards to pay quarterly, on the usual feast-days: Held, that in such case a notice to quit at Michaelmas was sufficient, and that although the landlord had at first given a notice expiring with the half quarter, it was not necessarily to be presumed from that circumstance that the tenancy was one from year to year, commencing with the half quarter. *Doe d. Savage* v. *Stapleton*, 3 C. & P. 275. [Park]

An authority from a landlord to his tenant to pay a charge upon the estate, in respect of a period subsequent to the expiration of the notice to quit, is not a waiver of the notice; nor is it an admission, that the person to whom it is addressed is filling the character of tenant at that period, because the tenant would be liable to answer for the amount in an action for mesne profits. *Doe d. Bath* v. *Scott*, 6 Law J. K.B. 110.

## LAND-TAX.

[See LANDLORD AND TENANT.]

The Royal Exchange Insurance Company, as such, is assessable to the land-tax. *Royal Exchange Insurance Company* v. *Vaughan*, 1 Ken. 321, s. c. 1 Burr. 155.

Although a redemption of the land-tax had taken place, the Court declined to certify this fact to supply a supposed defect of title for a trustee. *Ex parte Sparkes*, M'Clel. 518.

Land-tax redeemed by one who is *cestui que use* for life, and in possession at the time of the purchase, is personal property, and descendible to his personal representatives. *Monday* v. *Hurley*, 5 Law J. K.B. 212.

Surplus stock, arising from sales under the acts for the redemption of the land-tax, will be ordered to be transferred to the party, who, if it were laid out in the purchase of lands, would be entitled to have the lands conveyed to him in fee. *In the matter of Fortescue*, 3 Russ. 128.

## LARCENY.

[See Stat. 7 & 8 Geo. 4, c. 29.]

A person who has received *stolen* bank notes, without knowledge of the larceny, is entitled to maintain trover against a cashier of the Bank, who has refused to pay, and retains one of the notes, at the request of the party robbed. *Miller* v. *Race*, 2 Ken. 189, s. c. 1 Burr. 452.

A person under whose care sheep are specially placed, is guilty of a larceny if he converts them to his own use. *Rex* v. *Stock*, 1 R. & M. C.C.R. 87.

Where a parcel was left at a house, under the impression that it was for a lodger, who did not in fact live there, and it was claimed by the prisoner, who converted it to his own use: It was holden, that if the property was worth more than 40*s*. it was a capital offence. *Rex* v. *Carroll*, 1 R. & M. C.C.R. 89.

Where a larceny is committed in a furnished lodging, the property must be laid as the property of the lodger, and not of the landlord. *Rex* v. *Brunswick*, 1 R. & M. C.C.R. 26.

Where husband and wife do not cohabit, an indictment on the 3 & 4 W. & M. c. 9, against the latter for stealing goods in a lodging, *let to the wife*, is sufficient; for the letting may be stated according to the fact, or the legal operation. *Rex* v. *Hurrell*, 1 R. & M. 296, s. c. 1 R. & M. C.L. 1.

A piece of undivided silk handkerchiefs may be described in an indictment as *six handkerchiefs*, it being the custom of the trade to describe a set as so many handkerchiefs. *Rex* v. *Nibbs*, 1 R. & M. C.C.R. 25.

An indictment for stealing, taking, and carrying away a bag from the boot of a coach, is supported by proof that the prisoners had hold of the bag, and were endeavouring to pull it out of the boot when they were interrupted by the guard and dropped it. *Rex* v. *Walsh*, 1 R. & M. C.C.R. 14.

To support an indictment for stealing from the person, it must be proved that the thing was actually removed from the person: therefore, shewing that the article was raised one inch above the top of the pocket in a carriage, is of no avail. *Rex* v. *Thompson*, 1 R. & M. C.C.R. 78.

Upon an indictment for stealing a live animal, evidence cannot be given of stealing a dead one.

An indictment for stealing a dead animal, should state that it was dead; for upon a general statement that a party stole the animal, it is to be intended that he stole it alive. *Rex* v. *Edwards*, 1 R. & R. C.C.R. 497.

The statute 3 Geo. 4, c. 38, s. 2, (authorizing transportation for fourteen years, in cases of robbery by servants) does not extend to petty larceny. *Rex* v. *Ellis*, 5 Law J. M.C. 1.

To render a prisoner, convicted of grand larceny, a competent witness, he must be fined as well as imprisoned, unless the sentence directs burning in the hand, whipping, or hard labour, as well as imprisonment. *Rex* v. *Harling*, 1 R. & M. C.C.R. 39.

## LAW OF NATIONS.

Declarations made by persons, however eminent, assembled in congress, cannot overrule the established law of nations. *Le Louis*, 2 Dods. 252.

## LEASE.

[See LANDLORD AND TENANT, and COVENANT.]

(A) WHAT INSTRUMENT AMOUNTS TO.
(B) INVALID OR FRAUDULENT.
(C) CONSTRUCTION OF, IN GENERAL.
(D) COVENANTS.
(E) ASSIGNMENT.
(F) RENEWAL.
(G) SURRENDER. [See SURRENDER.]
(H) FORFEITURE.
(I) STAMP. [See STAMP.]
(K) PLEADING.
(L) EVIDENCE.

### (A) WHAT INSTRUMENT AMOUNTS TO.

An agreement "between A B and C D," by which "A B agrees to pay C D 140*l*. a-year, in quarterly payments, for a house, garden, &c. (describing the situation,) for the term of seven, fourteen, or twenty-one years, at the option of the tenant, the rent to commence from the 1st January" &c., is a lease, and not merely an agreement for one. *Wright* v. *Trevezant*, 3 C. & P. 441. [Best.]

### (B) INVALID OR FRAUDULENT.

[See POWER.]

Where waste land, which belonged to a vicarage, and had remained uninclosed and useless from the inability of the vicars to incur the expense of inclosure, was let (but had never been let before,) with the confirmation of the patron and ordinary, to C A P for three lives, C A P undertaking to reclaim the land, and to pay a rack rent, which was the most that could be obtained: Held, that such a lease was not binding on the incumbent's successor. *Doe d. Tennyson* v. *Lord Yarborough*, 1 Bing. 24, s. c. 7 B. Mo. 258.

Leases of glebe, and of rectorial and vicarial property, made between 1803 and 1816, are good; the

statute 43 Geo. 3, c. 14, having repealed the 13 Eliz. c. 20; and the provisions of the latter not having been revived until 57 Geo. 3. *Doe d. Cates v. Somerville*, 5 Law J. K.B. 28, s. c. 6 B. & C. 126, s. c. 9 D. & R. 100.

A lease of seventy-seven years is an alienation within the meaning of the clauses of an entail, prohibiting *alienation* and making void *dispositions* of the lands entailed. *Elliott* v. *Pott*, 3 Bligh, 134.

Acceptance of rent for many years by a remainder-man upon a lease granted by a tenant for life exceeding his power, does not make the lease valid as against the remainder-man in respect of a clause in the lease for perpetual renewal. *Higgins* v. *Rose*, 3 Bligh, 83.

Upon a bill by a tenant in remainder, under a marriage settlement, a lease at an under value, obtained by a solicitor from a tenant for life, being his client, and in circumstances of embarrassment: Held invalid, and rescinded on terms of paying for substantial improvements, and the usual terms in equity. *Ward* v. *Hartpole*, 3 Bligh, 470.

In 1804, A, tenant for life under a settlement with a power to grant leases for twenty-one years, concurred with B, the next tenant for life, in an agreement to grant to the steward and solicitor of A a lease of part of the lands, &c. in settlement for twenty-one years absolute, at a rent paid upon a valuation which omitted to estimate certain rights of common annexed to the lands, on the alleged ground that those rights were disputed by the copyholders of the manor. In 1809, B, having become tenant for life on the death of A, executed a lease according to the agreement.

In 1810, under an act for inclosure of waste lands, a very large allotment of the waste was made, in respect of the lands leased, the rights of common having been admitted. B died in 1816, when the reversion of the lands subject to the lease vested in C, who accepted the rent reserved till 1821, when he filed a bill to set aside the lease.

*Held*, in the court below, that the transaction was unimpeachable on the ground of fraud. On appeal, held, that the relief was barred by acts of confirmation and acquiescence; but whether considering the facts and the relation of the parties, the lease might not have been avoided, on the ground of fraud (or mistake), if the persons interested had questioned the lease recently after the transaction, *quere: semb. affirm.* *Lord Selsey* v. *Rhoades*, 1 Bligh. N.S. 1.

### (C) CONSTRUCTION OF, IN GENERAL.

A person being possessed of a piece of ground, marked out a road on it, and afterwards let the land, describing it as abutting on an intended way, *thirty feet wide*, the soil of which was not included in the lease. The premises were underlet, described as abutting on an intended way, and houses built on them.

The defendant bought the soil of the road and the land opposite to the houses, and built a wall, so as to make the way but twenty-seven feet wide, but still convenient enough to turn a carriage in any part of it.

A tenant of one of the houses brought an action; but the Court held, that there was not an implied grant of a way of thirty feet wide, and, as there was a convenient road, that the action could not be maintained. *Harding* v. *Wilson*, 1 Law J. K.B. 258, s. c. 2 B. & C. 96, s. c. 3 D. & R. 287.

A agreed to demise certain premises to B, who undertook to build houses thereon, at the rate of so many in each year; A was to grant separate leases of each house to B, as soon as it was covered in, but if the houses were not built within a specified time, B had a power of re-entry on the demised part of the premises. B subsequently contracted with C for the building of some of the houses, and C was to have two of them conveyed to him as a payment; A agreeing, by letter, to grant to C such leases as B would be entitled to under the first-mentioned contract; C had fulfilled his contract, but B had not satisfied the condition of his contract with A, who had, in consequence, recovered by ejectment the two houses which were to have formed C's remuneration. The bill sought from A a specific performance of the agreement to grant leases of the two houses to C. And upon a motion for an injunction to restrain A from granting leases to any person except the plaintiff, the equity of it was discussed: But held, that the plaintiff had no equity against the original lessor; and the only right the plaintiff had was, according to A's engagement, to such a lease as that lessee would be entitled to claim. *Anon.* 1 Law J. Chanc. 25.

Where there are clauses, some of which contain words of agreement or covenant, and others contain words of agreement or covenant and also words of condition, the deed shall be construed so as to give effect to both. *Doe d. Henniker* v. *Watt*, 6 Law J. K.B. 185, s. c. 8 B. & C. 308.

In debt against a surety, on bond conditioned for the payment of rent by a third person (lessee,) pursuant to the covenant in the lease, the covenant being with a proviso that if the rent should be unpaid for forty days after the stated day (although not demanded,) the lease should be void: Held, that such proviso did not vacate the lease entirely, although it did as against the lessee; and that the payment being to be made at the mansion house of the lessor, no demand was necessary. *Reds* v. *Farr*, 6 M. & S. 121.

A lease was dated 25th of March 1783, *habendum* from 25th March *now last past*: Held, that the term commenced from the 25th of March 1782. *Steels* v. *Mart*, 4 B. & C. 272, s. c. 6 D. & R. 392.

An action of ejectment disclosed this lease, that one of the lessors was an original lessee for the term of his natural life, and the other a person to whom he had granted a lease for a term of years certain, seven of which would remain unexpired on, &c.; and they thereby demised to the lessee the premises, *habendum* from, &c., for and during the two several terms therein mentioned, if the lessee should so long live, and the term and estate of the original lessee should so long continue. To this lease there was a memorandum subscribed, providing that the rent reserved should be paid during the first seven years to the intermediate lessee, and afterwards to the original lessee during the term of thirty years, if his interest should so long continue; and that the new lessee, his executors, administrators, and assigns, should and might have liberty to quit a part of the premises demised at any time during the term, upon giving twelve months notice: Held, that the lease and memorandum must be taken together, and con-

strued as one entire instrument; and that the intention of the parties expressed in the latter, so controlled the former part of it, as to extend the *habendum* beyond the term of the life of the lessee, giving him a lease for thirty-seven years, determinable at the death of the lessor. *Weak* v. *Escott*, 9 Price, 595.

Where a lease contains a proviso, that upon nonpayment of rent by the lessee the term shall cease, the power of determining the lease is vested in the lessor, and not the lessee. *Reid* v. *Parsons*, 2 Chit. 247.

Under a lease for years, with a condition, that if the lessee shall not so long live, then remainder over: Held, that the remainder-man shall, upon the lessee's death, enjoy during all the residue of the years to come. *Right* v. *Cartwright*, 1 Ken. 529, s. c. 1 Burr. 282.

An instrument by which A agrees to let, and B to take, certain premises, on the terms that A shall pay certain specified rents, varying in amount, at the end of every three years, up to a specified date, and which provides, that, from and after that date, "*he shall pay the clear annual rent of 9l. till the end of the lease*," but does not mention any time at which the lease is to terminate, is good only for the time previous to the date at which the 9*l.* is to commence. *Gwynne* v. *Mainstone*, 3 C. & P. 302. [Best]

Under a parol demise from year to year, by a tenant for life, with power to lease by deed, &c., and under written agreements for leases not exceeding three years, signed by the lessees, but not by the tenant for life, though witnessed by his agent, the interest of the lessees determines with the life of the lessor, and the rents are apportionable. *Symons* v. *Symons & Powell*, 6 Mad. 207.

A husband and wife made a lease of some premises, according to 32 Hen. 8, c. 28, s. 3, with a reservation to both of them during the life of the wife, and afterwards to her heirs or assigns.

The wife died, and the tenant, being threatened with legal proceedings, attorned to the heir of the wife.

The husband brought an action for rent which had accrued after the death of the wife.

The Court of Common Pleas held, that the term continued notwithstanding the decease of the wife, and, consequently, that the heir could not eject the tenant, but was entitled to the rent; and that the husband could "*not*" recover any rent become due after the death of his wife, although the tenant had not actually been disturbed by her "*heir*"; which judgment was affirmed by this Court. *Hill* v. *Saunders*, 4 Law J. K.B. 2, s. c. 4 B. & C. 529, s. c. 7 D. & R. 17.

An exception in a lease is to be construed strictly against the lessor; and, therefore, where the language is doubtful, the lessee shall have the benefit of the doubt.

A demise of a tenement for three lives, contained an exception of "all timber and other trees; but not of the annual fruit thereof." There was a clause making the lease void, if the tenant should cut "any maiden or sound pollard tree:" It was held, that apple-trees were not excepted; and that the exception of trees bearing annual fruit might be satisfied by referring it to other than apple-trees, which were on the premises; such as oak, &c., acorns being considered as fruit. *Bullen* v. *Dening*, 4 Law J. K.B. 314, s. c. 5 B. & C. 848, s. c. 8 D. & R. 657.

Under an exception in a lease, of all timber trees, and young saplings likely to become trees, a lessor is not justified in cutting decayed trees, which are fit only for fuel. *Channon* v. *Patch*, 4 Law J. K.B. 316, s. c. 5 B. & C. 897, s. c. 8 D. & R. 651.

Exception of the tithes of particular lands in a lease, seems to import a claim in the lessor to the tithes excepted; but the parol declaration of a former owner, that he was not entitled to the tithes, gives a construction to the exception in the lease. *Norbury* v. *Meade*, 3 Bligh, 261.

A tenant, by a clause in his lease, was bound "at his removal, to leave upon the land all the dung and manure of the preceding year, the value to be paid by the succeeding tenant, &c. and at no time to sell or give away any of the hay or straw of the said farm, which shall always be spent on the ground."

Held, on appeal (reversing the judgment below), that the tenant under this contract is not entitled to take away or sell, (*or semble*, to have value for) the straw of the last, or away-going crop; and that the lessor is entitled to have and maintain letters of suspension and interdict, if the tenant threatens to sell the straw.

A provision in a lease, that the dung and manure of the last year is to be left upon the ground, and paid for according to a valuation, and the absence of any such provision, as to the hay and straw, does not shew that the tenant was to be at liberty to carry and take away, at the expiration of the lease, the hay and straw of the last year, the prohibition extending, not only to selling or giving away, but providing that the hay and straw shall be always spent on the ground, is to be considered as applicable, not only to the currency of the lease, but to an act which takes place at or after its determination.

A tenant occupying a farm by lease under an express contract, having no hay or straw which was taken away by the precedent tenant, receives a consideration for those articles in the amount of rent to be paid by him.

The law presumes a consideration for this sacrifice, on the part of the tenant, in the nature and conditions of the contract. He binds himself by express obligation; and it must be inferred and implied, that in his contract he stipulated for some equivalent benefit.

From the provision, that the dung and manure are to be left on the ground, and paid for, an inference is not to be drawn that what, according to the expressions of the contract, the tenant is not bound to leave, he may carry away, nothing being said as to any payment for hay and straw; and the clause which provides what shall be done at the removal, that is, the expiration of the lease, stipulating that the hay and straw of the farm "shall always be spent on the ground." If the expression had been, that the tenant should spend it, that might lead to a different construction. *Roxburghe* v. *Robertson*, 2 Bligh, 156.

The provision that the tenant shall at no time sell or give away the hay or straw, is absolutely incompatible with the supposition of a right in the tenant, in any manner, to eloign those articles during the

year. *Semble*, That the express words of the rument prevent all conjectures as to any intent to except the last year of the lease. *Roxburghe obertson*, 2 Bligh, 156—67.

tenant, by the terms of his lease, was bound to old and maintain the houses let in sufficient ntable condition during the lease, and to leave n so at his removal, subject to a special provision the timber in the sub-tenants' houses should be ed at the commencement, and at the expiration e tack; and that the out-going tenant should or receive from the proprietor or in-coming nt, the difference in value at those respective s.

he lease contained a further provision, that if tenant should build an *additional* steading durthe lease, the value thereof, at the expiration of lease, to be ascertained by arbiters, at that time ld be allowed to him. Holding under this lease, tenant pulled down the old buildings, and built w steading.

was decided on appeal, reversing in part the gment of the Court below, that he was not orized to pull down the old buildings without ilding or substituting others, in their place: the knowledge of such unauthorized acts without rference on the part of the landlord, did not clude him on the principle of acquiescence, ch is not applicable to such a case; but, that the nt is entitled to the value of so much of the new ding as ought to be considered as an additional ding, and not a substitution for the old buildings, ect to the provision in the lease, as to the er in the sub-tenants' houses. It was held also, the tenant was entitled to be allowed for so h of the new buildings as, consistently with the er finding, he was entitled to have an allowance according to a valuation to be fixed at the time moval, and not according to actual expenditure. *lair* v. *Gordon*, 3 Bligh, 21.

## (D) COVENANTS.

Vhat are *usual covenants* is a question of fact for jury, and not a question of construction for the rt. *Bennet* v. *Womack*, 2 C. & P. 96. [Tenden]

he phrase "usual covenants" in an agreement hing a lease, may be explained by reference to nature of the premises, and the general practice regard to leases of premises of that descrip-

ccordingly, where an agreement was for an gnment of the lease of a public-house, which described as holden at a certain net rent, upon l and common covenants; and it appeared that ease contained a covenant by the tenant to pay and-tax, sewers-rates, and all other taxes, and viso for re-entry if any other business than of a victualler should be carried on in the house; it appeared that a considerable majority of pubouse leases contained these provisions; it was , that they were fairly described in the agree- as usual covenants. *Bennet* v. *Womack*, 6 J. K.B. 175, s. c. 7 B. & C. 627, s. c. 1 M. & 44.

he *deposit* of the lease of a house as a security epayment of a sum of money lent to the lessee, t a breach of a covenant, that the lessee will not let, set, assign, transfer, set over, or otherwise *part with* the premises, *the indenture of lease*, or his interest therein. *Doe d. Pitt* v. *Hogg*, 2 Law J. K.B. 89, s. c. 4 D. & R. 226, s. c. 1 C. & P. 160: s. P. *Doe d. Pitt* v. *Laming*, 1 R. & M. 36. [Abbott]

Covenant by a lessee, that he would not do any act, matter, or thing, upon the demised premises, which might be, grow, or lead to the damage, annoyance, or disturbance of the lessor, or any of his tenants, or any part of the neighbourhood; and the proviso for re-entry was, that the lessee should not permit any person to inhabit the premises who should carry on certain specified trades or businesses, (that of licensed victualler not being one of those), or any other trade that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants: The Court determined, that although a public-house was opened on the premises, yet it was not a breach of the covenant or proviso. *Jones* v. *Thorne*, 1 Law J. K.B. 200, s. c. 1 B. & C. 715.

Several engines, and other fixtures, used in mining and smelting, were standing on the premises at the date of the demise, which engines were purchased by the in-coming from the out-going tenants, and were not mentioned in the general words of the demise, nor in the clause of re-entry. But the lessees covenanted to keep the "said engines" (the word *engines* not having occurred before,) in good and tenantable repair, and the same in such state to yield up at the end, or other sooner determination of the term. The lessor covenanted that the lessees might remove (at the end of the term or sooner, except as in the cases and events before mentioned, in any of which, a taking in execution being one, it was made lawful for the lessor to re-enter, as into his first or former estate,) all such engines, &c. as had theretofore been erected, and all such as should by themselves be erected for carrying on the smelting business. By other covenants, the lessees undertook to build an engine on the mining premises; and the lessor, that the lessees might, at any time during the term, or within twelve months after the expiration or other sooner determination thereof, remove all such engines as last mentioned, unless the lessor should wish to repurchase the same. The lessees built one engine, and part of another, during the term: Held, that upon the forfeiture of the demise, by the taking in execution, the lessees had lost their right to remove any of the fixtures, and that they all belonged to the lessor, such being the intention of the parties. *Rex* v. *Topping*, M'Clel. 544.

By lease executed between the defendant of the first part, and E M B of the second, premises were demised for the term of ninety-nine years, if he E M B, E C, and E P M should live so long; subject, among other provisos, to a condition, that if E M B, his executors, &c., should at any time thereafter, upon the death of any or either of the life or lives, by which the said demised premises were then held, be desirous to renew his estate and interest, by adding a new life or lives in lieu of the person or persons so dying, and should give notice in writing to or for the defendant, his heirs, &c. within one year next after the death of any or either of the said person or persons, for whose life or lives the said premises were then held, then in such case the defendant, his heirs, &c. should execute a good and

sufficient and effectual lease of the premises, for a new term of ninety-nine years, determinable on the death or deaths of such lives thereinbefore mentioned. —*Quære*, whether, under the above covenant, it is not absolutely necessary that the party, claiming to be entitled to the benefit of the renewal, should not be able to shew, that a claim was duly made within twelve months after the death of the *cestui que vie*, who died first:—or whether the covenant may not be enforced after a claim of renewal made within twelve months after the expiration of the second life, where the party beneficially entitled to the right of renewal stated in his bill to compel performance of the covenant, the temporary loss of the lease, and his consequent ignorance of the covenant, as the reason why application was not made within twelve months after the dropping of the first life: Held to be a question which involved so much doubt, as to be a good cause for not dissolving an injunction obtained to restrain parties proceeding in ejectment. *Maxwell* v. *Ward*, 11 Price, 3.

Where the original lessee covenants to keep the premises insured, and afterwards a sublease is granted by his executor, without any covenant to insure; undisturbed possession under this sublease for twenty years, will entitle a Court to presume, that no breach of covenant took place during the life of the original lessee. *Montresor* v. *Williams*, 1 Law J. Chanc. 152.

Under a covenant in a lease, in case the premises shall be burned down, that the lessor will *rebuild and replace* the same as before the fire happened,—it was holden, that the landlord is only to rebuild what he let, and not bound to erect everything which the tenant had built during his tenancy. *Loader* v. *Kemp*, 2 C. & P. 375. [Best]

By lease, lessor demised for a term of years a piece of ground at a fixed annual rent; the tenant covenanted not to build on the land without the licence of the lessor; the lessor covenanted to pay all taxes already charged or to be charged upon or in respect of the demised piece of ground during the continuance of the term. At the time when the lease was executed, the lessor gave a licence to the lessee to build on the land demised. The lessee did build, and thereby increased the annual value of the premises: Held, that the landlord was liable upon his covenant to pay the taxes in proportion to the rent reserved, and not to the improved value.

The tenant compounded for his taxes under the provisions of a local act, and in consequence of such composition, her premises were assessed at a less annual sum than the improved annual value: Held, that the tenant paid taxes in respect of the whole improved annual value, and that the landlord was to pay that proportion of the taxes paid which the rent bore to such improved annual value. *Watson* v. *Horne*, 6 Law J. K.B. 73, s. c. 7 B. & C. 285, s. c. 1 M. & R. 191.

A tenant for life under a marriage settlement has a power to grant leases for any term or number of years, determinable on three lives. He grants a lease to A for his life, and those of his two sons *absolutely*, covenanting for quiet enjoyment, *for and during the said term*, without interruption, &c. of lessor, his heirs and assigns, or any other person claiming under him or any of his ancestors. A dies, and the defendant, his eldest son, who is tenant in tail under the settlement, evicts the plaintiff, who is the eldest son and heir of lessee, the third *ce que vie* being still living, on the ground that the l was a freehold lease; whereas, by the power, a chattel lease could be granted. In an actio the covenant for quiet enjoyment, contained in lease, it was held—First, that the eviction by tenant in tail during the life of two of the *cestuis que vie*, was a breach of the covenant for q enjoyment during the term: and secondly, that *term* granted by the lease and referred to in covenant, was intended by the parties to be a to continue during the three lives, and not m during the life of the lessor, though that turne to be its legal operation. *Evans* v. *Vaughan*, 3 J. K.B. 217, s. c. 4 B. & C. 261, s. c. 6 D. & R.

Where a covenant is against the acts of parti persons, it extends to illegal as well as legal performed by them; therefore, an entry on the l compelling tenants to attorn, and depriving the son in possession of the title deeds, are breach a covenant "*for quiet enjoyment*," against all c whatsoever at law or in equity. *Fowle* v. We Law J. K.B. 17, s. c. 1 B. & C. 29, s. c. 2 D. 133.

A granted a lease of certain premises to which was contained a power of re-entry, if his assigns should use them for any shop, warehouse or for carrying on any trade; B granted an u lease to C, with the usual covenants for quiet e ment, but he did not insert in it any covenant s to the one contained in the original lease, carrying on a trade. C underlet it to D, who, an auctioneer, openly carried on his business premises, and in consequence was ejected by brought an action against B on the covena quiet enjoyment; but the Court held that it not be maintained. *Spencer* v. *Marriott*, 1 L K.B. 134, s. c. 2 D. & R. 665, s. c. 1 B. & C

In an action upon a covenant for quiet enjoy an assignee who has converted lands assign him into pleasure grounds, and has erected ings on them, cannot recover the value of th provements, unless the special damage is sta his declaration specifically. *Quære*, whether stated he could recover. *Lewis* v. *Campbell*, 8 715.

## (E) ASSIGNMENT.

An agreement to assign a lease, is sufficie dence to support a count in a declaration for promised to be paid, on an agreement to pro lease. *Boone* v. *Mitchell*, 1 Law J. K.B. 25, B. & C. 18.

Unless an assignee of a lease is expressly in the lease as a covenantor, he is not liable original lessor for a breach of covenant not r with the land. *Grey* v. *Cuthbertson*, 2 Chit.

Although a lease has been assigned, yet lessee covenant for himself and his assigns lutely to repair without qualification, he is bo repair, notwithstanding the premises are des by fire. *Bullock* v. *Dommitt*, 2 Chit. 608.

*Semble*, that, in a declaration charging the nee of a lease at the suit of the lessor, the e the lessee is a material averment, and travers

In a declaration by the executors of one of lessors, against the assignee of the lease, it is sary for the plaintiffs to shew what estate the

had in the premises, although the covenant was their testator alone; for the assignee is charge- only by reason of the privity of estate, and not eason of any privity of contract. *Wiggins* v. *on*, 6 Law J. K.B. 93.

he assignee of part of leasehold premises is not e to the covenants in the lease, except in respect e part which is assigned to him.

at the lessor may, in the first instance, sue such signee in respect of the whole; and the assig- must, by his plea, shew that his liability is con- to the particular part.

nd if, as to that part, he is joint tenant with rs, who are not joined in the action, he cannot himself of that non-joinder, except by plea in ment. *Mercerou* v. *Dowson*, 4 Law J. K.B. s. c. 5 B. & C. 479, s. c. 8 D. & R. 264.

n action on a covenant for quiet enjoyment may aintained by the assignee of an assignee of a e of a term for years, entered into by the lessee, the first assignee and his assigns, upon the as- ment of the term to him. *Lewis* v. *Campbell*, unt. 715.

nder an agreement for a lease, containing a nant against alienation, and a proviso for re- y for breach of the covenant, the lessee, after g been in possession for many years, conveyed is property to trustees, for the benefit of his itors, and subsequently a commission of bank- issued against him, and he was found bankrupt. he trial of an ejectment at law, it was held, that the was an act of bankruptcy, and void; and that d not operate as a valid assignment of the lease, was therefore no forfeiture. On a bill by the nees for the specific performance of the agree- t, the Court decreed that the assignees were led to a lease, according to the agreement, on *nally* entering into those covenants which the rupt, if solvent, would have been bound to r into. *Powell* v. *Lloyd*, 2 Y. & J. 372.

## (F) RENEWAL.

covenant for perpetual renewal, does not entitle essee to a similar covenant, from assigns of the in subsequent leases. The subsequent leases t to contain a recital of the original covenant. *rnar and Company of Copper Mines* v. *Beach*, 1 J. Chanc. 84.

ovenant in a lease for a perpetual renewal, upon e within *one year next after the death of any or r of the life or lives;* informal notice about five s after the dropping of the first life, with an ation of accident, and ignorance of rights; and ular application after the determination of the nd and third lives, both within one year:—lessee not entitled to a renewed lease, determinable ither three or two lives, with a similar covenant, bill retained for a year, with liberty to bring an n at law. *Maxwell* v. *Ward*, 1 M'Clel. & Y. 458.

lessee who has the power of renewing his term giving six months notice of his intention so o before its expiration, by his preparing a new , &c. cannot, though he give notice of such his tion, demise the premises to a third person, nd the expiration of the first term, unless he prepared a new lease, and has endeavoured to t executed. *Mackay* v. *Mackreth*, 2 Chit. 461.

testator being possessed of a leasehold, subject to a nominal yearly rent, under an ecclesiastical corporation, (who were not bound to renew, but were in the habit of renewing every fourteen years, upon the payment of fines, leases of houses held under them,) bequeathed it to A for life, subject to the payment of all fines and rents as they became due, yearly and for every year, and after the death of A, to B absolutely: Held, that A was not bound to renew the lease during her life. *Capel* v. *Wood*, 3 Law J. Chanc. 91.

The renewal of a lease upon the terms contained in an award, which had been twice enforced by the Court, was again enforced. *The Attorney General* v. *Clements*, 1 Turn. 58.

## (H) FORFEITURE.

A demise may contain a clause of forfeiture, although it be not under seal; and, therefore, where by demise, not under seal, it was stipulated and conditioned that the tenant should not underlet, it was held, that underletting incurred a forfeiture. *Doe d. Henniker* v. *Watt*, 6 Law J. K.B. 185, s. c. 8 B. & C. 308.

*Quære*—As to the construction of a proviso in a lease, that, in certain events, the lease shall cease and be void, and the lessor may re-enter. *Dakin* v. *Cope*, 2 Russ. 170.

It was covenanted that the lessor should re-enter if the premises should be extended or taken in execution. An extent at the suit of the Crown having issued against the tenant, and the lessee's interest seized:—It was holden to amount to a forfeiture. *Rex* v. *Tipping*, M'Clel. 544.

A lease contained two conditions of re-entry, the one, that if the yearly rent was in arrear and unpaid thirty days after it became payable; the second was, in case the yearly rent was not paid at Lady-day and Michaelmas: Held, that the landlord had a right to re-enter on non-payment of each half year's rent: Held also, that the former clause only contained the description of the amount of the rent to be annually paid. *Doe d. Rudd* v. *Golding*, 6 B. Mo. 231.

Where a lease is declared to be void, in case the tenant shall commit waste to a certain amount, the question of waste to that amount should be left to the jury.

And the lessor cannot, in such a case, claim to re-enter, merely because part of the buildings have been pulled down and substituted by others against his consent: the question of waste to the specified amount must still be left with the jury. *Doe d. Darlington* v. *Bond*, 5 Law J. K.B. 68, s. c. 5 B. & C. 855, s. c. 8 D. & R. 738.

A corporation, by agreement under their common seal, dated 24th July 1811, covenanted with E to grant him a building lease of certain ground, for ninety-nine years, as soon as certain houses were finished thereon. E proceeded to build the houses, and on the 21st January 1812, obtained a licence from the corporation to build a particular house as a baker's shop, which he proceeded with accordingly, but put in no shop-front, the space left for it being boarded up. On 30th December 1812, the corporation, according to their agreement, granted a lease to E, containing a covenant by him, not to cut, maim, or injure any of the principal timbers or walls of the demised premises, nor to convert, use, or occupy them into or for any shop, &c. without the previous

consent in writing of the lessors, their successors, &c.; and also a proviso for re-entry on any breach of covenant. In 1814, the house, which had been left unfinished, was completed by E as a private house, the space intended for the shop-front being filled up with a brick wall, in which two windows were left. The house was occupied as a private dwelling till October 1822, when E took out the last-mentioned brick wall, and, placing a shop window in its place, commenced the business of a baker there.

Held, a breach of covenant, by which a forfeiture was incurred; and that the original licence to build the house as a baker's shop had no operation as such, after the lease executed containing the above covenants. *Doe d. Foundling Hospital* v. *Evans*, 4 Law J. K.B. 231.

A forfeiture cannot be enforced in respect of an act, which of itself might work a forfeiture, but which, by a subsequent act, is rendered void. Thus, where a lease contained a clause of forfeiture in case the tenant should assign that lease, and the tenant did assign it to trustees, for the benefit of his creditors, and upon this deed (treated as an act of bankruptcy), a commission issued against the tenant;—it was held, that this assignment, turning out to be void, was not sufficient to entitle the landlord to enforce it as a ground of forfeiture. *Doe* v. *Lloyd*, 4 Law J. K.B. 159.

If, in ejectment against the assignee of a tenant, on a forfeiture of a lease by breach of covenant, it appears that the landlord so acted as to induce the tenant's assignee to believe that the latter was doing all that he ought, the landlord cannot recover, although the covenants be actually broken, and there be neither a release nor a dispensation on the part of the landlord. *Doe d. Knight* v. *Rowe*, 1 R. & M. 343, s. c. 2 C. & P. 246. [Abbott]

Where the lessor of plaintiff had demised the premises, with a right of re-entry, if the buildings were not finished within a month; and the lessee immediately after assigned the premises, in trust, to secure an annuity to defendant, the buildings not being completed within the month, the lessor advised the defendant to take the premises and finish the buildings, upon which he purchased the original lessee's interest, and proceeded with them, but they were never completed; and upon objections that there was a waiver of the forfeiture after it had accrued: Held, that if the defendant had not any previous interest in the premises, and had been induced by the lessor's advice, given after the forfeiture, to purchase the lease, he could not have insisted on the forfeiture; but the expression, "take the premises," clearly referring to an interest then existing,—the defendant not having complied with the condition, could not defeat the plaintiff's right of entry. *Doe d. Sore* v. *Ekins*, 1 R. & M. 29. [Abbott]

Where the defendant took land under a building lease, and covenanted to build and complete certain houses within a year, but failed to do so: Held, that this was a forfeiture, and was not waived by his having caused workmen to be employed in finishing them after that time. *Doe d. Kensington* v. *Brindley*, 5 Law J. C.P. 3.

If rent, which has grown due after a forfeiture, be accepted by the landlord, with a knowledge of the forfeiture, such acceptance is a revival of the lease, though the clause which gives the forfeiture declare, that, by the act in question, the leas be absolutely "void." *Armsby* v. *Woodward*, J. K.B. 199, s. c. 6 B. & C. 519.

But a receipt of rent after an ejectment brou a forfeiture, is no waiver of such forfeiture. *Morecraft* v. *Meux*, 1 C. & P. 346. [Abbott]

## (K) PLEADING.

If the declaration sets out the legal operati effect of the demise, it is sufficient. *Wilson* v. *hall*, 1 Y. & J. 2.

In covenant by a devisee against the as on a lease by the testator, the declaration generally that the testator was seised, but d say of what estate. On motion in arrest of jud —Held, that the ambiguity was cured by th dict. *Harris* v. *Beavan*, 6 Law J. C.P. 149, Bing. 640, s. c. 1 M. & P. 633.

If a plaintiff avers, that he became at a par time well entitled to certain premises, the upon demurrer, will intend, that he becam entitled, not merely equitably, but also le *Hagley* v. *West*, 3 Law J. Chanc. 63.

That which is excepted in a lease, does n to the lessee at all; but where the lessor res right to do certain acts in respect of the de premises, he must, in pleading, set out the te the reservation, and of the instrument by w was created. *Fancy* v. *Scott*, 6 Law J. K.B.

A declaration in covenant, for not repairin tain premises, stated, that the plaintiff de certain premises, with the appurtenances, (ex therein excepted) to hold, &c., except, &c., t term of twelve years, except the last day th the lease being produced in evidence, in sup the declaration, was found to contain no exc of any part of the premises, but only an except the last day of the term: Held, after verdict, an immaterial variance. *Williams* v. *Hayes*, 11 642, s. c. 2 B. & B. 395.

Plaintiff demised to J W, certain premises, from the 29th of September 1809, for eleven and J W covenanted that he would not sell fro premises any of the straw which during th should grow upon the premises, save and wheat-straw and rye-straw, or sell any dung should arise from the said premises; and th every load of hay, wheat-straw, and rye-straw should be sold from the premises during the J W should bring to the premises one cart dung, or other manure; and the plaintiff cove that J W should use the barns, &c. in the la before the end of the term, until the 1st of Ma after the expiration of the same, without payi rent, he leaving all the muck, &c. arising fro corn, &c. for the use of the person entitled to

Breach—First, that during the lease, and the 1st of May 1821, to wit, on the 30th of S ber 1820, J W did sell and convey away fr premises a large quantity of straw, not being or rye straw, which grew upon the farm;— and third breaches similar to the first; and, that J W did, during the term, to wit, on th of September 1820, and before the 1st of May remove off and from the premises, large qu of hay, wheat and rye straw, which had gr the premises during the term, yet he did no back a load of dung for each load of hay and

and, fifth, that although J W had the use of the barns until the 1st of May, and though a great quantity of straw, hay, &c. did grow &c., yet he did not leave the same upon the premises for the use of the persons entitled to the said lease.—Pleas to the first, second, and third breach, denying that J W did the acts alleged. Fourth plea, to removing off by J W during the term from the said premises, the quantities of hay, &c.; that J W did bring to the said premises one load of dung for every load of hay, &c.; and demurrer to the residue of the fourth breach. Fifth plea, that J W did leave the quantities of dung, &c. according to the indenture. Sixth, a release of all causes of action, claims, &c., except such claim as plaintiff had in respect of J W not bringing back to the premises, dung, &c. for the hay, &c. removed after the 29th of September 1820. Demurrer and joinder therein: Held, first, that the whole of the fourth breach was answered by the plea thereto; and that, consequently, the demurrer to the residue could not be supported; and, second, that the true construction of this instrument is, that the term was not to end for every purpose, until the first of May 1821, the release is not then therefore an answer to all demands in the fourth breach, for acts done during the term, for it is expressly limited to such as were done before the 29th of September; consequently, as the plea does not answer all it professes to answer, it is altogether bad. *Saint Germains* v. *Willan*, 2 B. & C. 216, s. c. 3 D. & R. 441.

A lease, dated the 29th of September 1808, by the plaintiff to one Todhunter, for fourteen years, contained a covenant to paint outside twice in oil, at two different periods in every seven years of the term, at equal intervals, and to paint inside in like manner once in the course of each seven years of the said term. The lease was assigned to the defendant on the 24th of June 1811. Declaration alleged that the defendant continued in possession to the end of the term—viz. to the 29th of September 1822, and that the defendant did not paint outside twice in oil at two different periods in each seven years of the term, at equal intervals; and that he did not, in like manner, paint inside once in the course of each seven years of the term. Plea to that part of the breach which charged the not painting outside according to the covenant—that the lease came by assignment to defendant, after the first two years and half of the term, viz. on the 24th of June 1811; that the defendant, before the end of the first ten years and a quarter of the said term, viz. on the 29th of September 1818, assigned to C A, and that defendant, before such assignment, viz. on the 1st of October, 1811, painted the outside, and again on the 1st of August 1818, painted the outside, as required by the covenant,—was held bad on demurrer, for not shewing when the original lessee painted the outside, so as to enable the Court to judge whether the paintings which took place were done at due intervals, so as to afford a sufficient and equal interval for the fourth painting. Plea as to the not painting inside—that the lease came by assignment to defendant on the 24th of June 1811, and that he assigned it to C A, on the 29th of September 1818,—held good on demurrer, for the covenant to paint at equal intervals did not extend to the inside painting, and it did not appear from the declaration, that the original lessee had not painted the inside before the assignment to defendant, so that the latter would not be obliged to paint again inside before his assignment to C A. *Broome* v. *Winter*, 3 Law J. K.B. 191.

In an action of covenant by tenants in common, for not repairing a messuage, the defendants pleaded that the lessee, after the demise to him, and prior to the breach complained of, had purchased the interest of one of the lessors, whereby the lessee became tenant in common of the premises with the plaintiffs; on general demurrer, this plea was held ill, and that the action was properly brought. *Gates* v. *Cole*, 5 B. Mo. 554.

A, who was lessee of a farm, covenanted with B, his lessor, to convey and carry all such materials as should, at any time during the continuance of the term, be required in erecting a certain thrashing mill, which mill B covenanted with A to erect during the continuance of the said term, for the use of the said A, and the occupiers of an adjoining farm; B pleaded, first, that within a reasonable period from the date of the deed, and during the continuance of the term, he began to provide the necessary materials for erecting the mill; and whilst it was in prosecution, A desired him not to erect the same, but to refrain from so doing until he should be requested by A; and, lastly, a plea of leave and licence during the term. Upon special demurrer, it was held, that both these pleas were insufficient. *Cordwent* v. *Hunt*, 8 Taunt. 596, s. c. 2 B. Mo. 660.

To a declaration for not using premises in a husbandlike manner, a plea, that the fences became out of repair by natural decay, and that there was not proper wood which defendant had a right to cut for repairing the same, and that the plaintiff ought to have shewn that there was proper wood for the purpose, which he neglected to do, without averring a request to plaintiff, or a custom of the country in this respect, is untenable. *Whitfield* v. *Weedan*, 2 Chit. 685.

Action for a breach of covenant for quiet enjoyment. The plaintiff's assignee of the lease was evicted, and himself put to costs; in an action against him by the assignee for the eviction, he must shew by whom the assignee was evicted; hence, therefore, stating generally that a third person was seised in fee of the premises, and that the assignee was evicted, is sufficient. *Semble*—Under the word "demise," the lessee may maintain an action of covenant against the lessor, for not having sufficient power to demise for the whole term, whereby plaintiff was put to expense in procuring a better title for the whole term. *Fraser* v. *Skey*, 2 Chit. 646.

### (L) EVIDENCE.

The inrolment of a lease under the 1 & 2 Geo. 4, c. 52, s. 8, does not dispense with proof of the execution of the instrument. *Jenkins* v. *Biddulph*, 1 R. & M. 339. [Best]

An heir-at-law producing a lease granted by an ancestor, under whom he claims, although it is to be used as evidence against his right, is estopped from disputing the due execution of the instrument. *Doe d. Tindale* v. *Hemming*, 2 C. & P. 462. [Bayley]

In an action for rent of land verbally let, on the same terms as the former tenant's lease, such lease must be produced properly stamped. *Turner* v. *Power*, 1 M. & M. 131. [Tenterden]

A lessee, who executes the counterpart of a lease,

cannot dispute its admissibility in evidence, or impeach its validity, upon the ground of the original not being properly stamped. *Paul* v. *Mesk*, 2 Y. & J. 116.

## LEATHER.

A declaration, in an action against the defendant, on the 1 Jac. 1, c. 22, s. 38, for having in his house, in &c., within &c., two hides of leather before they had been sealed at Leadenhall, &c. was, on motion in arrest of judgment, holden sufficient. *Russell qui tam* v. ———, 2 Ken. 273, s. c. 1 Burr. 497.

## LEGACY.

[See EXECUTOR AND ADMINISTRATOR, and WILL.]

(A) CONSTRUCTION OF, IN GENERAL.
(B) WHO TAKE AS LEGATEES.
(C) WHAT PROPERTY PASSES.
(D) WHAT INTEREST VESTS.
(a) *Absolute.*
(b) *For Life.*
(E) SURVIVORSHIP.
(F) SPECIFIC.
(G) ACCUMULATIVE.
(H) VESTED.
(I) CONTINGENT.
(K) CONDITIONAL.
(L) ON WHAT PROPERTY CHARGEABLE.
(M) INTEREST UPON.
(N) INVESTMENT OF.
(O) ABATEMENT.
(P) WHERE A SATISFACTION.
(Q) PAYMENT.
(R) ADEMPTION.
(S) LAPSED.
(T) VOID.
(V) RESIDUE OR SURPLUS.
(W) LEGACY DUTY.
(X) RIGHTS OF LEGATEES.

### (A) CONSTRUCTION OF, IN GENERAL.

A testator directs that his trustees shall stand possessed of a certain sum of stock, upon trust for D, until D shall have attained his age of 25 years, with a direction that they shall transfer the stock to D as soon as they in their discretion think proper, and that it shall sink into the residue, which is given over in case D dies without lawful issue before he receives the bequest: Held, that the right to the dividends which accrue before D has attained his age of 25 years, or has had a transfer made to him, is suspended to go finally along with the capital. *Gordon* v. *Rutherford*, 2 Law J. Chanc. 50.

A testator bequeathed 5,500*l.* stock to trustees, upon trust, to pay the dividends to his son for life, and in case he should marry any woman with a fortune of 1000*l.* that the stock should be settled on her, and the issue of such marriage; and in case of his son's death, leaving no issue of his body lawfully begotten, he gave the stock over to various persons; and, finally, he bequeathed the residue to A: The testator's son married a woman who had not a thousand pounds fortune, and died leaving issue:

Held, that the words, "in case of his son's death, leaving issue," could not be construed, in case of his son's death leaving *such* issue; and that the bequest over did not take effect. *Andree* v. *Ward*, 4 Law J. Chanc. 98, s. c. 1 Russ. 260.

That the son did not take a *quasi* estate tail in the fund:

That the issue of the son did not take any interest under the bequest:

That the stock, as not specifically disposed of, fell into the residue, and belonged to the residuary legatee. *Green* v. *Ward*, 4 Law J. Chanc. 99, s. c. 1 Russ. 262.

A testator, after giving two annuities and some legacies, devises all the rest, residue and remainder of his freehold, copyhold, and leasehold estates, and all his stock, utensils, farming implements, and the rest of his real or personal property, to trustees upon trust for his four children, and directs them to carry on his farming trade for the benefit of those children: Held, that the annuities and legacies preceding the devise of the residue of the freeholds, &c. are charged upon the freeholds and copyholds.

*Semble*, The bequest of the stock, &c. is specific. The trustees could not carry on the farming business at the risk of legatees. *Cole* v. *Turner*, 6 Law J. Chanc. 101.

A testator, beginning his will by expressing an intention to give the bulk of his property to two of his sisters, gave them only a life interest in the greater part of it; and after giving legacies to others of his sisters, he expressed his wish, that A, and his the testator's servant B, should be his executors, and that B should live with his two sisters, and take care of them and their property; and by a codicil, he directed that the interest of 300*l.* should be paid to B half-yearly, as wages for taking care of his two sisters; and that, after the death of B and his two sisters, the 300*l.* should be paid to P: Held, that the legacy given to B by the codicil, was not a legacy given to her for her care and trouble, so as to convert her into a trustee of the residue for the next of kin, but that A and B, in their character of executors, took the residue beneficially. That after the death of the two sisters, though the services for which the legacy was given as wages could no longer be performed, B would be still entitled to the interest of 300*l.* during her life. *Dawson* v. *Thorne*, 3 Russ. 235.

A being possessed of a lease of a manor, lands, and hereditaments for 21 years, granted by the warden of an hospital, assigned, by his marriage settlement, the premises and all his interest, benefit, and advantage of renewal therein, &c. to trustees, upon trust, out of the rents and profits, to pay the rents, perform the covenants, raise a competent sum for renewing the lease from time to time as should be customary, and renew the lease accordingly; and, subject thereto, to pay the rents to A during his life, and, after his death, to stand possessed of the leasehold premises on certain trusts for the sons of the marriage, and, on failure of those trusts, for A absolutely. A by his will devised "his manor, hospital, lands and hereditaments situate in, &c. held by lease from," &c. to the same persons who were trustees of his marriage settlement, with directions to perform the covenants contained "in the now lease, or any leases hereafter" to be procured,

to collect out of the rents a competent sum for renewing the lease, and to renew the same from time to time. After the date of his will, A surrendered the existing lease, and obtained a renewed lease: Held, that this renewed lease passed by, and was subject to the trusts of his will.

The lease had been usually renewed every seven years, and, in February 1805, was renewed by the tenant for life under the will of A; in 1812, an exorbitant fine was demanded, and no renewal took place; and, in 1817, the warden of the hospital expressly refused to renew; the tenant for life died in January 1819, and, in the following February, the remainder-man renewed: Held, that the remainder-man was entitled to receive out of the assets of the tenant for life the amount of what would have been reasonable fines for renewal in February 1812, and February 1819, subject to a proportional abatement for the period which intervened between the death of the tenant for life and the renewal in February 1819. *Colegrave* v. *Manby*, 2 Russ. 238.

A testator by his will directed that his real and personal estate should be sold, and the produce to be invested in the public funds, and in the names of trustees for his son and daughter, and two others. Directions were given as to succession in cases of death without issue; and if all the legatees should die under age, and without issue, the property was to go over to B, C, D, & E, and their heirs, "which four persons the testator appointed as his executors, to see that everything was duly performed according to his will; he also appointed F and G as executors, "in addition to the above persons, for which he requested those two friends would accept of 50*l.* each;" he also requested F and G to act as guardians, in conjunction with B, C, D, and E, for the care of the persons and property of the legatees. The will was duly attested, but there was an unattested codicil, that if either of the executors should refuse to accept the trust, and act as executor, the bequest of property to every such person was totally annulled; the testator died, and the will was proved by B, C, and D only; E, F, and G renounced. Part of the real estate having been put up to sale in four lots, was purchased by G, against whom a suit was instituted in Chancery to compel him to complete his purchase. It was decreed by the Court, that the codicil was not to be considered as part of the will with reference to the real estate, but that the rest of the will ought to be established, and the trusts performed; and upon reference to the Master, it was found that the contract of purchase entered into by G was for the benefit of the legatees (who were infants). Lot 1 was then conveyed by lease and appointment, and release, from B, C, D, E, F, and G, to T, in consideration of 2,000*l.* Lot 2, by lease and appointment, and release from B, C, and D, to T, for 2,300*l.*, (T declaring by another deed, that the consideration-money, mentioned in the two first deeds, belonged to G; that the name of T was only used as a trustee, and that T stood seised of the premises in trust for G). Lot 3, by lease and appointment, and release from B, C. and D. to G, to the use of G, for 4,000*l.* Lot 4, by lease and appointment, and release from B, C, D, E, F, and G, to G, to the use of G, for 360*l.*: It was held, that by these conveyances the legal estate in lots 1 and 2, was well vested in T, and the legal estate in lots 3 and 4 in G. *Mackintosh* v. *Barber*, 1 Bing. 50.

Although it be expressly indicated in the will not to be the testator's intention to make an immediate disposition, yet it may, upon the construction of the whole will taken collectively, amount to a present bequest. *Lynn* v. *Beaver*, 1 Turn. 67.

A pecuniary legacy, given with a particular security, is a demonstrative legacy: Such a legacy does not fail by the failure of the security upon which it is given. *Fowler* v. *Willoughby*, 4 Law J. Chanc. 27.

Where 500*l.* is bequeathed to A for her life, and at her death to be divided into portions, as she shall direct, for the benefit of her children, and if she die before testatrix, then to be equally divided amongst her children: Held, that the children of A, living at her decease, were the only objects of the power, and as such entitled to a share lapsed by the death of a child, to whom it had been appointed. *Kennedy* v. *Kingston*, 2 J. & W. 431.

A testator bequeaths "to his wife certain personal property, which he desires may be distributed amongst his children, upon the youngest attaining the age of twenty-one years, at her and his executor's discretion, such part being reserved for her use as might be thought convenient, and at her death to be divided as above directed": Held, that these words express no gift to the children, but merely confer on the wife and executors a power of unequal appointment, and, therefore, that children dying during the infancy of the youngest take nothing.

Also, that the wife and executors must appoint the whole property, though the wife retain a part for her own use during her life. *Ford* v. *Rawlins*, 1 Law J. Chanc. 170, s. c. 1 S. & S. 328.

A testator bequeathed a leasehold to his wife for life, with a power of disposing of it at her decease to any one of his family; she survived her husband, and by her will bequeathed all her leasehold property, monies, &c. and personal estate, upon certain trusts, (subject to her debts and legacies) for the benefit of J G who was a relation, but not one of the next of kin, of the testator:—Held,

That the will of the wife was a good execution of her power to appoint the leasehold:

That she might appoint to one who was not one of the next of kin of her husband:

That if no appointment had been made, the next of kin of the husband would have taken. *Grant* v. *Lynam*, 6 Law J. Chanc. 129.

A bequest to a feme covert "for her own use, and at her own disposal," vests in her as separate estate. *Pritchard* v. *Ames*, 1 Turn. 222.

A testator gives his property to his wife, and after her death bequeaths and devises it to trustees, who are to invest it in securities, and to pay the interest to his daughters, Jane and Eliza, in equal shares, and also to pay to, or apply for the benefit of his grandson (Eliza's eldest son), 200*l.* annually, when he attains twenty-one; and before that period, such part of the 200*l.* bequeathed to him, as they may judge proper: in a subsequent part of his will he gives his daughters power to dispose of the moieties of his property, of which they respectively took the interest, in favour of their respective children or grandchildren, except that 4000*l.*, part of Eliza's share, out of which the interest to the grand-

son is to arise, and which is to be that grandson's property: Held, that the grandson was not entitled to any part of the 200*l.* a-year till he attained twenty-one, and that the 4000*l.* does not become payable till the death of his mother. *Livesey* v. *Livesey*, 6 Law J. Chanc. 13.

A testator bequeaths to his wife certain benefits (including a leasehold house which he inhabited), stating, that he considered that what he had given her would, with her own property, make up 2500*l.* a year; in fact, the income provided for her fell short of that sum by several hundred pounds: Held, that she was entitled to have her income made up to 2500*l.* out of the general assets of the testator:

That the yearly value of the leasehold house was not to be included as part of the 2500*l.* *Trevor* v. *Trevor*, 6 Law J. Chanc. 182.

Where the devisee was directed "to provide for the two daughters of my child H E, viz. S E and E E": they were holden to take no benefit under the will. *Abrahams* v. *Alman*, 1 Russ. 509.

But where a testator gave his daughter an annuity of 5*l.* per annum, and directed his son, whom he made executor and residuary legatee, "to take care of and provide for her," it was referred to the Master to fix the amount to be allowed. *Broad* v. *Bevan*, 1 Russ. 511.

### (B) WHO TAKE AS LEGATEES.

Bequest of a sum of money to A, with a gift over to A's two daughters in equal shares; and at their death, to their children. One of the daughters being dead, without leaving issue: Held, that the children of the other daughter were entitled only to a moiety of the legacy. *Taniere* v. *Perks*, 4 Law J. Chanc. 81, s. c. 2 S. & S. 383.

A gift of one shilling to a brother followed by a direction, to pay him a certain sum annually, if he should ever be unfortunate, does not make him a legatee. *Taniere* v. *Perks*, 1 Law J. Chanc. 79.

Where J S, who had contracted a marriage, which was void *ab initio*, and had from that marriage one son, made his will, and gave the residue of his personal estate to all his children by his reputed wife: Held, that a son born at the time of the making of the will, having the reputation of being the testator's child, was entitled, although illegitimate. *Bayley* v. *Snelham*, 1 Law J. Chanc. 35, s. c. 1 S. & S. 78.

A testator bequeaths the sum of 400*l.* sterling to each of his sister's children that may be alive and unprovided for by marriage at her death; and in a subsequent passage of his will adds, "I have left small legacies to my sister's children, that they may not in their turn become the prey of unprincipled men:" Held,

That this was a bequest to daughters only, and not to sons:

That "unprovided for by marriage" meant "unmarried:"

That a daughter, who was a widow at her mother's death, was entitled to her legacy of 400*l.* *Dunbar* v. *Boldero*, 4 Law J. Chanc. 76.

A testatrix gives a fund to her daughter for life, remainder as she shall appoint; and in default of appointment, to the testatrix's next of kin, to be a vested interest at the testatrix's death, except as to afterborn children of the daughter; the daughter having died without issue, and without having appointed: Held, that the persons entitled to the fund were those, who, at the testatrix's death, would have been her next of kin, if the daughter had then been dead without issue. *Bird* v. *Wood*, 4 Law J. Chanc. 86, s. c. 2 S. & S. 400.

Where an annuity is given to a father for life, of part of dividends, and remainder to his children, subject to the father's annuity, when they arrive at the age of twenty-one, it is a gift to all the children living, when the eldest is twenty-one. *Curtis* v. *Curtis*, 6 Mad. 14.

Under a bequest to A for life, and, after her death, to the children of the testatrix's nephew, born in the lifetime of the testatrix, a child *in ventre sa mere* at the time of the testatrix's death, will take. *Trower* v. *Butts*, 1 Law J. Chanc. 115, s. c. 1 S. & S. 181.

"Lawful heirs," applied to personal property, means "next of kin." *Hayes* v. *Hayes*, 6 Law J. Chanc. 141.

A testatrix bequeaths a legacy to such persons as her daughter, Mrs. Salmon, should appoint; and, in default of such appointment, to Mrs. Salmon for life, to her separate use; and, after her decease, to such persons as would have been her *next* of kin, if she had died sole and intestate, to the utter exclusion of her husband. She then bequeaths another legacy, on similar trusts, and with similar powers, for the separate use "of her daughter Ursula (who was unmarried), and such her appointee and appointees, or such other person or persons, in default of any appointment, as are hereinbefore respectively declared and contained, of and concerning the said several hereinbefore-mentioned trust sums, for the separate use and benefit of my said daughters, Mary Ann Salmon and Margaret Gwynne respectively, and the benefit of such appointee and appointees, or such other person and persons, in default of any appointment, or as near thereto as the deaths of parties, or other intervening circumstances, will admit and allow." Ursula married, and died in the testatrix's lifetime, leaving an only child her surviving: Held, that the child was entitled to the legacy. *Hardwick* v. *Thurston*, 6 Law J. Chanc. 124.

Under a bequest of a residuary fund to the testator's first and second cousins, and the children of his kinsman, Geo. Charge, which children were first cousins of the testator, twice removed, all persons related to the testator in the degree of second cousin are entitled. *Charge* v. *Goodyer*, 3 Russ. 140.

A testatrix bequeaths the residue of her personal estate to trustees, upon trust, to pay the interest to A during her life; and from and after her death, to pay the interest thereof to B, during his life; and from and after his decease, to transfer the trust monies to such of the testatrix's nephews and nieces as should be then living at the time of B's decease: the testatrix dies; then B dies, and afterwards A dies: Held, that all the nephews and nieces of the testatrix, who were living at the death of B, though not living at the death of A, were entitled to take. *Netherwood* v. *Hall*, 3 Law J. Chanc. 159.

P S having two daughters, named Selina and Mary Ann, A bequeathed a legacy to Sophia Still, daughter of P S. There was evidence to shew that Selina was the person meant; but, the other daughter being an infant, a reference was directed to the Master, to inquire who was the legatee intended by

the description in the will. *Still* v. *Hester*, 6 Mad. 192.

(C) WHAT PROPERTY PASSES.

A bequest of "all such sums of money as should be owing to the testatrix at the time of her decease from G B" does not pass a distributive share of the assets of an estate, to which at her death no administration had been taken out. *Collins* v. *Doyle*, 1 Russ. 135.

*Dugdale's Monasticon*, *Domesday Book*, and the *State Trials*, will pass under a bequest of the testator's law library and books of antiquities. *Wallace* v. *Bayldon*, 4 Law J. Chanc. 74.

The term "legacy" will pass real as well as personal property. *Hope* v. *Taylor*, 2 Ken. 9, s. c. 1 Burr. 268.

*Semble*—Stock in the public funds will in general pass under a bequest of *securities for money*. *Bescoby* v. *Pack*, 2 Law J. Chanc. 17, s. c. 1 S. & S. 500.

A testator bequeaths in the following words: First, at my death I give and bequeath to Susannah Jane Kendall, my beloved wife, the sum of 150*l.* per annum during her natural life, as I am empowered to do by the will of my late beloved father William Kendall, bearing date the 6th of April 1816, to be paid by the executors of the said William Kendall deceased. Secondly, I also bequeath to my said wife, all monies, goods, chattels, clothing, &c., and my property which may remain after paying the charges incident to my funeral, and such debts as I may owe at my death:" Held, that these words carried stock, to which the testator was entitled, and the whole residue of his personal estate. *Kendall* v. *Kendall*, 6 Law J. Chanc. 111.

Under a will by a testator, bequeathing, after the death of certain annuitants, a sum set apart by the Court for payment of them; or of such part of it as should not, by reason of their deaths, have been assigned or transferred; a sum ordered to be, but not actually, transferred on the death of an annuitant, was holden not to pass. *Hooper* v. *Goodwin*, 1 Jac. 374.

Bequest by testator of 19*l.* to J H, and after specific bequests of certain of his goods to different persons, bequest to J H thus: "All my other effects I will to J H, &c. to be sold for his benefit:" It was held, that J H was entitled to all the residue of the testator's property, including money, &c. *Hearne* v. *Wigginton*, 6 Mad. 119.

The words "household effects," in a will, include everything placed in the house for use or consumption therein, or for ornament to it. *Cole* v. *Fitzgerald*, 1 Law J. Chanc. 91, s. c. 1 S. & S. 189.

A testator bequeaths to A "all his monies in hand," and to B all his monies out at interest, on mortgage, notes of hand, or any other security: A is entitled to monies of the testator, which, at his death, were in the hands of a person who acted as his banker, and who paid interest for them.

A devise of farming stock does not *per se* pass growing crops. *Vaisey* v. *Reynolds*, 6 Law J. Chanc. 172.

A bequest of personal property may be a general disposition, although accompanied with expressions favouring a more limited construction, and pointing only to a particular surplus beyond the property specifically mentioned. *Bland* v. *Lamb*, 2 J. & W. 399.

A testator devises his estates in the county of Leicester to trustees, upon trust to sell and dispose thereof, and also of his books and live and dead farming stock there, either altogether or in parcels, by private or public sale, and to pay and apply the monies to arise from such sale or sales and the interest thereof in such manner as thereinafter mentioned: in a subsequent clause he says, that as to the monies to arise from the sale of his Leicestershire estate, thereinbefore devised to be sold, it was his will that the said monies should be applied as there mentioned; and in his subsequent dispositions, he describes the fund by the words "the monies to arise from the sale of my Leicestershire estate:" Held, that the monies arising from the sale of the books and of the live and dead stock, as well as the monies arising from the sale of the estate, passed by these words. *Newburgh* v. *Ayre*, 6 Law J. Chanc. 153.

A testatrix devises real estates to trustees upon trust, to raise out of the same, by mortgage, a sum sufficient to pay certain legacies, which are made payable twelve months after her decease, and subject to that charge "in trust for R N in fee; provided that if R N shall not, within six calendar months after my decease, by writing under his hand and seal, &c. accept the devise; and shall not at the same time secure to the satisfaction of the said trustees, or pay to them a sum of money sufficient to satisfy the legacies:" the trustees shall stand seised of the real estates upon trust to sell the same, and to distribute the money among the legatees, in proportion to the amount of their several legacies: R N died in the lifetime of the testatrix: Held, that the legatees are entitled only to their legacies, and not to the whole produce of the estate. *Davidson* v. *Davidson*, 3 Law J. Chanc. 103.

(D) WHAT INTEREST VESTS.

(*a*) *Absolute.*

[And *see post*, H.]

A testator gives 3000*l.* to trustees, upon trust to pay the interest to A during her life, and, after her decease, to apply the interest to the maintenance of the children she had at the date of the will, and the survivors of them, till they attained twenty-four respectively, and, upon their respectively attaining that age, to transfer their shares to each of them: the share of any one dying to go to the survivors, upon their attaining twenty-four; with a direction, that, if none of the children should be living at A's death, or if none of them should attain twenty-four, the 3000*l.* should go over: of those children only one attained twenty-four, but he died in A's lifetime: Held, that the fund vested in him absolutely. *Langslow* v. *Butts*, 5 Law J. Chanc. 166.

Construction of a will as to whether a bequest was to operate as a gift absolutely, or only for life. *Woodbridge* v. *Mears*, 6 Law J. Chanc. 149.

A testatrix gave to two trustees a sum of stock upon trust to dispose of the dividends thereof, as the same should from time to time arise, into the proper hands of M H, (a married woman,) or otherwise to permit her to receive the same to her own sole and separate use, exempt from the control and debts of her husband; no other trust was declared of the stock: Held, M H was entitled to the stock abso-

lutely, and not merely to a life interest in it. *Haig* v. *Swiney*, 1 Law J. Chanc. 26, s. c. 1 S. & S. 487.

A testator bequeaths the whole of his property to Lady C, the wife of his elder brother, "for her to manage and appropriate in the best manner for the welfare of *her* family." He then mentions that he makes this disposition on account of the exceedingly embarrassed circumstances of his elder brother, which might leave nothing for his family: to obviate which, the testator adds, that all his property is to be placed in trustees' hands, for Lady C's sole and separate use: Held, that there was no trust for the children of the elder brother; and that Lady C was entitled to the fund absolutely. *Crawfurd* v. *Crawfurd*, 3 Law J. Chanc. 105.

Gift by will to A, to be paid to him at twenty-one, with a bequest over in the event of his dying under that age, or afterwards, without heirs and intestate: Held, an absolute interest in A on his attaining twenty-one. *Cuthbert* v. *Purrier*, 1 Jac. 415.

A bequest of a sum of money to all and every the child and children of A and their issue, to be equally divided amongst them, share and share alike, and to be paid twelve months after the testator's decease, gives the money absolutely to such children of A as are living at the testator's death. *Butter* v. *Ommaney*, 6 Law J. Chanc. 54.

Personalty is bequeathed to A, to go, if A has children, to A's heirs, and if A dies leaving a husband, but no child, the interest is given to the husband for life, and then a class of legacies is given; and if A dies unmarried, other legacies are given. A dies without having been married: Held, that the first class of legacies fails, and that A's personal representatives are entitled to the fund absolutely, subject to the second class of legacies. *Swayne* v. *Smith*, 1 Law J. Chanc. 16, s. c. 1 S. & S. 56.

### (*b*) *For Life.*

A testator bequeaths all his personal estate to his wife for her life; and directs that, from and after her decease, one moiety thereof shall be at her entire disposal, either by will or otherwise; and the other moiety shall be equally divided among certain persons: Held, that the wife did not take a moiety absolutely, but that she took it only for life, with a power of disposing of it. *Reith* v. *Seymour*, 6 Law J. Chanc. 97.

### (E) SURVIVORSHIP.

A testator gave stock to trustees, to be divided, after the death of two persons who had life interests in it, among A, B, C, D, and E, in equal shares, and he directed that, if any of them should die without issue, before their respective shares should become payable, the share of him, her or them so dying without issue should go to, and be equally divided among the survivor and survivors of them; A died, leaving issue who were living at the time fixed for the distribution of the fund; then B died, leaving a son, who died without issue, before the period of distribution; shortly afterwards, and also before the period of distribution, C died, without issue: Held, that B's personal representative was not entitled to any portion of the fund:—That the one share of B's share, which on the failure of her issue, survived to C, did not, on C's death survive to the other legatees, but was transmitted to her personal representative:—That the words "survivor and survivors," were to be construed in their natural sense, and not as equivalent to "other and others," so that no part of the shares of B and C went over to A's personal representative. *Crowder* v. *Stone*, 3 Russ. 217.

Bequest of personal property to trustees, to be settled, on the marriages of the testator's daughters, on them for their separate use, and for their children upon trust at their deaths, with a limitation, in the event of either of the daughters dying without having been married, or without leaving any children, her surviving; the shares of the children of each daughter are vested subject to be divested by all dying before their mother; and there being one alive at her death, the representative of two who died before her, held entitled to their shares. *Bromhead* v. *Hunt*, 2 J. & W. 459.

### (F) SPECIFIC.

[See *Cole* v. *Turner*—*ante*, A, and *post*, L.]

"I give and bequeath to my wife, M A R, all and singular my leasehold estate, situate at B, in the county of M, together with all my household furniture, plate, linen, &c. contained in my dwelling-house, being situate at B as aforesaid,"—is a specific bequest; so is a legacy to J of so many of the testator's horses as should amount to 800*l*. *Richards* v. *Richards*, 9 Price, 219.

A testator gave a number of legacies, adding—"I guarantee my estates at C for the payment of the above legacies;" and he, in the subsequent part of his will, gave many other legacies. The first class of legacies are not specific, and, failing the estates at C, are to be borne by the general personal estate. *Willox* v. *Rhodes*, 2 Russ. 452.

### (G) ACCUMULATIVE.

A testatrix devised leaseholds to her son, charged with an annuity of 12*l*., payable half-yearly to the separate use of her daughter Maria: long afterwards, the son devised freeholds and leaseholds (including those devised to him by his mother), to R, paying Maria 12*l*. per annum, by half-yearly payments, to be made on specified days, which were the very days on which the annuity given by the testatrix was payable: Held, that after the death of the son, Maria was entitled to two annuities of 12*l*. a year. *Bartlett* v. *Gillard*, 6 Law J. Chanc. 19.

A testatrix, by a codicil to her will, directs that each of her daughters should have for her fortune 10,000*l*.; by her will she had exercised a power which she had of appointing the residuary estate of C, and under that appointment, the daughters, in the events that happened, became entitled; they were also, in the events that happened, entitled to a sum of 4000*l*., which, on the marriage of the testatrix, had been settled by their grandfather: Held, that each daughter was entitled to 10,000*l*., exclusively of their interest in the 4000*l*. and in the residuary estate of C. *Whyte* v. *Kearney*, 6 Law J. Chanc. 22.

By the marriage settlement of A, a sum of 15,000*l*. was to be raised for the portions of the younger children, in such shares, and payable at such times as A should appoint; and in default of appointment, among the children equally; the share of each son to be vested at twenty-one, and of each daughter,

at twenty-one or marriage; with a proviso, that the share of any younger child, dying before the time prescribed for the vesting of his or her portion, should go over to the survivors. Afterwards A, by his will, bequeathed unto all and every his daughters who should be living at his death, or born in due time afterwards, 40,000*l.* share and share alike; but if he should have only one daughter, then unto such only daughter, the sum of 20,000*l.*; to be paid to them or her, at such time or times, &c. as the provision made for them by this marriage settlement was payable. A died, leaving two daughters, one of whom died under age and unmarried: Held, that the surviving daughter was entitled to the whole of the 40,000*l.*, if the personalty was sufficient to raise it.

*Quære*—Whether the surviving daughter would be entitled to such part of 20,000*l.* (moiety of the 40,000*l.*) as it might be necessary to raise out of real estate? *Sandford* v. *Irby*, 4 Law J. Chanc. 23.

G H, by a testamentary paper, in the form of a regular will, naming executors, and bequeathing the residue, bequeaths "to his wife 500*l.* sterling per annum for her life, to be placed in, and payable out of the long annuities, to stand in her name and &c. (trustees); and at her decease, to my father, T H, for life, remainder to my cousin, R H, son of my uncle, absolutely," &c.

By a second testamentary paper, dated four months after the first, and beginning in the regular form of a will but not naming executors, nor bequeathing the residue, the testator gives "to his wife so much money as will purchase 500*l.* sterling per annum, in the long annuities granted by government, the income thereof to be received by her during her life, for her own use, and at her death to my child or children, for their own use and benefit, equally; in default of issue, then to my father, T H, for his life, and at his death to go to my cousin, R H, absolutely," the principal to be in the name of &c. (wife and trustees).

Each of the testamentary papers contained gifts of a great number of legacies, and in a large majority of the bequests they were precisely in similar terms. In the case of two of the legacies given by the second will, the testator expresses that they are to be "*in lieu* of any other annuity he may have granted to those legatees." This precaution is omitted in the case of the legacy to the wife, with remainder, &c. The two papers were proved in the Ecclesiastical Court as one will.

Held, in the court below, without doubt, that the second legacy was a substitution for the first: Held on appeal, that it was a case of great doubt and difficulty, but the judgment was affirmed. *Hemming* v. *Clutterbuck*, 1 Bligh, N.S. 479.

A testator gives a legacy to his friend and partner P; and he afterwards appoints him one of his executors, and gives him other benefits much greater than those bequeathed to any of the other executors: the legacies bequeathed to P are not to be considered as bequeathed to him in his character of executor. *Cockerell* v. *Barber*, 5 Law J. Chanc. 77, s. c. 1 Sim. 23.

A testator by his will bequeathed 4000*l.* in trust after the death of his daughter Caroline, who was then unmarried, for her children, to be paid, if the children were under 21 and unmarried at her death, to such of them as were sons, at their ages of 21, or sooner, if the trustees should think fit; and to such of them as were daughters, at their ages of 21 years or days of marriage; but if, after Caroline's decease, the children should all die under 21 and unmarried, then in trust for Caroline's next-of-kin in consanguinity. Caroline died, leaving R, her only son, an infant; after her death, the testator by a codicil bequeathed to his grandson R, 6000*l.*, payable when he should attain the age of 21 years, and directed his executor to expend any sum not exceeding 250*l.* a year in the maintenance and education of R: Held, that the legacy of 6000*l.* was not a substitution for the legacy of 4000*l.*, and that R was entitled to both legacies. *Wray* v. *Field*, 2 Russ. 257.

Legacies given by a codicil, held to be additions to, and not substitutions for, legacies given by the will to the same legatees. *Mackenzie* v. *Mackenzie*, 2 Russ. 262.

### (H) VESTED.

A testator bequeaths certain capital sums to trustees, upon trust to pay the interest to W B, for his life, and after his decease, upon trust to pay, transfer, and assign the capital sums, and all arrears of interest, to the children, if more than one, of the body of the said W B, lawfully to be begotten, share and share alike; and in case of one only child, to pay, transfer, and assign the same to such one child, the share and shares of such of the said children, if more than one, as shall be a son or sons, at his and their age, or respective ages, of 21 years; and to such of them as shall be a daughter or daughters, at her or their age, or respective ages of 21 years, or day or respective days of marriage, which shall first happen next after the decease of the said W B: Held, that the children of W B did not take vested interests till the time when they were entitled respectively to payment, arrived. *Bentinck* v. *Portland*, 4 Law J. Chanc. 13.

Testator bequeathed to his wife the use of his furniture, &c. which he desired to be distributed among his children when the youngest attained 21, at her and his executor's discretion; such part to be reserved for her use as might be thought reasonable, and at her death to be distributed as above directed: Held, that those children who died before the youngest attained 21, did not take vested interests. *Ford* v. *Rawlings*, 1 S. & S. 328.

A testator, by his will, directed that after the death of the survivor of his widow and daughter, his trustees should stand possessed of the residue of his personal estate, upon certain trusts, for his grand-daughters: then, by a codicil, he revoked the bequest to his grand-daughters, and gave the share and interest, which they, by his will, would not have taken, in his personal estate, to all and every the child and children of his said grand-daughters in equal shares, to be paid to such child or children when the youngest or survivor of them should attain the age of 21 years: Held, that these words gave a vested interest to the great grand-children who were living at the death of the survivor of the mother and daughter, and that after-born great grand-children took nothing. *Smith* v. *Jackson*, 1 Law J. Chanc. 231.

Testator directed his executors to purchase, out his residuary estate, a certain sum of stock, and pay

the dividends to his wife for her life, and after her death to divide the capital between such of his three daughters as should then be living: Provided that, if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his lifetime. One of the daughters died three months after the testator: Held, nevertheless, that she had a vested interest in one of the shares. *Collins* v. *Macpherson*, 2 Sim. 87.

Bequest of 25,000*l.* three per cents. to testator's daughter S C for life, and after her decease one moiety to the testator's next-of-kin, in equal degree, other than and except any child or children of S C; and as to the other moiety to go unto and amongst all and every the child and children of S C, equally to be divided between them at their respective ages of 21 years, if more than one, share and share alike, and if but one, then to such only child at his or her age of 21 years. The will afterwards contained a proviso, that in case S C should die without leaving any child or children of her body, or leaving any such child or children, such only child or all such children, should die before attaining the age of 21 years, then the last-mentioned moiety should be paid among all the next-of-kin of the testator in equal degree, who should be living at the time of the death of the longer liver of them, his said daughter and her said children so dying before having attained the age of 21 years as aforesaid. Determined that, two daughters of S C having attained the age of 21 years, but died in the lifetime of their mother, took vested interests in the last-mentioned moiety. *Maitland* v. *Chalie*, 6 Mad. 243.

## (I) CONTINGENT.

A testatrix directs that her trustees (who were also her executors) should, within a year after her decease, pay to the several persons named in a schedule to her will, the sums set opposite to their respective names, as vested and transmissible interests: in a subsequent clause she gives 3000*l.* to the trustees, upon trust to invest the same, and pay it to A on her attaining twenty-one, with a proviso that it should fall into the residue, if A died under twenty-one: by the schedule to her will, she gives to her executors 600*l.* in trust for A, in addition to the 3000*l.* given by the will: Held, that the legacy of 600*l.* was not affected by the contingency to which the 3000*l.* was subject, but vested immediately. *Tilbury* v. *Wakeford*, 5 Law J. Chanc. 73.

A testator bequeaths as follows—"I give to my son A B, who is now at sea, the interest of 500*l.* stock in the five per cents. navy, during his natural life, if he comes to claim the same within five years after my decease; but, if he should die or not come to claim the same within the time limited, then I give the said stock to the children of my daughter C D, share and share alike, with all the interest that may be due thereon." A B claimed the same within the five years, and received the dividends of the 500*l.* stock till his death, which happened after the five years had elapsed: Held, that, upon his death, the children of C D became entitled to the 500*l.* stock. *Smart* v. *Clark*, 5 Law J. Chanc. 111.

A testatrix bequeaths a fund to A and B, in equal shares, to be in trust, and the interest to be paid them till they come of age or marry; but if one of them die before marriage or coming of age, to go to the survivor or her child or children; and if both die leaving no issue, she gives them power to dispose of it by will; A dies, leaving an infant daughter: Held, that A's administrator was entitled to her moiety of the fund. *Thackeray* v. *Hampson*, 2 S. & S. 214, s. c. as *Thackeray* v. *Dorrien*, 3 Law J. Chanc. 89.

A testator after devising lands to his daughter for life, and to his two sons as tenants in common, by a codicil directed that if his daughter should have any child or children living at her decease, that then his said sons should pay 200*l.* equally between them as they should severally attain twenty-one, and should pay interest for the same until the said legacy was due and payable towards their maintenance, &c. The daughter died, leaving a child who died under twenty-one: Held, that the father as representative was entitled to recover the interest on the 200*l.* *Harris* v. *Finch*, M'Clel. 141.

A testator directs his trustees to divide the yearly interest of certain monies into five equal parts or shares, and pay the same unto his cousins James, Charles, and Mary, in manner following: that is to say, two fifth-parts thereof unto James for his life, two other fifth-parts thereof unto Charles for his life, and the remaining one-fifth unto Mary for her life; and if Mary should have issue living at her decease, he gave unto such issue that fifth part of the principal monies, the interest whereof was given to her for her life, but if she should die without issue, the interest of the monies so given to her for life was to go equally to James and Charles for their respective lives, or to the survivor for his life; and if Charles should leave issue living at his decease, such issue were to be entitled to the given principal monies, the interest whereof was to Charles for his life; but if Charles died without issue, living the said James, he gave unto James all benefit and advantage of the bequest thereby made unto Charles; and if James should, without having succeeded to and been in actual possession of the family estate of Hassop, in the space of five years next before his decease, leave issue, other than an eldest or only son, living at his decease, such issue were to be entitled to all the principal monies, "the interest whereof the said James may be entitled to as aforesaid;" but if James should depart this life without leaving any such issue living, or, having such issue, should have had and enjoyed the Hassop estate for the space of five years, then, if Charles should be then living, the benefit and advantage of the bequest to James was to go over and belong to Charles; and if both James and Charles should die without leaving any lawful issue to be entitled as aforesaid to the bequest, the whole of the property was to go to and be disposed of by the survivor of the two in such manner such survivor should think fit.

Mary died without issue in the lifetime of James and Charles; James died in the lifetime of Charles, leaving a daughter, and without having been in possession of the family estate; after Charles died without issue: Held, that the whole of the fund belonged to the daughter of James. *Newburgh* v. *Ayre*, 6 Law J. Chanc. 153.

Where a contingent legacy in sterling money given, the Court does not secure it by appropri

what may be deemed a sufficient amount of stock to pay it when it becomes due: but it will direct security for the payment of the legacy, if the contingency should happen, to be given by the person who, till the contingency does happen, is entitled to the fund. *Webber* v. *Webber*, 1 Law J. Chanc. 219, s. c. 1 S. & S. 311.

### (K) CONDITIONAL.

Where a testator, after appointing two executors, bequeathed to them 50*l.* each, provided they acted as such, and then used these words—"I give to my cousin, T K 50*l.*, whom I appoint joint executor:" Held, that although T K renounced, he was entitled to the 50*l.*, as that legacy was not annexed to the office of executor. *Dix* v. *Reed*, 1 S. & S. 237.

Where a condition is to assign a part of a bequest of leasehold property to a charity, the legatee will take, discharged of the condition. *Poor* v. *Mial*, 6 Mad. 32.

Where a testator in his will introduces a condition to prevent the marriage of his daughter with one A B, and previous to his death consents and approves of the marriage, she is entitled to the legacy, because the condition is dispensed with. *Smith* v. *Cowdery*, 3 Law J. Chanc. 205, s. c. 2 S. & S. 358.

A bequeathed to his daughter B a certain sum in stock in trust, with this proviso, that if B married with the consent of the trustees, they were to advance her husband a portion not exceeding one-third; but if she married without their permission, that then the whole amount of stock was to vest absolutely in her and her children: B married during A's lifetime without his consent, though he subsequently became reconciled to the marriage: Held, that B's husband was entitled to one-third of the stock, as it must be considered the same as if B had married with the consent of the trustees after A's death. *Wheeler* v. *Warner*, 1 S. & S. 304.

Bequest of an annuity to A of 200*l.* per annum, if he paid 2000*l.*, and 100*l.* if he paid 1000*l.*, with a direction to his testator to be liberal. A paid the executor 1400*l.*, who, during his life, allowed him the 200*l.* per annum, and gave him a discharge, though not an express release for the other 600*l.*: Held, upon the executor's death, that his executor might withhold the annuity from A until he paid the remaining 600*l.* *Hemming* v. *Gurney*, 2 S. & S. 311.

A testator's will stated, "I forgive and release A B from all debts, &c. which he may owe to me at my decease, on condition that he does, within two months after my death, sign a release of all claims or demands he may or can have on my estate or property which I have bequeathed to his wife:" Held, that such release was to be for the benefit of the wife, and that he was not bound to execute it within the two months. *Hollinrake* v. *Lister*, 1 Russ. 500.

The testator bequeathed stock, in trust, to be transferred when A attains twenty-one, giving the trustees power to lend B 10,000*l.* *so long as he carries on the business of banker at H:* It was holden, that B was not entitled to the 10,000*l.* after A attained twenty-one. *Browne* v. *Sansome*, 1 M'Clel. & Y. 427.

A legacy being given to A to bind her apprentice: Held, that she was not entitled to the legacy while she refused to be bound apprentice. *Woolridge* v. *Stone*, 4 Law J. Chanc. 56.

If a testator directs that A shall carry on the testator's trade, with a capital taken from the testator's personal estate, and shall educate and support D, and bind him apprentice to himself, and that, upon the expiration of the apprenticeship, or so soon as A shall think D capable, A shall take D into the business as a partner: Held, that D is not entitled to claim a share of the profits from the death of the testator, and that he has no right to be admitted a partner at any time, unless his conduct is such as to render him not unfit for the situation. *Gordon* v. *Rutherford*, 2 Law J. Chanc. 50, s. c. 1 Turn. 377.

Where a legacy is given to a father, on condition that he does not interfere with the education of his daughter; the Court will compel him to give security to that effect. *Colston* v. *Morris*, 6 Mad. 19.

### (L) ON WHAT PROPERTY CHARGEABLE.

The testator bequeathed the sum of 10,000*l.* stock, and framed the bequest in these words,—"If I shall not have so much as 10,000*l.* capital stock in the three per cent. reduced or consolidated bank annuities, or one or both of them, I will that A and B (his executors), shall make up the sum of 10,000*l.* in the three per cent. reduced or consolidated bank annuities, or one or both of them, and shall hold the same in trust," &c. for the legatees, and it was to be considered as part of his personal estate. The testator died, leaving 70,000*l.* three per cent. consols, and 9000*l.* three per cent. reduced annuities; such legacy was to be specific, and not general or pecuniary, and, therefore, the legatees were entitled to the dividends from the death of the testator; and such a legacy is specific, with the substitution of a general pecuniary legacy in case of its failure, to be satisfied in a particular manner; the same legacy may be specific where it can be specifically satisfied, or general where it cannot. *Semble*, that the executor has the election out of which stock the bulk of the legacy shall be satisfied, and not the legatee. *Fontaine* v. *Tyler*, 9 Price, 94.

A testator devises leaseholds to F C, his heirs, executors, and administrators; but in case F C should die unmarried, then to certain other persons. F C being in possession under this devise, pays two legacies with which the lands were charged, and his proportion, in respect of those lands, of the expenses attending an inclosure under an act of parliament. Many years afterwards, he dies unmarried, and without having done any act to shew an intention to exonerate the lands from any claim which he might have on them, in respect of his payment of those legacies and expenses: Held, that his personal representatives are entitled, as against those claiming under the limitations over, to have the amount of those legacies and expenses raised out of the premises. *Drinkwater* v. *Combe*, 3 Law J. Chanc. 178, s. c. 2 S. & S. 341.

A testator having directed his executors to lay out in what government security they pleased, as much money as would produce a certain annual interest; and having given that annual interest to his wife during her life, in case she did not marry again, the executors invested in the five per cents. a sum which yielded dividends exactly equal to the specified income: those dividends being afterwards di-

minished by the conversion of the five per cents. into four per cents., the widow was held entitled to have the deficiency make good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available. *May* v. *Bennet*, 1 Russ. 370.

Under a will charging lands with all debts, and making the executrix residuary legatee, and after payment of legacies, bequeathing to her the personal effects as a specific legacy: The Court held, that the personal property was first applicable to discharge the legacies, and then the landed property, if that proved deficient. *Gleed* v. *Gleed*, 2 Ken. 14, Chanc.

Where a legacy was directed to be paid out of an estate the testator was about to purchase; on that contract being rescinded, it was holden, that the legacy must be paid out of the testator's general estate. *Fowler* v. *Willoughby*, 2 S. & S. 354.

Legacies held upon the general construction of a will, to be charged solely on the real estate, and not at all on the personal estate. *Kirke* v. *Kirke*, 6 Law J. Chanc. 143.

Where a testatrix, after directing her executor to pay legacies, gave all her real estates, and the residue of her personal estate, after payment of her debts, &c. to her executor: It was holden, that the real estates were not charged with such legacies. *Parker* v. *Fernley*, 2 S. & S. 592.

A testatrix having, under her marriage settlement, a power, *in default of issue*, to appoint by her will a sum of 2200*l.*; she by her will, after reciting the power, proceeded thus: "*And* I give and bequeath," [several legacies, some to persons absolutely, and others to persons for life, and, after their decease, to their children or other persons by substitution, amounting in the whole to the precise sum of 2200*l.*], and as to all such real estates, as she had power to dispose of under her marriage settlement, or the will of her husband, she expressed her desire that the same should descend to and vest in her daughter, by the preferable title of descent; and, subject as aforesaid, she bequeathed the residue of her personal estate to her said daughter: Held, that the legacies were not general legacies, payable out of her general personal estate, but were intended to be given by the testatrix, under a mistaken notion that the execution of the power was not restricted to the event of her dying without issue. *Walker* v. *Laxton*, 1 Y. & J. 557.

Where pecuniary legacies are charged upon real and personal estates, and there is a deficiency of personal assets, the real estates, as well those specifically devised, as those devised under a general residuary devise, must make good the deficiency. *Spong* v. *Spong*, 1 Y. & J. 300.

### (M) INTEREST UPON.

[And see *ante*, I.]

Under a bequest to A, as soon as she attains twenty-one, with interest, A is not entitled to interest until she arrives at that age, when it will be computed from the end of the year after the testator's death. *Knight* v. *Knight*, 2 S. & S. 490.

A testator devises his property to be invested in the funds; and gives 100*l.* a year out of the interest, to be paid yearly to the order of A, and the remainder of the interest to B and C, during their lives, share and share alike: at the death of either, her share to go to A; and then orders, that at the death of both B and C the property shall be drawn out of the funds, and remitted to a corporation to be applied to charitable purposes: the testator dies; then B dies; and then A: Held, that A's representative was entitled to the 100*l.* a year, and B's moiety of the residue of the interest during the life of C. *Booth* v. *Garraway*, 2 Law J. Chanc. 183.

Where a testator gives his wife a legacy, to be paid to her within three months after his death, in lieu of her jointure, and she elects to accept the legacy, she is not entitled to interest upon it during the interval between the death of the testator and the time of payment. *Elton* v. *Montague*, 1 Law J. Chanc. 212.

### (N) INVESTMENT OF.

When a bill is filed for a legacy of stock, although the Court does not usually inquire whether the stock legacy could have been invested at an earlier time; yet, where an executor is also trustee, and retains the legacy without investing, he is liable for any loss which may be occasioned by the non-investment. *Byrchall* v. *Bradford*, 9 Mad. 13.

### (O) ABATEMENT.

A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *Stanton* v. *Knight*, 1 Sim. 482.

By a settlement made after marriage, a provision is made for the wife, which is expressed to be in bar of dower; by his will, the husband gives her a legacy, and declares that what he has so given her, together with the provision made upon their marriage, should be in bar of dower; he died, leaving freehold property, of which his wife would have been dowable, but the assets were not sufficient for the payment of all his legacies in full: Held, that, the wife electing to take the provisions made for her by the will and settlement, she was entitled to priority over the other legatees, and that the legacy to her was not to abate rateably with the other legacies. *Heath* v. *Denby*, 5 Law J. Chanc. 59, s. c. 1 Russ. 543.

A legatee, under a bequest of wines, which arrived in the port of London in a ship before the death of testator, the report of the arrival of the ship being made before, but the entry of the wines not being made till after the death of testator, is not subject to the payment of the duties, the executor being bound to pay them out of the assets. *Stewart* v. *Denton*, 2 Chit. 456.

### (P) WHERE A SATISFACTION.

Bonds by the husband upon marriage to pay to trustees in his lifetime, or immediately after his death, 500*l.* in trust, for his wife for life, and after her death, for their issue, and in default of issue, for his wife for her own use. By his will, the husband, first directing full payment of all his just debts, gave her 1000*l.* absolutely, payable within six months after his decease, together with other valuable legacies: the bequest of the 1000*l.* is neither a performance, nor satisfaction of the obligation to pay the 500*l.* *Adams* v. *Lavender*, 1 M'Clel. & Y. 41.

A legacy given by a father's will is such an advancement of younger children in the lifetime of the

father as will be accounted in a court of equity, a satisfaction *pro tanto* of portions to be raised for them under the testator's marriage settlement, if it contain a clause providing that advancement shall be a satisfaction so far; and the will being silent in that respect is not *per se* equivalent to a declaration under hand and seal, that the legacy shall not be a satisfaction *pro tanto* of the portion. *Goolding* v. *Haverfield*, M'Clel. 345, s. c. 13 Price, 593.

A testator, who had received two legacies, bequeathed to his infant daughters, gives them, by his will, great contingent benefits, and specifies, by a memorandum, that he had received their legacies. These contingent benefits are not a satisfaction of the demand which the daughters have against their father's assets in respect of his receipt of their legacies. *Sandford* v. *Toby*, 4 Law J. Chanc. 24.

(Q) PAYMENT.

Where executors are directed by the will of the testator, to pay a legacy as soon after his death as they should think proper; the Court will consider a year from the day of the death a reasonable time. *Benson* v. *Maude*, 6 Mad. 15.

Where a testator charges his general estate with legacies, and the executor and residuary legatee sells a leasehold, and no demands in respect of the charges created by the will are made for twenty years, the Court will presume that the legacies are satisfied; nor are releases from the legatees necessary to make a good title to the leasehold. *Montrésor* v. *Williams*, 1 Law J. Chanc. 151.

A libel for a legacy must be in the words of the will. *Butter* v. *Robson*, 3 Phill. 368.

Where a legacy of a sum of stock was bequeathed to the rector, churchwardens, and overseers of the poor, of a parish, upon trust to lay out and dispose of the interest and dividends in bread, to be given, for ever, annually, to the poorest parishioners, at the discretion of the rector, churchwardens, and overseers, for the time being: Held, that the rector, churchwardens, and overseers, might file a bill for payment of the legacy, and that an information by the Attorney-General was not necessary. *Mavor* v. *Nixon*, 2 Y. & J. 60; see *Magdalen College* v. *Sibthorpe*, 2 Y. & J. 64.

Where, on a bill by a legatee, there is a decree for the administration of the estate by the executor, another legatee ought not to file a new bill for the payment of his legacy. A solicitor, who, claiming an interest in the legacy under assignment from the legatee, being a married woman, files such a second bill, making the married woman co-plaintiff with him, will be ordered to pay his own costs and hers out of his own pocket. *Packwood* v. *Maddison*, 1 Law J. Chanc. 107, s. c. 1 S. & S. 232.

Where a legacy was given to A, to be paid on her attaining the age of twenty-one years, and in case of her death before that time, was given over; the evidence on which the Master made a report as to her age, with a view to allowing her a suitable maintenance, though sufficient for that purpose, may not be sufficient to establish the time of her birth so clearly, as to sustain an application for the payment of the legacy. *Anon.* 1 Law J. Chanc. 77.

Legatees will not be excluded from the benefit of a decree, on account of non-claim after the usual advertisement. *Anon.* 9 Price, 210.

A bequest of money to be invested in an annuity for the life of a married woman, for her separate use, paid to the husband upon her consent, taken in court. *Gullan* v. *Trimbey*, 2 J. & W. 457.

Where a legacy was bequeathed to R L who died, leaving his widow executrix, and two executors; and the executrix also died, leaving an executor; and the accountant-general having refused to pay the legacy under a power of attorney from the surviving co-executors of R L, without a discharge from the executor of the deceased executrix; the Court ordered the legacy to be paid to the surviving executor. *Moodie* v. *Bainbridge*, 6 Mad. 107.

In all cases upon legacies, where the word "sterling," or some word equivalent, has been used, the money has been held payable in English currency, although the testator was resident out of England.

A legacy in the words contained in a power, *i. e.* given to be paid "in lawful money of Great Britain," is payable in the currency of England.

Unascertained or general legacies must be paid in the currency of the country where the will is made. The rule of law in the case of a legacy, where a party must claim under the voluntary benefaction of a testator, will *à fortiori* apply to a case where the party is a purchaser. *Lansdowne* v. *Lansdowne*, 2 Bligh, 95.

(R) ADEMPTION.

A testator bequeaths all his right, title, and interest in two policies of insurances, which he had effected on the life of his wife, together with all benefit and advantage thereof, to his executors, upon trust, after the death of his wife, to receive the amount of the policies, and thereout to pay or provide for certain legacies; his wife having died, he received the money, and invested it in securities, of which he continued possessed at his death: Held, that the legacies failed. *Barker* v. *Rayner*, 2 Russ. 122, s. c. 5 Mad. 208.

(S) LAPSED.

A legacy is given to a married woman for life, to her separate use, but to be her own absolutely, if she survives her husband; with a power of appointing it by her will, if she dies in his lifetime, and for want of appointment, to her next of kin, exclusive of her husband; if she dies in the lifetime of her husband, leaving the testator her surviving, the legacy is lapsed, and her next of kin are not entitled to it. *Baker* v. *Hanbury*, 1 Law J. Chanc. 78.

A legacy given out of the personal estate of the testator, in trust to pay the interest to a legatee for her life, and after her death to pay the principal absolutely, in certain shares, to and amongst several legatees; "and in case of the death of such legatees (naming them), or any or either of them, before such their respective legacies should or might become payable, then the legacy or part of him, her, or them so dying, to go to his, her, or their executors or administrators, as part of his, her, or their personal estate": Held, as to one of such shares, to have lapsed, notwithstanding the intervening life estate, on the death of one of the legatees in the lifetime of the testator; and that the mention of the executors and administrators, in the clause of the will, did not amount to a substitution, so as to vest any interest in them and prevent the lapse. *Bone* v. *Cook*, M'Clel. 168, s. c. 13 Price, 332.

A testator, who died in 1799, bequeathed a legacy to his father in Ireland; but, in case of his father's death before he received the same, he bequeathed the same sum over for the benefit of his (the testator's) brothers and sisters: the father lived till 1796; but, from difficulties in getting in the testator's estate, never received any part of the legacy: Held, that the gift to the father did not take effect. *Law* v. *Thompson*, 6 Law J. Chanc. 56.

A testatrix, after directing her lands to be sold, and making a void disposition of 800*l.* of the money to be raised by the sale, gave to R all the residue of the monies to be raised by such sale: by a subsequent clause, she likewise gave to R all the residue of her personal estate: Held, that R is not entitled, under either residuary gift, to the lapsed legacy, but that the 800*l.* will go to the heir-at-law.

The costs of the suit in such a case will be borne by the whole residuary fund, including the 800*l.* so that a proportion of them may fall on the lapsed legacy. *Jones* v. *Mitchell*, 1 Law J. Chanc. 163, s. c. 1 S. & S. 290.

### (T) VOID.

A testator bequeathed stock to trustees, upon trust to sell the "same when an opportunity offers of building a chapel for the worship of a certain protestant sect, and to contribute the same towards the building and its support:" Held, that the bequest was void under the Statute of Mortmain. *Prichard* v. *Arbouin*, 5 Law J. Chanc. 175.

A Scotchman, by a will made in England in the English form, bequeaths money to trustees, of whom two were resident in Scotland, upon trust to lay out the same in the purchase of lands or rents, of inheritance in fee simple, upon trust to pay the rents to the magistrates of a town in Scotland for the benefit of persons residing in or within a certain distance of that town: Held, that the bequest was void under the Mortmain Acts. *Attorney General* v. *Mill*, 5 Law J. Chanc. 153.

Bequest out of real estate to erect a monument in a church to a testator's memory, is not within the Statute of Mortmain. Bequest to erect a monument to the testator's memory within a year after his death in the church of A, with a legacy to the rector of A, on condition of his consenting to the erection of the monument, and a direction, that if he refused, the testator was to be buried elsewhere: Held, that the purpose failed, by the rector's refusing, for many years, to allow the monument to be erected, though a succeeding rector was willing to consent. *Mellick* v. *the President and Guardians of the Asylum*, 1 Jac. 180.

The testator bequeathed personal property to his trustees and executors, upon trust to pay the dividends to his daughter during her life to her separate use, and after her decease, to pay the principal unto all and every her children who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship in case any of them died under that age, with limitations over in case there should be no such child or children; or being such, all of them should die under twenty-three without lawful issue. The daughter had a child, who died under age in her lifetime: Held, that the bequests to the children, and the subsequent limitations, were too remote. *Bull* v. *Pritchard*, 1 Russ. 213.

A testatrix bequeaths stock to her children f life, and after their death to their children for lif and after the death of the children of the childre to the testatrix's lawful heirs: Held, that all the b quests, except the bequests to the children for lif are void. *Hayes* v. *Hayes*, 6 Law J. Chanc. 141.

If a legacy of stock is given by a testator, wh has not the stock described, nor any other stoc the legacy fails. *Evans* v. *Tripp*, 6 Mad. 91.

A gift of personal property to all the children the testator's son, who should be living at the en of twenty-eight years from the testator's death, void, as being too remote. *Palmer* v. *Holdford*, Law J. Chanc. 104.

A testatrix devises and appoints estates to b daughter O for life; remainder to the use of the fir and other sons of O successively in tail male; remai der to the daughters of O, as tenants in common i tail, with cross remainders between them in tai remainder, in default of all such issue of O, to trus tees for the term of one thousand years, to rais such legacies as she had thereafter bequeathed, o should by any codicil bequeath, and to pay the sam to the legatees; remainder to the husband of th testatrix in fee. In a subsequent part of the wil she gave and bequeathed, from and immediatel after the decease and failure of issue of her daughte O, various legacies, to the persons therein named Held, that the words "failure of issue," in the be quest of the legacies, meant, not a failure of issu generally, but a failure of such issue as were com prised in the prior limitations of the estate: and therefore, that the legacies were not too remote, an were well charged on the lands. *Morse* v. *Lor Ormonde*, 4 Law J. Chanc. 158, s. c. 1 Russ. 382.

Where the will relates only to personal estate, th 25 Geo. 2, c. 6, does not apply; and a legatee is en titled to his legacy, though he be an attesting wit ness. *Emanuel* v. *Constable*, 5 Law J. Chanc. 191 cont. *Lees* v. *Summersgill*, 17 Ves. 503.

The statute 25 Geo. 2, c. 6, is limited, in point o true construction, to wills and codicils of real estate though it extends, in terms, to all wills and codicil whatsoever. Hence, a legacy, &c. to a subscribin witness to a mere will, or codicil, of personalty, is good legacy, and as such, recoverable at law; not withstanding that statute. *Brett* v. *Brett*, 3 Add 210.

A leasehold estate, bequeathed, amongst othe personalty, for the support of a charity, under a de vise void by stat. 9 Geo. 3, c. 36, is applicable, i the first place, as assets undisposed of, to the pay ment of debts, &c., and the residue is to be appro priated according to the testator's intentions. *Attorne General* v. *Tomkins*, 1 Ken. 129, Chanc.

### (V) RESIDUE OR SURPLUS.

Construction of general words in residuary be quest. *Hougham* v. *Sandys*, 6 Law J. Chanc. 671

The plain express meaning of words in a residuar clause will be followed, where such meaning is con sistent with the general intention of the testatrix though it should be repugnant to the strict litera import of a former clause. *Hopkins* v. *Towle*, 1 Law J. Chanc. 155, s. c. 1 S. & S. 337.

Although the whole value of the land may be given in legacies, yet after giving legacies to a certain amount, the surplus cannot be given away in

this manner. The surplus is held to be land, and is not thus to be disposed of. *Craufurd* v. *Coutts*, 2 Bligh, 679.

Where a party bequeaths the whole of his property, it demonstrates an intention on the part of the testator not to die intestate with regard to any portion of his effects; hence a residuary legacy will be extended to after-acquired property, unless special words be introduced to limit the general rule. *Bland* v. *Lamb*, 2 J. & W. 405.

The testator bequeathed legacies of 100*l.* to each of five persons, and all his "goods and moveables;". and, by codicil, he directed "his goods and utensils" also to be divided between these five persons: Held, that such words are to be limited to utensils and articles *ejusdem generis;* and that the testator died intestate as to the beneficial interest in the general residue of his property. *Sutton* v. *Sharp*, 1 Russ. 146.

A testator, after devising to his natural son some real estates, bequeaths to him *his furniture, plate, books, and live stock, or what else he may then be possessed of at his decease;* he then makes other devises and bequests in his favour, and also gives pecuniary legacies to various persons: Held, that the words, "or what else the testator might then be possessed of at his decease," operate as a bequest of the general residue of the personal estate to the testator's natural son. *Fleming* v. *Burrows*, 4 Law J. Chanc. 115, s. c. 1 Russ. 276.

Testator, after bequeathing to A and B legacies of stock, unequal in amount, and giving several legacies to public charities, requests the said A and B to be his executors, and gives to them as such one hundred guineas each. He then orders his books, jewels, plate, and household furniture to be sold; and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the will, and to his two executors for a ring, as a token of remembrance, concludes his will in the following manner: "In case there is any money remaining, I should wish it to be given in private charity": Held, that the general residue of the testator's personal estate, consisting of a leasehold estate, money in the funds, and a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles, which the testator directed to be sold. *Ommanney* v. *Butcher*, 1 Turn. 260.

Testatrix, by her will, disposes of certain long annuities, and of a sum in cash, and then uses the following words: "I believe there will be sufficient money left to pay my funeral expenses." By a codicil to her will the testatrix expresses herself thus: "If there is money left unemployed, I desire it may be given in charity:" Held, that the general residue of the testatrix's personal estate, including a sum of £2500 trust monies, in which she had a vested reversionary interest at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money left unemployed," and as well given to charity. *Legge* v. *Asgill*, 1 Turn. 265.

A testator gives the residue of his estate to his executors, upon trust to invest the same on securities, and pay the interest to A during his life, with certain limitations over: the executors, within the year after the testator's death, receive a sum of money as dividends on part of the testator's estate, which was invested at his death; and this sum was not wanted for payment of debts or legacies: Held, that this sum did not constitute part of the residue, but belonged to the tenant for life. *Hewitt* v. *Morris*, 2 Law J. Chanc. 87, s. c. 1 Turn. 241.

A testatrix devises her messuages, buildings, lands, tenements, and hereditaments, to trustees and their heirs, and bequeaths all her personal chattels and effects to the same trustees, their executors, administrators, and assigns, directing them to sell both species of property, and to keep two distinct accounts: the one, of the monies arising from the sale of her messuages, lands, tenements, and hereditaments: the other, of her personal estate thereby made saleable, and legally applicable to the charitable purposes therein expressed: she further directs that her debts and legacies (except those given to charities) shall be paid out of the produce of her real estate; that the legacies to charitable uses shall be raised out of the personal estate; and in case the former fund be insufficient to pay the legacies charged upon it, that the personal estate shall be applied to make up the deficiency; and she adds, that, if any part of her personal estate remain undisposed of after satisfying the specified charges on it, she gives the residue of her said estate and effects, not thereby otherwise disposed of, to C: Held, that the surplus of the personal estate, after payment of the charitable legacies, was not applicable to the payment of her debts and general legacies, in ease of her real estate;—That the chattels real of the testatrix were included in her devise of her messuages, lands, buildings, and hereditaments;—That the surplus of the real estate, after payment of debts and legacies, did not pass by the residuary clause;—That the heir-at-law of the testatrix took that surplus as money, and not as land. *Dixon* v. *Dawson; Slawin* v. *Farside*, 3 Law J. Chanc. 195, s. c. 2 S. & S. 327.

A bequest of residuary estate to trustees, to apply the interest to the education and maintenance of A during her minority, and, when she has attained the age of twenty-one years, to the use of A absolutely, does not give A any vested interest till her full age is attained; and, if she dies during her minority, the residue goes to the next of kin of the trustee. *Russel* v. ——, 1 Law J. Chanc. 69.

Testatrix bequeathed one moiety of the residue of her personal estate to her daughter Hannah, for her separate use, during the joint lives of her and her husband; and, if she survived, to her absolutely; if not, to her children who should attain twenty-one; and she bequeathed the other moiety for the benefit of her daughter Mary and her children; with a bequest over, if she died without children, to Hannah and her children, in like manner as the first moiety. By a codicil, she bequeathed the whole residue, if both her daughters died without leaving a child who should attain twenty-one, to A. Both the daughters died without issue, but Hannah survived her husband: Held, nevertheless, that A was entitled to the residue. *Hopkins* v. *Towls*, 1 Law J. Chanc. 155, s. c. 1 S. & S. 337.

A testator bequeathed a fund, which was to be produced by the conversion into money of the residue of his real and personal estate, to trustees, upon trust to pay the interest of one moiety to his daugh-

ter, for her separate use during her life; and, after her death, to pay 100*l.* a year to her husband during his life, and to apply the remainder of the dividends to the maintenance and education of all and every her children, until they attained twenty-one respectively, and when they attained their respective ages of twenty-one, upon trust to pay the principal to them in equal shares; the mother survived the testator, and left two children, who died under twenty-one. The moiety of the residue vested in these children. *Jones* v. *Mackilwain*, 1 Russ. 220.

Testator, after bequeathing an annuity and goods to his wife for her life, directs the whole of his fortune, in default of his own issue, and of a second son of his brother, and second son of his sister, to be divided between the plaintiff and the defendant, making the latter the residuary legatee: Held, that under the words *whole fortune*, the interest of the moiety, till the determination of the contingency, did not belong to the plaintiff; and that the residuary legatee was entitled to that and the reversionary interest in the goods left to the wife. *Mitford* v. *Wicker*, 2 Ken. 61. Chanc.

M, by his will, after disposing of his personal property, gave to his sisters, H and M, a certain annual rent, and at their respective deaths, willed to their children in equal shares, the inheritance their mothers derived from his estate, leaving H and M residuary legatees: Held, that as H and M took the residue absolutely, it conferred no benefit on their children. *Grassick* v. *Drummond*, 1 S. & S. 517.

A testator gives a residue to his widow, for life, and, after her decease, to C, to be at her own disposal; but if C should happen to die, leaving any child living at her decease, then to such child or children; and if she should die without any child living at her decease, then to D and E; but if either of them should die before they should become entitled to receive the same, then the whole to the survivor; but if they should both die in the lifetime of his widow, then to his wife absolutely:—C having survived the widow: Held, that she was entitled to the residue absolutely. *Da Costa* v. *Kier*, 5 Law J. Chanc. 161.

A testator bequeaths to his wife the residue of his estate, requesting that she would, at her death, leave three legacies of 200*l.* each, to three persons whom he describes, and that she would leave the remainder of her property to his two nephews, in such proportions as she thought proper: Held, that, subject to the three legacies, the widow was entitled to the residue absolutely, and that no trust, as to any portion of it, was raised in favour of the nephews. *Eade* v. *Eade*, 4 Law J. Chanc. 44.

A testator bequeaths a sum of stock to each of five nephews and nieces, or to their respective child or children; should any die without child, such share to revert to the residuary legatee; each of the nephews and nieces who survive the testator, takes his or her legacy of stock absolutely. The same testator appoints as his residuary legatee E P M, his child or children; in case of his death without any such, the residuary interest to vest in the other five nephews and nieces then alive, share and share alike, and, as before, to the child or children of each: and in case of either of their deaths without any such issue, then his or her share to be divided amongst the survivors; E P M, having survived t testator, takes the residue absolutely. *Montagu* *Nucella*, 1 Russ. 165.

A testatrix, after devising her freehold and cop hold estates to trustees for sale, proceeds as follow —"I will and direct that the monies to arise fr such sale be considered and taken as a part of m personal estate": In a subsequent part of her wi she uses the following words:—"And I here direct, that, out of the monies to arise by such sa and out of all other my personal estate, the seve legacies hereinafter mentioned be paid and sati fied": she then gives several legacies, and, by t residuary clause in her will, she gives "all t residue of my personal estate, and of the mon arising from the sale of my real estate," in the ma ner therein mentioned. The personal estate was n sufficient to pay the legacies, and several of t legacies lapsed: Held, that the lapsed legacies f into the residue, and did not go to the heir-at-law the testatrix.

The legacies were not paid till the expiration a year from the testatrix's death, during which ti the funds, out of which they were paid, yielded i terest and dividends: Held, that such interest a dividends formed part of the corpus of the resid and did not belong to the tenant for life of t residue. *Amphlett* v. *Parke*, 5 Law J. Chanc. 1 a. c. 1 Sim. 275.

A B devised to his five children 2500*l.* each, up their severally attaining twenty-one; during th minorities the surplus, after paying for their ma tenance and education, to accumulate; and, if th should be any surplus after giving each of th 2500*l.*, to divide it amongst the five children, such of them as should be living when the young attained twenty-one; and in case any of the s five children died under twenty-one, without leav issue, the share of such children in the trust mon should go to the survivors; but if any of th should die under twenty-one, leaving issue, shares of such children should go to such their iss One of the children attained twenty-one, and d leaving issue, but before the youngest child of testator had arrived at twenty-one: Held, that issue of the deceased child took no interest in surplus. *Howes* v. *Herring*, 1 M'Clel. & Y. 295

Property was devised to a college for found additional fellowships, and the surplus, if any, to be appropriated as a fund for the repairs; property having increased considerably—it holden, that the surplus not required for repair &c. vested in the old foundation. *Attorney Gen* v. *Master of Catherine Hall*, 1 Jac. 381.

A testatrix bequeaths the interest of her residu estate to A for life, directing her executors to in it in the meantime; and, after his death, she g it to B, C, D and E, and the survivors or surv of them, share and share alike, to be paid to t at twenty-one, with interest, until they shoul entitled to receive their shares. B and C die du her life: Held, that D and E are, upon A's de entitled to the whole residue. *Pope* v. *White* 6 Law J. Chanc. 53.

A testator, out of a fund composed of the ceeds of his real and personal estate, gives a le to A, and a contingent legacy to B: he then di his trustees to pay to his *devisees as under*, C

&c. certain sums; finally, he gives the residue to his *devisees above named*, share and share alike, in proportion to their several legacies: Held, that A and B are entitled to share in the residue, as well as C, D, &c. *Coope* v. *Banning*, 2 Law J. Chanc. 11, s. c. 1 S. & S. 534.

A testator directs the residue of his estate to be divided into eight equal shares, and disposed of as follows, among the children of B: he then enumerates the number of shares which each child is to take, but the shares so given, amount only to seven: Held, that the children of B take the whole residue, and that the division is to be by seventh, instead of eighth, shares. *Berkeley* v. *Palling*, 4 Law J. Chanc. 226, s. c. 1 Russ. 596.

Under a gift of the residue to all the testator's legatees, in equal shares (which were 23 in number), each legacy will have added to it one-twenty-third part of the residue. *Taniere* v. *Perks*, 1 Law J. Chanc. 79.

A testator, after giving certain legacies, bequeathed the whole of his real and personal estates to two persons, as his sole executors, "in trust to dispose of the whole," according to the testator's directions, with a concluding bequest in these words, "To my two executors, whom I appoint to this purpose, in trust to see the above fulfilled, I bequeath ten guineas, together with all the rest of my estate, whether real or personal, wherever deposited, after paying funeral expenses, or other incidental charges. One of the executors died in the testator's lifetime, the other survived him but seventeen days; he died, leaving executors. On the hearing of a cause by bill filed against the executors of the surviving executors of the original testator, by the next of kin praying to be declared entitled to the general residue, according to the Statute of Distributions: Held, 1st, that the executors were beneficially entitled to the whole of the residue, and were not trustees for the next of kin. 2nd, that the executor of the first testator was not precluded, by having done no act in his lifetime manifesting his intention to take on himself the burthen of the execution of the will; and, 3d, that under the words of the will, he and his executors were entitled to the lapsed legacies, (many legatees having died in the lifetime of the testator,) and to the whole of the residue, from whatever cause arising, beneficially, and not as trustee. *Semble*, that the survivor of two executors, to whom a residue is bequeathed, is entitled to the whole, if the other executor dies in the testator's lifetime. *Parsons* v. *Saffery*, 9 Price, 578.

A testatrix, after some specific bequests, gives to A, for his life, all monies, dividends of stock, and all other monies due to her; she directs, after his decease, the principal and interest to be divided among his children in the following manner (giving 500*l.* to one child, and 300*l.* to each of three others) and she then appoints A and B her executors: these legacies were sufficient to exhaust all the testatrix's property as it stood at the date of the will; but in consequence of subsequent acquisitions, there remained at her death a large residue: Held, that the executors were entitled to take the residue beneficially. *Haynes* v. *Littlefear*, 2 Law J. Chanc. 13, s. c. 1 S. & S. 496.

A testator appoints A and B his executors "for the just and due performance of his last will and testament:" Held, that these words will not convert the executors into trustees of the residue, for the testator's next of kin. *Gascoigne* v. *Lynde*, 4 Law J. Chanc. 54.

A testatrix by her will appoints A B her executor, "to see that her will is put in force as follows;" and then gives various specific and pecuniary legacies: Held, that the executor takes the residue, not beneficially, but only as a trustee for her next of kin. ——— v. *Farrand*, 6 Law J. Chanc. 34.

A testatrix gave the interest of the residue to her brother during his life, and after his death, she gave the residue to her executors, in trust for four persons by name, and the survivor and survivors of them, to be paid to them respectively when they should attain twenty-one, with interest in the meantime; of these four persons two died during the life of the brother: Held, that they did not take vested interests in any part of the residue, but that the whole of it belonged to the two survivors. *Pope* v. *Whitcombe*, 3 Russ. 124.

A testator gives to two persons, successively for their lives, his house and garden, with the furniture, and an income of 300*l.* a year to maintain it; and he directs, that, at the death of the survivor, the whole of the premises shall become the property of the executors: Held, that this bequest will not exclude the executors from taking the beneficial interest in the residue. *Gascoigne* v. *Linde*, 4 Law J. Chanc. 54.

A testator devises real estates to trustees upon trust for A, during his life, with remainder over; and he gives the residue of his personal estate to the same trustees, upon trust, with all convenient speed, to purchase lands to be conveyed to the same uses as the devised estates, and until the purchases be made, upon trust to lay out the money on securities, and pay the dividends to those, who (if lands had been bought) would have been entitled to the rents: Held, that the tenant for life is entitled to the dividends accruing upon the clear residue of the personal estate, within the year after the testator's death. *Angerstein* v. *Martin*, 2 Law J. Chanc. 88, s. c. 1 Turn. 232.

A will contained a direction, that the residue of the testator's personal estate should be expended in the purchase of land, as soon as land in the county of Y could be conveniently found, which must produce a certain per centage: It was holden, that until the direction be complied with, the tenant for life was entitled to all interest of the testator's residuary estate accruing from the end of one year after the testator's death. *Kelvington* v. *Gray*, 2 S. & S. 396.

Legacies bequeathed by the will of a husband, and subsequently of the widow, proving void, they fall into the residue of the estate, and are not to be distributed among the remaining legatees. *Lake* v. *Cook*, 2 Ken. 54. Chanc.

## (W) LEGACY DUTY.

If a testator dies in India, and his personal estate is wholly there, and the executor is resident there, and the will is proved there, and such executor remits a legacy to a legatee here, or to some other person for the specific use of the legatee, the legacy duty is not payable on such remittance, inasmuch as the estate is wholly administered in India.

But if part of the assets are found in England, in the hands of the agent of such executor, without specific appropriation, and a legatee in England institutes a suit here, for the administration of such unappropriated assets, such assets are administered in England, and are therefore liable to the payment of the legacy duty. *Logan* v. *Fairlie*, 3 Law J. Chanc. 152, s. c. 2 S. & S. 284.

A testator, resident in India, bequeaths to an infant a sum of money, to be invested in the company's securities, of which the interest is to be applied to her maintenance, and the principal to be settled upon herself for life, with remainder to her children; he is lost on the voyage to England, leaving all his property in India; executors resident in that country prove his will at Calcutta, invest the legacy in the company's securities, and for several years remit the interest to their correspondents in London, for the benefit of the legatee who had come to England; a part of that interest is brought into court, in a suit established by her for the appointment of a guardian, and for the allowance of maintenance, and an order is made for the payment to her guardian, out of the fund so created, of 200*l.* a year as maintenance: Held, that there was specific appropriation in India of the legacy; and that the payment of 200*l.* a year was not liable to the legacy duty. *Hay* v. *Fairlie*, 1 Russ. 117.

A, who died in 1794, bequeathed a legacy, in consolidated stock, to executors, in trust to pay the interest to B for life; remainder, after B's decease, to the surviving children of B on their attaining twenty-one; remainder, if no surviving children, to the appointment of B; remainder, in default of appointment, to B's next-of-kin: upon A's death, the executors transferred the legacies into their own names from that of the testator, paid the testator's debts, and accounted for the residuary estate to the residuary legatee; the dividends were regularly paid by the executors to B until 1826, when B died, leaving three children: Held, that the transfer did not amount to a payment, delivery, retainer, satisfaction, or discharge of the legacy, before the 31st of August 1815, and was therefore liable to the duty under the 55 Geo. 3, c. 184. *Attorney General* v. *Wood*, 2 Y. & J. 290.

A testator bequeaths annuities to be charged on leasehold estates, and directs that they shall be paid without any deduction or abatement: Held, that they are to be paid free of the legacy duty. *Smith* v. *Anderson*, 6 Law J. Chanc. 105.

A testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and as to the remaining 30,000*l.*, she was to receive the interest to her separate use during her life, and, after her death, the principal was to be paid to such person or persons as she might by her will appoint; and, after giving various other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed, that all the specific and pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees free of the legacy duty; the daughter having died in his lifetime, he afterwards by a codicil "instead of the legacies given to her by my will, which are now lapsed," bequeathed to her husband 20,000*l.*: Held, that the husband was not entitled to have the 20,000*l.* paid to him free of legacy duty. *Chatteris* v. *Young*, 2 Russ. 183.

Residuary bequest of the personal estate of a t tator to his son-in-law G B, and to his (the testator daughter and his wife for their absolute benefit, chargeable, under the 55 Geo. 3, c. 184, with 1 per cent. on one moiety, and 1*l.* per cent. the other. *Attorney General* v. *Bacchus*, 11 Pri 547.

Money paid by an executor as legacy duty, t stamp distributor or his agent, under an agreem that the receipts for the legacies, in respect of wh such payment is made, shall be transmitted to duly stamped within twenty-one days, according the provisions of the act, 36 Geo. 3, c. 52, c. may, on failure to perform such agreement, be covered back from the stamp distributor, either u the special assumpsit, or upon a count for money and received, &c.

*Semble*—That, in an action to recover back amount of such payments from a distributor of sta and collector of the legacy duty, a person who been appointed by him a sub-distributor of sta will be deemed to have been appointed a sub-coll tor of the legacy duty, until the contrary be prov *Scott* v. *Knapp*, 5 Law J. K.B. 281.

## (X) Rights of Legatees.

A legatee may file a bill for an account. Sha v. *Sharples*, M'Clel. 506.

Where a testator bequeaths money upon trus trustees to invest in the public funds, and pay dividends to A until her marriage, and, upon marriage, to transfer the stock to her; but, in she should die unmarried, then to transfer the s to such person as she should by her will appo and, in default of such appointment, to her execu or administrators. *Semble*—That she is not enti to have the fund transferred to her while she rem unmarried. *Wilson* v. *Mount*, 2 S. & S. 493.

Maintenance allowed to a legatee after she attained the age of twenty-one. *M'Dermot* *Keeley*, 4 Law J. Chanc. 102.

Where an account of the residuary estate of a tator has been made out by the executors, signed by the parties interested, under which acc all of them have been paid except one, such one recover his proportion, with interest, in assum against the executors. *Gregory* v. *Harman*, 3 P. 205. [Burrough]

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## LEGAL REPRESENTATIVES.

Legal representatives to be understood exec and administrators unless controlled by inte upon the whole instrument. *Price* v. *Stran* Mad. 159.

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## LETTERS OF REQUEST.

Letters of request must shew that they were by a competent jurisdiction. *Rose* v. *Lee*, 3 566.

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## LIBEL.

(A) ACTIONS FOR.
(B) PLEADINGS.
(C) EVIDENCE.
(D) INFORMATIONS AND INDICTMENTS.
(E) DAMAGES.

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### (A) ACTIONS FOR.

It is a libel to publish of a protestant archbishop, that he attempts to convert catholic priests by offers of money and preferment. *Archbishop of Tuam* v. *Robeson*, 6 Law J. C.P. 199, s. c. 5 Bing. 17, s. c. 2 M. & P. 32.

Where a written publication charges a man with that what, if true, would degrade him in the opinion of his neighbours, it is not the less a libel, although the main purpose appears to have been to charge him with the breach of a particular law; and the whole context shews that the writer is mistaken in his law.

Accordingly, where a written publication charged the plaintiff, an overseer of the poor, with illegal conduct towards the paupers, by forcing them to take goods at a disadvantage in lieu of money, (the writer evidently meaning to charge an offence under the 55 Geo. 3, c. 137, s. 6; but not stating facts applicable to that statute)—it was held, that this was a libel, inasmuch as the conduct ascribed to the plaintiff in his character of overseer was oppressive and disgraceful, whether it amounted to a legal offence or not. *Woodward* v. *Dowsing*, 6 Law J. K.B. 225, s. c. 2 M. & R. 74.

The defendant being sued by the plaintiff on a bond executed by him as surety for one Morrison, conditioned for the due performance by Morrison of an award about to be made between him and the plaintiff, the defendant resisted payment, and commenced proceedings in equity, and also in Scotland, to set aside the bond, which the plaintiff (pending these proceedings) advertised for sale by public auction as a common money-bond. The defendant attended at the Auction Mart on the day of sale, and there read and circulated a letter that he had previously sent to the auctioneer, in which he stated that the plaintiff's object in offering the bond for sale, was "either to extract money from the pocket of an unwary purchaser, or, what was more likely, by means of the threat of publication, to extort money from him (the defendant):" Held, that this was a libel, and that proof of express malice was not necessary. *Robertson* v. *MacDougall*, 6 Law J. C.P. 171, s. c. 4 Bing. 670, s. c. 1 M. & P. 692, s. c. 3 C. & P. 259.

Where a party complains of a libel, which is confined to an illegal transaction, in which he himself is engaged, he cannot recover in an action for such libel; but if fraud *ultra* such transaction be imputed to him, the action may be maintained. *Yrisarri* v. *Clement*, 4 Law J. C.P. 128, s. c. 3 Bing. 432.

An action for a libel cannot be sustained where the injury has been done to the plaintiff in his exercise of an illegal vocation. *Hunt* v. *Bell*, 1 Bing. 1, s. c. 7 B. Mo. 212.

To constitute a libel, it need not be understood by all the world; if it can be comprehended by those who know the plaintiff, it will suffice. But those persons must not resort to another libel, written by another person, to shew that through the medium of that libel they were enabled to understand that the plaintiff was intended. *Bourke* v. *Warren*, 2 C. & P. 307. [Abbott]

No action lies for a libel contained in an affidavit, produced in a court of justice, and as a defence to a legal proceeding. *Astley* v. *Young*, 2 Ken. 536, s. c. 2 Burr. 807.

Though counsel, in the discharge of their duty to their clients, are privileged to utter matters highly injurious to individuals, yet the publication of these observations is not justifiable, unless it be shewn that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence. *Flint* v. *Pike*, 3 Law J. K.B. 272, s. c. 4 B. & C. 473, s. c. 6 D. & R. 528.

The plaintiff being about to be chosen preacher at a dissenting chapel, the defendant, in a conversation with one of the congregation, who made inquiry of him respecting the plaintiff's character, related a circumstance which had occurred some years before, in such a manner as to induce that person to suppose that the plaintiff had been guilty of forgery. This assertion appearing to be without foundation, the deacons of the chapel sent a circular to each of the congregation, with an account of the affair, to the intent that the plaintiff's reputation might be maintained amongst them. The defendant wrote a letter in answer, directed to the minister and deacons, in which he again charged the plaintiff with forgery; and, in support of the charge, set out what purported to be the opinion of counsel on a case submitted, but which was, in fact, only a part of the opinion; certain parts of it being purposely suppressed, they not supporting the defendant's assertion. It was left to the jury to say, whether or not the libel imputed forgery to the plaintiff, and whether or not the defendant was actuated by express malice in writing it. They found that the libel did impute forgery; but that the defendant was not actuated by express malice, and, accordingly, gave a verdict for the plaintiff, damages 50*l*.

On motion for the defendant to have it entered for him on the general issue, and for the plaintiff on the special pleas, on the grounds that the jury having negatived express malice, the action could not be maintained; and that the letter containing the libel was a privileged communication; and on motion by the plaintiff for a new trial, on the ground that from the lapse of time since the bill was given, and the defendant's withholding that part of the opinion which was favourable to the plaintiff's case, there was sufficient proof of express malice, and that the jury ought to have found it,—the Court refused to disturb the verdict. *Blackburn* v. *Blackburn*, 6 Law J. C.P. 13, s. c. 4 Bing. 395, s. c. 1 M. & P. 33, s. c. 3 C. & P. 146.

In the newspaper called *The Morning Herald*, a report was given of a case heard before a justice of the peace at the Bow-street office. The statement charged a person with a criminal offence, and consequently was a libel: The Court held, that if it was a fair and true report of what occurred at the office, yet it was unlawful in the editors of the newspaper to publish it. *Duncan* v. *Thwaites*, 3

Law J. K.B. 3, s. c. 3 B. & C. 556, s. c. 5 D. & R. 447.

Two persons appeared before a magistrate, and verbally made a statement injurious to the character of the plaintiff. The magistrate was not called on to act in his judicial character, but merely to give his advice. The defendants, editors of a newspaper, published an account of the proceedings which contained matter, part of which was not actionable when spoken, but became so when written. The defendants pleaded, that the report was correct, and that the facts were true. The jury found that the statement was not true, but that the report was correct: The Court held, first, that as the magistrate was not acting in his judicial character, the defendants were not justified on the ground of its being a correct report of legal proceedings. Secondly, that the defendants did not give any right of action against the persons who addressed the magistrate. And thirdly, that they had not offered themselves as witnesses, by saying that they had themselves heard the slander. *M'Gregor* v. *Thwaites*, 2 Law J. K.B. 217, s. c. 3 B. & C. 24, s. c. 4 D. & R. 695.

An officer in the navy has no right to make communications upon subjects, with which he becomes acquainted in his professional capacity, except to the Government; and, therefore, a letter, written to Lloyd's Coffee-house, about the conduct of the captain of a transport ship, by a lieutenant, who was superintendant on board, is not a privileged communication. *Harwood* v. *Green*, 3 C. & P. 141. [Best]

A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transactions, is not a privileged communication.

*Semble*, that if such letter *state particular facts*, it will not be a libel, though some of the persons receiving it, believed that it was sent to intimate that the parties mentioned in it were common sharpers and swindlers. *Aliter*, if it contain a *general statement*—such as, that the party mentioned in it is considered an improper person to be proposed to be balloted for as a member of the society. At all events, in the former case, it is a question for the jury, whether the society really and *bonâ fide* intended to give the *particular information* which the letter contains. *Getting* v. *Foss*, 3 C. & P. 160. [Gaselee]; and see *Goldstein* v. *Foss*, 2 C. & P. 252. *Post*, B. [Abbott]

*Semble*, That a character of a servant, if given *bonâ fide*, is a privileged communication, although it had not been applied for. *Puttison* v. *Jones*, 3 C. & P. 383. [Tenterden]

A comment on matters of general interest, such as a petition in parliament, is not a libel unless the private character of the petitioner be vilified. *Dunne* v. *Anderson*, 1 R & M. 287. [Best]

Where, in an action for a libel, the plaintiff declared that he was a member of the Royal College of Surgeons; and that he had set up a certain establishment from which he was deriving great gains and profits; and that he had presented a petition to the House of Commons against empiricism and quackery; but that the defendant published a certain libel of and concerning the plaintiff as a surgeon, charging him with ignorance in the science of his profession and of chemistry; and it was left to the jury, that, if the defendant's publication was a fair comment on the plaintiff's petition, it was not a libel; but that if it tended to reflect on the plaintiff in his private practice, or imputed ignorance to him in his character of a surgeon, it would be; and whether, from the terms of the libel, it applied to his ignorance as a surgeon or a chemist; and they found a verdict for the defendant: The Court granted a new trial. *Dunne* v. *Anderson*, 3 Law J. C.P. 157, s. c. 3 Bing. 88, s. c. 10 B. Mo. 407.

Whatever is fairly written of a work, and can be reasonably said of it, or of its author, as connected with it, is not actionable, unless it appear that the party, under the pretext of criticising the work, takes an opportunity of attacking the character of its author. *Macleod* v. *Wakley*, 3 C. & P. 311. [Tenterden]

A fair criticism on the works of a professional artist, in the course of his professional employment, is not actionable, however mistaken it may be: if it is unfair and intemperate, and written for the purpose of injuring the party criticised, it is actionable. *Soane* v. *Knight*, 1 M. & M. 74. [Tenterden]

Two or more partners may join in an action for libel imputing insolvency to them in the way of their trade as bankers, whereby they have sustained a special damage; as, where the interest is joint, all may join in the action. *Foster* v. *Lawson*, 4 Law J. C.P. 148, s. c. 3 Bing. 452.

### (B) PLEADINGS.

Where an index to a review contained a libel: It was holden sufficient to set out the contents of the index, without stating the whole subject matter, which might introduce a material qualification. *Buckingham* v. *Murray*, 2 C. & P. 46. [Abbott]

In an action for a libel, a letter, stated as an inducement in the declaration, need not be all set out therefore if it be found to contain more than is alleged in the pleadings, it is no variance. *Bourke* v. *Warren*, 2 C. & P. 307. [Abbott]

Where that which is complained of in the declaration as a libel, does not upon the face of it apply to the plaintiff, and import a libel, it is necessary by inducement to state such facts as will support an innuendo, and shew the libellous application of the statement to the plaintiff. *Hall* v. *Blandy*, 1 Y. & J. 480.

In an action for a libel set forth in the declaration as follows: "Who do you think was the archbishop who promised M, the priest of the mountain 1000*l*. in cash, and a living of 800*l*. a year? Why no less a personage than the Archbishop of Tuam (the plaintiff)!!! The archbishop wrote to a Protestant clergyman, desiring him to make the offer and to shew the letter, but not to surrender it in his possession, unless M was disposed to accede,"—with an innuendo that "the defendant meant by the libel, that the plaintiff had offered the said M 1000*l*. in cash, and a living of 800*l*. a year, if he would accede to become a Protestant clergyman,"—a motion was made in arrest of judgment, on the ground that there were no introductory averments to explain the intent of the libel, nor anything on the face

the libel, as set out, to warrant the innuendo: Held, that, after verdict, the declaration was sufficient. *The Archbishop of Tuam* v. *Robeson*, 6 Law J. C.P. 199, s. c. 5 Bing. 17, s. c. 2 M. & P. 32.

The introductory statement in an action for a libel cannot aid the count, unless it be connected with it by words of express reference.

Therefore, where the introductory statement was, that certain persons were associated together, under the name of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers"; and that the defendant, under colour of being their secretary, was accustomed to publish certain printed reports, for the purpose of signifying to the members, the names of such persons as were considered *swindlers and sharpers*, and improper persons to be proposed to be balloted for as members of the society; and the count then went on to charge the defendant with having published a paper, which denoted that the plaintiff was *an improper person* to be proposed to be balloted for, as a member of a society of guardians for the protection of trade against swindlers and sharpers: It was held, that the introductory statement could not be called in aid of the count, not being connected with it by any express words.

An innuendo may explain, but may not enlarge the meaning of the expression: Therefore, where the defendant was charged with having published a paper, stating that the plaintiff was an improper person to be proposed to be balloted for, as a member of a society for the protection of trade against swindlers and sharpers; and it was alleged by innuendo, that the defendant meant thereby that the plaintiff was himself a swindler and sharper: It was held, that the innuendo was not warranted by the expression; and therefore, without the aid of some explanatory matter, the count was held bad after verdict. *Goldstein* v. *Foss*, 5 Law J. K.B. 84, s. c. 6 B. & C. 154, s. c. (in error,) 2 Y. & J. 146, s. c. 4 Bing. 489, s. c. 1 M. & P. 402, s. c. 2 C. & P. 252.

In an action against the proprietor of a newspaper for a libel, the declaration set out the libel, without an innuendo that the plaintiff was intended to be charged as stated in the inducement, as follows:—

"To bill-brokers and others. Caution. Reward. Whereas information has been given to me, that attempts have been made to obtain the discount of a bill of exchange, bearing date *London*, May 26th 1825, and purporting to be drawn by one J S upon, and to be accepted by, the Dowager Lady P T, for 6000*l.* with interest, payable, twelve months after date, to the order of the said J S: I do hereby give notice, on behalf of the said Dowager Lady P T, that she has not accepted such bill, and that, if her name should appear on any such instrument, the same has been forged, or her handwriting to the said acceptance of the said bill, if genuine, has been obtained by fraud, in total ignorance, on her part, of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument shall be handsomely rewarded. Thomas Binns": The jury having found for the defendant, the Court refused to set aside the verdict. *Stockley* v. *Clement*, 5 Law J. C.P. 139, s. c. 4 Bing. 163.

A count which sets out a supposed libel on the plaintiff, that supposed libel being contained in words, which, of themselves, have no allusion or reference to the plaintiff, must explain the words as they are set out by innuendos. The mere introductory expression in the count, that the libel was "of and concerning the plaintiff" is insufficient. *Clement* v. *Fisher*, (in error), 6 Law J. K.B. 39, s. c. 7 B. & C. 459, s. c. 1 M. & R. 281.

A libel, in a letter addressed to the editor of a newspaper, contained this passage among others, viz. "the plaintiff lost no time in transferring himself, together with 200,000*l.* sterling of John Bull's money, to Paris, where he now outtops princes in his style of living": Held, that it did not impute to him the commission of a fraud on the English nation; and, therefore, *innuendos* imputing such fraud to him, could not be supported. *Yrissarri* v. *Clement*, 4 Law J. C.P. 128, s. c. 3 Bing. 432.

The declaration, after the usual prefatory averments, stated that the plaintiff was a justice of the peace, and that the defendant published of him as such justice the matter following: "The other two magistrates residing within our county, are H C A, esq. (meaning the plaintiff) and F G, the latter of whom is gone to reside abroad; as to Mr. A, he is Chairman of the Finance Committee of the county of W, and has audited accounts containing items of upwards of 12,000*l.* for the nominal purpose of furnishing lodgings, plate, &c., for the judges, but which expenditure in reality was, to find accommodation for the magistrates, as the sheriff always found the judges suitable lodgings, without putting the county to any expense," thereby meaning that the said plaintiff had conducted himself corruptly, unduly, and improperly, in his office of justice of the peace. After verdict, the judgment was arrested, the publication not being libellous *per se*, and the declaration containing no prefatory averment, connected with the publication, to support the *innuendo*. *Adams* v. *Meredew*, 2 Y. & J. 417.

Pleas of justification to an action for a libel, asserting the general bad character of the plaintiff, are demurrable.

A demurrer to a plea of justification does not admit the truth of the libel. *Jones* v. *Stevens*, 11 Price, 235.

The insufficiency of a plea of justification to an action for a libel, cannot be taken advantage of at the trial, but the party must demur. *Edmonds* v. *Walter*, 3 Stark. 7. [Abbott]

To the first and second counts of a declaration, alleging that the defendant "had composed and published two libels," the defendant pleaded pleas of justification, which stated, "that the libels so set forth were one and the same supposed libel, and not other or different supposed libels." On demurrer, the pleas were held bad. *Edmonds* v. *Walker*, 2 Chit. 291.

*Semble*, That a plea justifying a charge of felony, must give the particular facts, from which the defendants mean to insist that a felony was committed by the plaintiff as charged; and those facts must be stated with the same particularity as would be required in an indictment for the felony. At least the plea must give particulars sufficient to enable the plaintiff to meet the charge, and to prepare for his defence against it. *Carpenter* v. *Jones*, 6 Law J. K.B. 4.

When it had been stated in a newspaper that "A serious misunderstanding has taken place amongst the independent dissenters of Great Marlow and their pastor, in consequence of some personal invective publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand however, that the matter is to be taken up seriously"; a plea in justification, stating that the pastor in his chapel had uttered the following words:—"I have something to say, which I have thought of mentioning for some time, namely, the improper conduct of one of the female teachers, her name is Miss Fair; her conduct is a bad example and disgrace to the school, and if any of the children dare to ask her to go home, she (meaning one of the children) shall be turned out of the school and never enter it again. Miss Fair does more harm than good"; Held, sufficient. *Edward* v. *Bell*, 2 Law J. C.P. 42, s. c. 1 Bing. 403. s. c. 8 B. Mo. 467.

Case for a libel in a newspaper, which purported to be a report of a trial had, but set out a part only of the speech of a counsel for the defendant. *Plea*, that the supposed libel was "*in substance* a true account and report of the trial": Held bad on demurrer; for it contained no denial of the malicious motives imputed in the declaration, or any statement that the publication was for the purpose of giving useful or necessary information to the public, or that it was an accurate report of the trial. *Flint* v. *Pike*, 3 Law J. K.B. 272, s. c. 4 B. & C. 473, s. c. 6 D. & R. 528.

### (C) EVIDENCE.

The publication of a libel is proved by shewing the delivery of the newspaper to the officer at the stamp-office. *Rex* v. *Amphlet*, 4 B. & C. 35, s. c. 6 D. & R. 125.

A newspaper containing a libel is admissible in evidence. *Weaver* v. *Lloyd*, 1 C. & P. 296. [Garrow]

To prove who was the party who had inserted a libel in a newspaper, a reporter was called, who stated that the paragraph contained in the paper was communicated to him by, and published at, the defendant's request; and that the paper then produced contained exactly the same information as had been disclosed to him, the reporter, except a little variation in the words, not altering the substance: Held, 1st, that the reporter's evidence was sufficient to charge the defendant; and, 2dly, that the newspaper was inadmissible, in the absence of the memorandum from which the account had been taken. *Adams* v. *Kelly*, 1 R. & M. 157. [Abbott]

In cases of libel, a subsequent publication, brought out even after issue joined, may be evidence to shew the motives of the party. An admission signed by the defendant's attorney, consenting to admit the defendant to be editor of a periodical work called "The Lancet," is no evidence that the defendant was editor on a day subsequent to the date of such admission. *Macleod* v. *Wakley*, 3 C. & P. 314. [Tenterden]

In an action on the case for a libel in a newspaper, the plaintiff cannot give evidence of the contents of a placard posted in the window of a third person, although the placard states what *will appear* in the defendant's newspaper respecting the plaintiff, and that which it foretold does appear accordingly. *Raikes* v. *Richards*, 2 C. & P. 562. [Abbott]

Reading the libellous part of a publication, will not suffice, if the defendant wishes to have the whole of it read. *Cooke* v. *Hughes*, 1 R. & M. 112. [Abbott]

In an action for a libel, clear statements have the effect of dispensing with proof, on the part of a plaintiff, of facts so alleged, if they become necessary to support his case.

To prove, in an action for a libel reflecting on the character of the plaintiff, that he is an attorney, the production of the book of admission by the proper officer is good evidence. *Jones* v. *Stevens*, 11 Price, 235.

The plaintiff, in his declaration for a libel, alleged that he was an attorney, and that the libel was published of and concerning him, and of and concerning him in his profession. He proved, that he had been admitted an attorney; but he did not prove, that at the time the libel was published, he had taken out his certificate, or that he was practising as an attorney: The Court held, that it was sufficient to prove that he had been admitted an attorney. *Lewis* v. *Walter*, 2 Law J. K.B. 219, s. c. 3 B. & C. 138, s. c. 4 D. & R. 810.

In the declaration for a libel, it was averred in the introductory part, that the plaintiff was an attorney and vestry clerk, and whilst he was such clerk, prosecutions were carried on by the parish against a person for malpractices on the parish; and, in *furtherance of such proceedings*, and to bring them to a successful issue, certain sums of money, belonging to the parishioners were applied in discharge of the law expenses; yet the defendant of and concerning &c., and of and concerning *the matters aforesaid*, published the libel, which, on production in evidence, imputed to the plaintiff that he had fraudulently applied the parish money in paying the expenses of the prosecution *after it was terminated*: The Court held, that it was no *variance*. *May* v. *Brown*, 2 Law J. K.B. 212, s. c. 3 B. & C. 113, s. c. 4 D. & R. 670.

Where a libel imports in terms that the person who is the subject of it holds a situation of trust and confidence, and that he had abused it; and the declaration alleges that plaintiff held *an office of trust and confidence*: it is unnecessary to prove that the nature of the situation which he held was an office of trust and confidence; nor is proof that it was not such an office a ground of nonsuit. *Bagnall* v. *Underwood*, 11 Price, 621.

In a declaration for a libel, it was stated by way of inducement, that the plaintiff was appointed by the government of the *state* of Chili, to the office of *Envoy* Extraordinary from the state to this country: the defendant admitted in the libel that Chili was a state; and it being proved that the plaintiff had been appointed such envoy: Held, to be sufficient proof of such allegation. *Yrisarri* v. *Clement*, 4 Law J. C.P. 128, s. c. 3 Bing. 432.

If a foreign state be recognized by this government it is not necessary to prove that it is an existing state, but otherwise if it be not so recognized; therefore, in an action for libel on plaintiff exercising the functions of a public envoy from Chili,—it was holden, that although the issuing and negotiating

bonds for foreign stock without the sanction of government, was illegal, and any public observations relative thereto might not have been libellous, yet a libel imputing fraud to the plaintiff personally, was actionable. *Yrisarri* v. *Clement*, 2 C. & P. 223. [Best]

Where a defendant has only pleaded not guilty to an action for a libel, evidence of facts, although not amounting to a justification, is not admissible either to negative the presumption of malice, or in mitigation of damages. *Waithman* v. *Weaver*, 1 D. & R. N.P.C. 10. [Abbott]

In an action for a libel, the defendant cannot give in evidence other libels not connected with that on which the action is brought, neither in bar to the action, nor in mitigation of damages; but he may give general evidence, that the plaintiff has before published libels of the defendant. *May* v. *Brown*, 2 Law J. K.B. 212, s. c. 3 B. & C. 113, s. c. 4 D. & R. 670.

But general evidence tending to shew that the plaintiff had been in the habit of libelling the defendant, held inadmissible. *Wakley* v. *Johnson*, 1 R. & M. 422. [Best]

*Semble*—That in an action for a libel, evidence of facts, which do not amount to a justification, may, under circumstances, be received in mitigation of damages, though special pleas of justification, which were on the record, have been withdrawn before the trial, and the plaintiff in consequence is not prepared with evidence to answer the defendant's proof.

A witness, who has given evidence on his examination in chief as to the truth of a libel, may be asked on his cross-examination, whether the MS. of the libel was not written by him, and he is bound to answer the question. *East* v. *Chapman*, 2 C. & P. 570. [Abbott]

In an action for a libel, purporting to be a report of a coroner's inquest, evidence of the correctness of the report is admissible under the general issue, in mitigation of damages; but no evidence of the truth or falsehood of the facts stated at the inquest is admissible on either side. *East* v. *Chapman*, 1 M. & M. 46. [Abbott]

Under a plea of justification to a libel, evidence of general bad character is inadmissible: so it is in mitigation of damages to rebut the usual allegation in the declaration of good fame, &c. *Jones* v. *Stevens*, 11 Price, 235.

The whole of the allegations in a libel must be justified and proved to be true: The Court held, that a statement, that the plaintiff had literally knocked out the eye of a horse, was not supported by evidence that the horse was so much beaten that its eyes were closed for three days. *Weaver* v. *Lloyd*, 2 Law J. K.B. 122, s. c. 2 B. & C. 678, s. c. 4 D. & R. 230, s. c. 1 C. & P. 295.

If a master, in giving the character of a servant, in a letter state certain facts, the master, in the defence of an action brought by the servant for libel, is not bound to prove the truth of every fact he stated: it is enough, that he give such evidence as convinces the jury that he wrote what he did with an honest belief of its truth. *Pattison* v. *Jones*, 3 C. & P. 383. [Tenterden]

In an action against a lieutenant in the navy, superintendant of a transport ship, for a libel contained in a letter written to Lloyd's Coffee-house, concerning the conduct of the captain: Held, that evidence of its being the practice for persons so circumstanced to make communications to Lloyd's, could not be received, either as furnishing a defence, in conjunction with other circumstances, or in mitigation of the damages to be recovered. *Harwood* v. *Green*, 3 C. & P. 141. [Best]

In an action for a libel on a person about to be appointed a minister of a dissenting congregation, contained in communications sent round to the members of the congregation, a letter written to the defendant, containing a statement of the facts upon which he founded his charges, is receivable in evidence on his behalf, to shew the *bona fides* with which he acted. *Blackburn* v. *Blackburn*, 3 C. & P. 146. [Gaselee]

Where, to an action for a libel, the general issue and special pleas were pleaded, it was holden, that the plaintiff could not divide his evidence, by giving part in the first instance and reserving the residue for the reply: but that he might give all the evidence in the outset, to rebut the plea of justification, or he might reserve such evidence for the reply. *Browne* v. *Murray*, 1 R. & M. 254. [Abbott]

### (D) INFORMATIONS AND INDICTMENTS.

The Christian religion being part of the common law of the land, although it is lawful to question its authenticity, by reasoning in calm and respectful language, yet it is a libel to vilify it. *Rex* v. *Waddington*, 1 Law J. K.B. 37, s. c. 1 B. & C. 26.

If a man publish a statement which he does not know to be true or not, or has no means of judging whether it be true or not, it is false, and he has been guilty of a criminal untruth, and the matter is a libel.

It is a general rule, that a man shall be presumed to have intended that which is the natural consequence of the act done by him, and the jury may infer that a statement was maliciously published, if it be untrue and will necessarily produce a mischievous effect. *Rex* v. *Harvey and Chapman*, 2 Law J. K.B. 4, s. c. 2 B. & C. 257, s. c. 3 D. & R. 464.

### (E) DAMAGES.

In a joint action for a libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business. *Hawthorn* v. *Lawson*, 3 C. & P. 196. [Gaselee]

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## LICENCE.

(A) TO TRADE.
(B) ALE AND BEER LICENCE.

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### (A) TO TRADE.

As a licence to trade is to be construed liberally, an unintentional misdescription of the person to whom it is to be granted will not invalidate it: Thus, where A was described to be "of London, merchant," when he was resident at the time at Heligoland, but was about to come and settle in London,

it was holden, in the absence of all evidence or intention to mislead the Secretary of State, to be a valid licence. *Lemeke* v. *Vaughan*, 2 Law J. C.P. 44, s. c. 1 Bing. 473, s. c. 8 B. Mo. 646, s. c. 7 D. & R. 236, s. c. 1 Bligh, 473.

It is of no consequence who are the persons who act under a licence where the terms of it are general. *Acteon*, 2 Dods. 52.

### (B) ALE AND BEER LICENCE.

The mayor of the borough of Yarmouth, who, in right of his office, is a justice of the peace, took four shillings as a fee for assenting to the grant of a licence to an innkeeper to sell ale. There was proof of a custom for the mayor to take that fee, as far back as living memory could go, but no evidence of its having been taken before the reign of Edw. 6: The Court held, that the mayor had no right to such a fee; that the innkeeper could recover back the sum paid in an action for money had and received, and that it was not necessary to give a notice of action. *Morgan* v. *Palmer*, 2 Law J. K.B. 145, s. c. 3 B. & C. 729, s. c. 4 D. & R. 283.

The Court quashed a conviction on the 48 Geo. 3, c. 143, for selling beer or ale without an excise licence. *Rex* v. *North*, 6 D. & R. 143.

The 48 Geo. 3, c. 145, does not interfere with the jurisdiction of justices given by the 35 Geo. 3, c. 113, on an information for selling ale, &c. without a licence. *Rex* v. *Drake*, 6 M. & S. 116.

On the construction of the 26 Geo. 3, c. 31, s. 4, and 3 Geo. 4, c. 77, s. 7, it was holden, that justices can only license alehouses in cities and towns corporate during the month of September, because the latter statute does not repeal the general provisions of the former, but only extends its operation to cities and towns corporate. Therefore, a mandamus will not lie to the justices to compel them to rehear an application for a licence at any other period of the year than within the first twenty days of September, though the justices may have refused a licence under a mistake of the law. *Rex* v. *Justices of Surrey*, 5 D. & R. 208.

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## LIEN.

[See ATTORNEY AND SOLICITOR, BANKRUPT, INSURANCE, PRINCIPAL AND AGENT, SHIP AND SHIPPING, and VENDOR AND PURCHASER.]

(A) AT LAW.
(B) IN EQUITY.
(C) WAIVER OR DISCHARGE.

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### (A) AT LAW.

A banker who accepts or discounts bills for his customer, has a lien upon any securities which may be placed in his hands until those liabilities have ceased. *Bolland* v. *Bygrave*, 1 R. & M. 271. [Abbott]

The vendor of goods delivered them to the defendants, carriers, who detained them for a general lien: Held, that replevin would not lie against them for the detention, at the suit of the consignee. *Galloway* v. *Bird*, 5 Law J. C.P. 180, s. c. 4 Bing. 299.

Although a livery-stable keeper has not by la lien for the keep of horses, unless by special agr ment with the owner of them; yet, if such an agr ment exists, and the plaintiff removes the horse order to defraud the defendant of his lien, defendant has a right without force to retake horses, and being so repossessed, his lien revi *Wallace* v. *Woodgate*, 1 C. & P. 575, s. c. 1 R M. 193. [Best]

A horse having been placed under the care livery-stable keeper, who had made advances to owner, who agreed that the horse should stan the stables as a security, and that the livery-st keeper should try to sell the horse and repay h self the advances made: Held, that he had a lien the horse, although it was insisted that he had wai it by the agreement at the time the horse was lef his stable. *Donatty* v. *Crowder*, 4 Law J. C.P. 1

*Quære*—Whether a trainer can have a lien horses for his charge for training and feeding th *Jacobs* v. *Latour*, 6 Law J. C.P. 243, s. c. 5 Bi 130, s. c. 2 M. & P. 206.

A dyer has not a general lien, but only on particular parcel of goods sent to him be dy *Bennett* v. *Johnston*, 2 Chit. 455.

A wharfinger has not a general lien in respec labourage and warehouse-room, except by agr ment, express or implied. General, continued, undisputed usage, may be evidence of such agr ment, but where the right is disputed in the pl where the wharfinger lives, he cannot set it against a customer, unless he has previously gi him notice that he will deal only upon those ter *Holderness* v. *Collinson*, 6 Law J. K.B. 17, s. c B. & C. 212, s. c. 1 M. & R. 55.

### (B) IN EQUITY.

The rules with respect to lien are the sam equity as at law. *Oxenham* v. *Esdaile*, 2 Y. & 493.

Executors, who are also trustees, agree to one of the residuary legatees, as a security for share, a legal mortgage of real estate, part of testator's assets, and for the purpose of having mortgage prepared they deliver the title deed his agents,—this gives him an equitable lien on property as against the executors, though no against the other residuary legatees. *Hockle Bantock*, 1 Russ. 141.

If deeds are given to a man for the purpo obtaining credit from him, he has a lien upon t for the money advanced at the time the deeds deposited with him, but not for what was sub dently advanced. *Mountford* v. *Scott*, 1 Turn.

Deeds are deposited with a firm of five part one of whom was a nominal partner, as a lateral security for advances by the firm, w are secured by bond; the nominal partner b dead, it is agreed that the four surviving ners shall hold the deeds as a collateral sec for sums secured by a second bond in additio the former bond: Held, that under this agreem the partnership of four has an equitable lien on estates comprised in the deeds, to the extent o sums due on both bonds. *Ex parte Alexander*, *Tills*, 2 Law J. Chanc. 159.

What circumstances will give the creditor of a tator a specific lien on assets, standing as part o

testator's estate at his death. *Tyler* v. *Manson; Manson* v. *Tyler*, 5 Law J. Chanc. 34.

Where a bill had been filed on bonds given by an incorporated society, to pay money borrowed by them under the authority of an act of parliament, which gave the lenders a lien on the profits of the society: Held, not demurrable, on the ground that the plaintiff's remedy was at law. *Duncan* v. *the Manchester Water-works Company*, 8 Price, 697.

Papers delivered to a solicitor in his capacity of steward, are not subject to the general lien which usually attaches upon papers delivered to a solicitor. *Champernown* v. *Scott*, 6 Mad. 93.

*Quære*—Whether a solicitor has a right of lien on the proceedings under a commission of bankrupt that has been superseded. *Ex parte Shaw*, 1 Jac. 276.

A bill for establishing a lien upon deeds drawn for the sale of certain premises, the contract for which had been rescinded, and alleged to have been prepared by the plaintiff, charged a defendant with denying the plaintiff's alleged lien, claiming a lien for himself in respect of the same demand, and the possession of the deeds and other facts tending to shew a connexion with the subject of the suit; and further, that the defendant had contracted with his co-defendants for the purchase of the same premises, the defendant answered to the last charge only, that he had agreed to purchase, as agent for other persons, and disclaimed all other interest. Exceptions to the answer for insufficiency were allowed. *Oxenham* v. *Esdaile*, M'Clel. 540.

### (C) WAIVER OR DISCHARGE.

As a general rule, it seems, that if a party having a lien on goods d emanded of him, justifies his non-compliance upon grounds distinct from his claim of lien, he cannot afterwards resort to his lien as a defence of the retention. But where a party who was indebted to the defendant on a general account for dying goods, after an act of bankruptcy sold them to the defendant; and upon the property being demanded by the assignees, the defendant said nothing respecting the purchase, but only observed, that "he might as well give up every transaction of his life:" Held, that such refusal did not amount to an abandonment of the lien. *White* v. *Gainer*, 2 Law J. C.P. 101, s. c. 2 Bing. 23, s. c. 9 B. Mo. 41, s. c. 1 C. & P. 324.

Where a party has goods in his possession on which he has a right of lien for a debt due to him from the owner, and afterwards takes those goods in execution for such debt, his lien is thereby destroyed, although the goods were never off his own premises. *Jacobs* v. *Latour*, 6 Law J. C.P. 243, s. c. 5 Bing. 130, s. c. 2 M. & P. 201.

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## LIGHTS.

A grant to open lights may be presumed, although the windows are in a building which does not extend to the boundary of the plaintiff's land.

A purchaser of some premises erected a high building, and obstructed the light from entering windows which had been opened at least thirty-eight years. It appeared that neither the vendor, nor any of his agents, had seen these premises for upwards of twenty years; but it did not appear that the tenant had a lease. The Court held, that an action could be maintained against the purchaser. *Cross* v. *Lewis*, 2 Law J. K.B. 56, s. c. 2 B. & C. 686, s. c. 4 D. & R. 234.

The enjoyment of a light during a period of twenty years, with the clear knowledge and acquiescence of the owner of the adjoining premises, is sufficient to raise the presumption of a grant, and to give a right of action in case of obstruction.

But *semble*, that where a window has been opened in a building erected by a tenant, for the mere purpose of trade, and which is not annexed to the freehold, but may be removed by that tenant at his pleasure, or at the end of his term, no such right or presumption will arise. *Maberley* v. *Dowson*, 5 Law J. K.B. 261.

If a man pull down a building which has ancient lights in it, and erect another in the place of it without windows, he cannot afterwards open a window, and require a person who has erected a building near to it to pull it down, because it obstructs the light of his window. *Moore* v. *Rawson*, 3 Law J. K.B. 32, s. c. 3 B. & C. 633, s. c. 5 D. & R. 234.

In an action on the case for the obstruction of lights, a clerk who superintended the erection of the building which led to the nuisance, and who alone had directed the workmen, may properly be joined with the original contractor as a co-defendant. *Wilson* v. *Peto*, 6 B. Mo. 47.

To prove an obstruction of ancient lights, it must appear that there is such a privation of light as to render the occupier of his house uncomfortable;—shewing that he has less light than before, is of no avail. *Back* v. *Stacey*, 2 C. & P. 465. [Best]

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## LIMITATIONS, STATUTE OF.

(A) WHERE AVAILABLE.
(a) *At Law.*
(b) *In Equity.*
(B) COMPUTATION OF TIME.
(C) SUBSEQUENT PROMISE OR ACKNOWLEDGMENT.
(D) PLEADINGS.

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### (A) WHERE AVAILABLE.

#### (a) *At Law.*

A demand of a rent-charge is not barred by the Statute of Limitations. *Cupit* v. *Jackson*, M'Clel. 495.

To an action founded upon a breach of duty, the Statute of Limitations is a good answer, though the action be framed in case for the consequential damage resulting within the six years. *Howell* v. *Young*, 4 Law J. K.B. 160, s. c. 5 B. & C. 259, s. c. 8 D. & R. 14, s. c. 2 C. & P. 238.

A landlord, on letting his lands, undertook to pay all the rates. For many years he charged his tenants 3*l.* 10*s.* per acre. One of them died, and his administratrix paid another year's rent, including that charge. Another of the tenants spoke to the landlord, and told him, that he and all the tenants had

paid him too much: he answered, that if there was any mistake, it should be rectified. He had paid but 1*l.* 10*s.* per acre.

The administratrix brought an action to recover the sums overpaid by the intestate. The landlord pleaded the Statute of Limitations: The Court held that she could recover the money. *Clark* v. *Hougham*, 1 Law J. K.B. 249, s. c. 2 B. & C. 149, s. c. 3 D. & R. 322.

Where a debtor, at the time of contracting a debt, is abroad, his return to this country, though for a very short time, (a day or two, for instance,) without any intention to remain, and without the knowledge of the creditor, is yet a return within the meaning of the statute 4 Anne, c. 16, s. 19; and the time reckoned by the Statute of Limitations will thereupon begin to run. *Gregory* v. *Hurrill*, 4 Law J. K.B. 262, s. c. 1 Law J. C.P. 115, s. c. 1 Bing. 324, s. c. 8 B. Mo. 189, s. c. 5 B. & C. 341, s. c. 8 D. & R. 270.

*Semble*—That a *latitat* properly returned and continued, may be connected with a bill of Middlesex sued out afterwards, so as to save the Statute of Limitations. *Page* v. *Newman*, 5 Law J. K.B. 263.

A writ sued out, in order to save the Statute of Limitations, must be returned and filed with the proper officer, (Clerk of the Treasury in K.B.; Custos Brevium in C.P.) The mere indorsement by the sheriff of the words of his return, the writ itself remaining in the sheriff's office, will not be sufficient. *Gregory* v. *Hurrill*, 4 Law J. K.B. 262, s. c. 5 B. & C. 341, s. c. 8 D. & R. 270.

### (*b*) *In Equity.*

Courts of equity are bound to act according to the spirit of the statute; and even in cases where it is not too late to maintain an ejectment, courts of equity have refused to interfere, because evidence has been lost. *Whalley* v. *Whalley*, 3 Bligh, 17.

The Statute of Limitations cannot be pleaded to a suit for specific performance.

If there has been such a lapse of time, that the Court, proceeding upon a rule adopted by analogy to the Statute of Limitations, would refuse to enforce specific performance; these circumstances, if not disclosed in the bill so as to enable the defendant to demur, ought to be stated in the plea; and the Court, for the purpose of applying its own rule, will advert to the statute, though not pleaded. *Talmarsh* v. *Muggleston*, 4 Law J. Chanc. 200.

Where, under misrepresentations as to the terms of a bond, the executors paid the property-tax,—it was holden, that they were entitled to have the whole amount of that duty refunded, notwithstanding a space of more than six years had elapsed since the last of the payments. *Smith* v. *Alsop*, M'Clel. 622.

If a tenant for life has rendered accounts to the remainder-man, of timber cut by him, during a period of more than six years, before a bill is filed against him for an account of such timber, and of the value of it, the Statute of Limitations cannot be pleaded to the bill; for though, if the remainder-man had brought an action of trover, the tenant for life might, notwithstanding the rendering of the accounts, have pleaded the statute, he could not have done so, if the remainder-man had brought an action of assumpsit. *Hony* v. *Hony*, 1 S. & S. 568.

To a bill, by a remainder-man, for an accou timber wrongfully cut by the tenant for life and assignee, the Statute of Limitations canno pleaded. *Alderman* v. *Bannister*, 4 Law J. Ch 126.

The Statute of Limitations may be pleaded i to a bill, to prevent the setting up of outstan terms. *Jermy* v. *Best*, 1 Sim. 373.

A bill filed by one creditor on behalf of hi and the others, will prevent the Statute of Li tions from running against any of the creditors came in under the decree. *Sterndale* v. *Hanbi* 1 Sim. 393.

### (B) COMPUTATION OF TIME.

The Statute of Limitations on a note payabl demand runs from the demand. *Thorpe* v. *Co* 8 D. & R. 347, *semble* s. c. 1 R. & M. 398.

The Statute of Limitations does not begi operate between creditors and an executor, unt has either proved the will or exercised some a executorship. *Douglas* v. *Forres*, 6 Law J. 157, s. c. 4 Bing. 686, s. c. 1 M. & P. 663.

Where, in an action against the London I Company for an injury by undermining a wa appeared that the excavation had been made i lifetime of the plaintiff's ancestor, who had a terest under a devise to him for life, remainde the plaintiff in fee; and that the wall had not fa in until after the plaintiff's title accrued; that undermining had taken place two years previo the falling of the wall; and that the dock act tained a clause that no action should be bro unless within six mon ths after the fact commit It was holden, that the plaintiff was entitled t cover, notwithstanding the alteration of title, notwithstanding the limitation of the action, i much as it meant six months after the falling o wall. *Gillon* v. *Boddington*, 1 C. & P. 541, s. R. & M. 161. See 39 & 40 Geo. 3. c. 47, s. 1

The cause of action, within the meaning of Statute of Limitations, arises when the party the right to apply to a court of equity: as whe reversion, alleged to have been fraudulently chased, descends in equity to the heir by the d of the ancestor.

*Semble*—that the time of limitation begins to from the time when the fraud is discovered, e in the lifetime of the ancestor, or upon the des *Whalley* v. *Whalley*, 3 Bligh, 12—17.

Where an officer seized a vessel on the 23d of August, and detained her until the 24th of tember following: Held, that the time within w the action should have been brought, must be culated from the first day of seizure, as th Geo. 3, c. 37, s. 28 enacts, that "every a commenced against any person, for any act don him relating to the public revenue of Custom Excise, shall be commenced within three mo after the matter or thing done."

The word "month," in that section of the act, be construed as a lunar, not a calendar month. ( v. *M'Tavish*, 1 Law J. C.P. 43, s. c. 1 Bing. 1

The 23 Geo. 3, c. 70, s. 34 enacts, that " action or suit against any person or persons, for matter or thing done by any officer or office Excise, or any others acting in his or their aid, be commenced within three months next afte

cause of action." *Semble*, that this section extends to the officers themselves, and others acting in their aid; at all events, an action against officers of excise, &c. not brought within the time limited, is barred by the 28 Geo. 3, c. 27, s. 23, which extends to any action against any person or persons, for anything by him or them done in pursuance of any act or acts relating to the revenues of Custom or Excise. *Hendry* v. *Biers*, 2 D. & R. 9.

In an action of trespass against a constable and others, for seizing and taking away goods, it appeared that they were directed to search for, and take certain black cloth alleged to have been stolen, and that they had taken other cloth, and carried it before a justice of the peace: Held, that as the action was not brought within six months, they were protected by the 24 Geo. 2, c. 44, s. 8. And, *semble*, that that section applies to all cases of constables acting as such. *Smith* v. *Wiltshire*, 5 B. Mo. 322, s. c. 2 B. & B. 619.

(C) SUBSEQUENT PROMISE OR ACKNOWLEDGMENT.

The defendant having pleaded the Statute of Limitations to an action on a promissory note, the plaintiff gave in evidence, as proof of an acknowledgment within six years, the following letter from the defendant to the plaintiff: "Business calls me to Liverpool; should I be fortunate in my adventures, you may depend on seeing me at Bristol, or otherwise I must arrange matters with you as circumstances will permit." The defendant did not shew that there were any other matters except the promissory note to which the letter could refer: Held, that the question, whether this letter referred to the matter of the promissory note, was properly left to the jury; and that the acknowledgment was sufficient to take the case out of the Statute of Limitations. *Frost* v. *Bengough*, 1 Law J. C.P. 96, s. c. 1 Bing. 267.

A having employed B as his solicitor and agent for some years, on the 23rd April 1813, writes to him a letter, in these words:—"I have for a length of time been in expectation of receiving the account of whatever I may stand indebted to you, let me again request you will oblige me with it, that everything may be settled." A died on the 27th August 1814, having made his will, by which he devised his real and personal estates, in trust for sale, and directed his trustees to stand possessed of the monies to arise by the sale thereof, after paying his debts, and the charges and expenses attending his will, upon the trusts therein mentioned. B, shortly after A's death, delivered his bill, the last item of which was on the 19th of August 1808, and on the 18th November 1820, he files his bill on behalf of himself and the other creditors of the testator. The Court held, that the debt was taken out of the Statute of Limitations by the testator's letter of the 23rd April 1813, and was continued to be kept out of that statute by the devise in the testator's will; and decreed for the plaintiff accordingly: but, in consequence of his laches and some misconduct, without costs. *Rendell* v. *Carpenter*, 2 Y. & J. 484.

Where, to an action of assumpsit for goods sold and delivered, the defendant pleaded the Statute of Limitations, and the plaintiff gave in evidence a letter written by the defendant to the plaintiff's attorney, stating that he had received his letter respecting the plaintiff's demand—that it was not a just one—that he was ready to settle the account whenever the plaintiff thought proper to meet him on the business—that he was not in his debt 90*l.*, nor anything like that sum—and that he should be happy to settle the business by the plaintiff's meeting him in London: Held, that the judge was warranted in telling the jury, that, after this letter, the Statute of Limitations was out of the question, as there was a clear admission of an existing debt upon the face of the letter itself. *Colledge* v. *Horn*, 3 Law J. C.P. 184, s. c. 3 Bing. 119.

The Court held, that the words, "It is ten years ago, and I cannot pay my new debts, much less my old ones," were not such an acknowledgment of an existing debt as to take the case out of the Statute of Limitations. *Knott* v. *Farren*, 2 Law J. K.B. 122, s. c. 4 D. & R. 179.

*Semble*—That after the lapse of six years it is not a sufficient acknowledgment to take the case out of the Statute of Limitations, to say, "I will see my attorney, and tell him to do what is right." *Miller* v. *Caldwell*, 3 D. & R. 267.

The Statute of Limitations is avoided by the debtor saying to his creditor, "I shall go to my attorney's and pay the debt and settle it." *Triggs* v. *Newnham*, 1 C. & P. 631. [Best]

Where, on the defendant's being arrested at the suit of the plaintiff, for a debt due more than six years, he said to the officer, "I know that I owe the money; but the bill I gave is on a wrong stamp, and now I am arrested I will never pay:" Held, that this was not such an acknowledgment of the debt as to take the case out of the Statute of Limitations. *A'Court* v. *Cross*, 4 Law J. C.P. 79, s. c. 3 Bing. 329.

Where to a plea of the Statute of Limitations, on which issue was joined, and the plaintiff proved that three years after the original cause of action accrued, and within six years of the commencement of the suit, the defendant, on being called on for payment, said he could not pay the debt, that he would do so as soon as he was able: Held, that this was a conditional promise only, and did not take the case out of the statute. *Scales* v. *Jacob*, 4 Law J. C.P. 209, s. c. 3 Bing. 638.

To a plea of the Statute of Limitations, the plaintiff proved, that having demanded payment of his debt within six years from the commencement of the suit, the defendant said, that he should be happy to pay him if he could; that money was due to him from J G; and that if the plaintiff could get it, he might pay himself: Held, that this was only a conditional promise, and that it was incumbent on the plaintiff to shew the defendant's ability to pay. *Ayton* v. *Bowles*, 5 Law J. C.P. 109, s. c. 4 Bing. 105.

In assumpsit, brought to recover a sum of money, the defendant pleaded the Statute of Limitations, and upon that issue was joined. At the trial the plaintiff proved the following acknowledgment by the defendant within six years:—"I cannot pay the debt at present, but I will pay it as soon as I can:" Held, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. *Tanner* v. *Smart*, 5 Law J. K.B. 218, s. c. 6 B. & C. 603.

The borrower of money gave the lender the fol-

lowing memorandum :—" I owe you 100*l.*, C.R., 30th July 1821 ;" underneath was written, " August 17, received 50*l.*, C.R. :" Held, that the latter item, which was within six years of the commencement of the suit, did not amount to such an acknowledgment of the existence of the prior debt, so as to take it out of the statute. *Robarts* v. *Robarts*, 6 Law J. C.P. 117, s. c. 1 M. & P. 487, s. c. 3 C. & P. 296.

Subsequent admission of having committed a trespass, will not take the case out of the Statute of Limitations. *Hurst* v. *Parker*, 2 Chit. 249.

The defendant, upon being requested to pay a bill for dinners and other matters, by the keeper of an hotel, answered, " I am not bound to pay it, for I was invited to their dinners." He afterwards paid a small sum into court : The Court held, that neither the answer, nor the circumstance of the defendant having paid money into court, took the case out of the Statute of Limitations. *Long* v. *Greville*, 2 Law J. K.B. 205, s. c. 3 B. & C. 10, s. c. 4 D. & R. 632.

The defendants, being sued for a sum due for principal and interest from their testator, pleaded the Statute of Limitations, and paid *the principal* into court, but *refused* to pay the interest: Held that the payment of the principal into court did not amount to an implied promise to pay *the interest*, so as to take *that* out of the statute. *Collyer* v. *Willock*, 5 Law J. C.P. 181, s. c. 4 Bing. 313.

A verbal promise or admission is not indispensable, to take a case out of the Statute of Limitations: therefore, where persons liable consulted, attended, and advised as to the mode of proceeding against other persons also answerable,—it was holden sufficient to preclude the statute from being a bar against he former persons. *East India Company* v. *Prince*, 1 R. & M. 407. [Abbott]

An acknowlegement within six years, by one of the joint makers of a promissory note, will revive the debt against the other, although he has made no acknowledgment, and only signed the note as a surety. *Perham* v. *Raynal*, 2 Law J. C.P. 271, s. c. 2 Bing. 306.

Where a man and his sister made a joint promissory note ; but six years had elapsed without an acknowledgment from either of them ; but after the marriage of the sister, and within six years, the man promised to pay it : Held, that in a declaration without counts laying promises made after the marriage, the case was not taken out of the Statute of Limitations. *Pittam* v. *Foster*, 1 Law J. K.B. 81, s. c. 1 B. & C. 248, s. c. 2 D. & R. 363.

A payment of interest by A on the joint and several note of A and B, is evidence of a promise by B, and takes the note out of the Statute of Limitations, though B was a mere surety, and the payment was made without his knowledge. *Burleigh* v. *Stott*, 6 Law J. K.B. 232, s. c. 8 B. & C. 36, s. c. 2 M. & R. 93.

To take the case out of the Statute of Limitations, there must be an express promise by all the executors, since a mere acknowledgment by all, or an express promise by one, is of no avail. *Tullock* v. *Dunn*, 1 R. & M. 416. [Abbott]

An admission of a debt by the executrix of a trader, within six years before the filing of a creditor's bill, will not take the debt out of the Statute of Limitations, so as to enable the creditor, under the 47 Geo. 3, c. 74, to claim payment out of the real estate in the hands of a devisee. *Putnam* v. *Bates*, 3 Russ. 188.

If one of two partners has become bankrupt, and obtained his certificate, and after that he acknowledges a debt due to the plaintiff by his partner and himself; this acknowledgment is not sufficient to take the case out of the Statute of Limitations, in an action against him and his partner for such debt, if his partner plead the Statute of Limitations, and he plead his bankruptcy. *Martin* v. *Bridges*, 3 C. & P. 83. [Tenterden]

## (D) PLEADINGS.

If the declaration be entitled generally, and the defendant plead that the cause of action did not accrue within six years before the exhibiting of plaintiff's bill, the defendant may prove the exact day on which the bill was filed. *Granger* v. *George*, 5 B. & C. 149, s. c. 7 D. & R. 729.

When the Statute of Limitations is pleaded in bar to a bill of discovery, the plea must shew that the statute has been pleaded with due averments to the action at law. *Macgregor* v. *East India Company*, 4 Law J. Chanc. 173.

Where a bill is filed for discovery in aid of an action, to which the Statute of Limitations has been pleaded, and the plaintiff states in his bill that several pleas have been pleaded at law, of which the general issue is one : the defendant, in pleading the Statute of Limitations in bar to the discovery, must make it appear on his plea, that the Statute of Limitations has been pleaded at law. *Macgregor* v. *East India Company*, 4 Law J. Chanc. 23.

A creditor's bill being filed against an executrix and heir-at-law of a person who died in 1820, charging, that the testator had, within six years before his death, and also within six years before the filing of the bill, admitted the debt, and that the executrix, since his decease, had admitted the debt; to the whole of the bill, except certain specified parts, (which exception did not contain the allegation that the executrix had admitted the debt,) the defendants pleaded the Statute of Limitations, but the plea did not aver that the executrix had not admitted the debt: Held, that the plea was bad in substance. *Bosworth* v. *Cotchett*, 4 Law J. Chanc. 21.

A replication to the Statute of Limitations, setting out a number of writs, the first of which was sued out within six years after the return of the plaintiff to England, need not state that it was the *first return* of the plaintiff, or that the writs are *alias plurias*, &c. ; and it is no objection that some of them were not bailable, and the last bailable, if it be stated that the non-bailable writs were sued out with the intent to declare on the promises actually declared on. *Plummer* v. *Woodburne*, 4 Law J. K.B. 6, s. c. 4 B. & C. 625, s. c. 7 D. & R. 25.

To a declaration in trover by an administrator, charging a conversion after the death of the intestate, the defendant pleaded, Not guilty within six years: Held, bad upon special demurrer. It should have been that the cause of action did not accrue within six years. *Pratt* v. *Swaine*, 6 Law J. K.B. 353, s. c. 3 B. & C. 285.

When the recovery of a debt has been impeded by the Statute of Limitations, and the plaintiff relies upon a new promise, *semble*, he should declare on the new promise, and not on the original cause of action.

At all events, he cannot reply such new promise, to a plea of "action not accrued within six years." Nor, if he take issue on such a plea, will a qualified or conditional admission entitle him to recover, if his declaration has proceeded on the original cause of action. *Tanner* v. *Smart*, 5 Law J. K.B. 218, s. c. 6 B. & C. 603.

To a plea of the Statute of Limitations, the plaintiff proved a promise by the defendant to pay the debt due within six years, although the original cause of action accrued thirteen years before: Held, a sufficient acknowledgment to take the case out of the statute, and that the plaintiff need not declare specially on the subsequent promise. *Upton* v. *Else*, 5 Law J. C.P. 108.

## LOAN.

*Quere*, Whether a resident here can raise money by way of loan, to assist *subjects* of another state in alliance with this country, without licence of the king. *De Wats* v. *Hendricks*, 3 Law J. C.P. 3, s. c. 2 Bing. 314.

Where a sum of money has been advanced, upon the surrender of copyhold property to the use of the party making that advance, on condition that such surrender shall become void, if payment with interest be made at a particular time, otherwise to be of full force and virtue; and interest has been paid from time to time, subsequent to the day appointed for re-payment; and where other circumstances in the conduct of the party to whom the advance was made, shew that it was considered as money borrowed: This transaction will not be treated as a conditional purchase, but as a loan for which the surrender is a collateral security; and the administrator of the lender may recover principal and interest in arrear, in an action of assumpsit. *Allenby* v. *Dalton*, 5 Law J. K.B. 312.

## LONDON POLICE ACT.

The London Police Act, 3 Geo. 4, c. 55, s. 16, authorising the apprehension of suspected persons or reputed thieves, only applies to the apprehension of persons of general bad character, as rogues and vagabonds, not to apprehension on suspicion of a particular felony. *Cowles* v. *Dunbar*, 1 M. & M. 37. [Abbott]

## LORD'S ACT.

[See PRISONER.]

## LORD'S DAY.

A contract entered into on a Sunday, in the making of which either party is exercising his ordinary calling, is void, under the statute 29 Car. 2, c. 7; and it is of no consequence whether the act be done openly or concealedly, or whether it be an act of work and labour or not. *Fennell* v. *Riddler*, 4 Law J. K.B. 207, s. c. 5 B. & C. 406, s. c. 8 D. & R. 204.

A contract made on a Sunday is void, although it was entered into by a broker without the knowledge of his principal, and at the special request of the purchaser, who afterwards refused to fulfil it. *Smith* v. *Sparrow*, 5 Law J. C.P. 80, s. c. 4 Bing. 83.

The driving of a stage coach on Sunday is not prohibited by 3 Car. 1, c. 2, or 29 Car. 2, c. 7. *Sandeman* v. *Breach*, 5 Law J. K.B. 298, s. c. 7 B. & C. 96.

A contract of hiring and service for a year, made between a farmer and a labourer, on a Sunday, is not within the prohibition in 29 Car. 2. c. 7, s. 1; and due service under it confers a settlement. *Rex Whitnash*, 6 Law J. M.C. 26, s. c. 7 B. & C. 596, 1 M. & R. 452.

A gentleman, on a Sunday, bargained with a stage-coach proprietor for a horse, which was warranted sound. On the next Tuesday, the horse was delivered, when the money was paid; but the horse proved to be unsound. The seller was a horse-dealer, but the buyer did not know that fact: The Court held, that the contract was not complete until the horse was delivered, and therefore that the contract was not void under 29 Car. 2; c. 7, s. 2; but even if it was, still they held that the buyer, not knowing that the seller was exercising his calling on a Sunday, might recover back his money. *Bloxsome* v. *Williams*, 2 Law J. K.B. 224, s. c. 3 B. & C. 232, s. c. 5 D. & R. 82, s. c. 1 C. & P. 294.

## LUNATIC.

(A) PRIVILEGES.
(B) COMMISSION.
(C) COMMITTEE.
(D) PROPERTY.

### (A) PRIVILEGES.

A lunatic may be arrested. *Ex parte Hall*, 1 Jac. 161.

Unsound mind in defendant no defence to an action on a contract unless it was known, or in any way taken advantage of, by the plaintiff. *Browne* v. *Joddrell*, 1 M. & M. 105, s. c. 3 C. & P. 30. [Tenterden]

### (B) COMMISSION.

The Chancellor said, that he could not make a grant of a committeeship of lunacy, on a return to a commission, that the party was a lunatic enjoying lucid intervals, and that during such intervals he was competent to the government of himself and his affairs; but that the commission should be quashed and a new one issued. *Ex parte Atkinson*, 1 Jac. 333.

Ill treatment by the nearest relatives is a ground of granting a commission of lunacy to strangers—and the former will be compelled to pay the costs occasioned by their opposition. *In re Smith*, 1 Russ. 348.

The issuing of a commission of lunacy in Jamaica is no bar to issuing one here upon the lunatic's coming into England. *In re Houstoun*, 1 Russ. 312.

### (C) COMMITTEE.

In choosing a committee for a lunatic, those who can visit frequently will be preferred.

Under special circumstances, the committee of a lunatic will be allowed a salary. *Ex parte Fermor*, 1 Jac. 405.

No allowance will be made to the committee of a lunatic for visiting the lunatic, because the committee ought to reside within the jurisdiction of the court. *Ex parte Ord*, 1 Jac. 94.

A committee of a lunatic who retains a balance and omits to pass his accounts, will be charged with interest. *Ex parte Hall*, 1 Jac. 160.

If a lunatic and his committee be defendants, and the committee die after the decree, and a new one be appointed, the Court, on motion, will order that the future proceedings in the cause be carried on in the name of the new committee. *Lyon* v. *Mercer*, 1 S. & S. 356.

Even the eldest son and heir-at-law of a lunatic will not be appointed one of the committee of his estate, without giving security, unless the Master reports that no person can be found to act as committee, who will give security. *In re Frank*, 2 Russ. 450.

### (D) PROPERTY.

A lunatic's property ought not to be laid out on anything but government securities, except in very peculiar cases. *Ex parte Ellice*, 1 Jac. 234.

Where part of the purchase-money of timber belonging to a lunatic's estate was promissory notes; it was ordered to be paid to the receiver, in order to be paid into court. *Ex parte Clayton*, 1 Russ. 476.

The statute 39 & 40 Geo. 3. (Lord Eldon's act,) does not apply to money paid into court in the matter of a lunatic. *Ex parte Verney*, 1 Jac. 234.

The Court will not sanction the granting of building leases of part of a lunatic's estate for 999 years. *In re Starkie*, 2 Russ. 197.

A petition praying that the committee of a lunatic may be ordered to transfer property vested in the lunatic as a trustee, ought to be entitled in the lunacy, and need not be entitled in the matter of the act which authorizes the Lord Chancellor to make the order. *In re Fowler*, 2 Russ. 449.

Order made without a reference to the Master, that the committee of a lunatic should be at liberty to employ a particular person for inspecting the lunatic's property at a fixed salary, to be paid out of the rents. *In re Errington*, 2 Russ. 567.

## MACHINERY.

It is undecided whether the 21 Geo. 3, c. 37, relative to forfeited machinery, is a remedial or a penal statute. *Attorney General* v. *Jefferys*, 13 Price, 545, s. c. M'Clel. 270.

## MALICIOUS ARREST.

(A) ACTION FOR.
(B) COSTS.

### (A) ACTION FOR.

In an action for a malicious arrest, the question of malice or no malice, may properly be left to the jury. *Lloyd* v. *Thomas*, 1 Law J. C.P. 51.

An action lies for maliciously holding a party bail, although he is never arrested, but is told th there is a writ out against him, and he goes to t sheriff's officer and gives bail. *Small* v. *Gray*, 2 & P. 605. [Tenterden]

Although a person be advised, by a *special plead* that he may arrest another person without subjec ing himself to an action for a malicious arrest, ye if he make the arrest not acting *bonâ fide* on th opinion, with the expectation of recovering t amount of his debt, but in order to force the parti to do something out of the course of the cause, will be liable to be sued for damages, for havi made a malicious arrest. *Revenga* v. *Mackintosh*, Law J. K.B. 137, s. c. 2 B. & C. 693, s. c. 4 D. R. 187, s. c. 1 C. & P. 204.

The plaintiff, having been arrested as administ trix, brought an action for maliciously holding h to bail, which was founded on the single fact of h having been arrested as administratrix of her hu band: in the absence of malice being proved, eith express or implied, the jury gave a verdict for f shillings damages: and, on motion to set it asid the Court refused to interfere, on the ground, th after verdict, malice must be implied. *Fletcher* *Webb*, 11 Price, 381.

Two tradesmen had been accustomed to ha mutual demands on each other. They quarrelle The one sent in his bill, amounting to upwards 23*l.* to the other, and arrested him for that amou The former, both before and after the arrest, admi ted that the real balance between them was 5 which was paid to him under a judge's order, t gether with the costs.

The Court held, in an action for a malicious arre that there was no reasonable or probable cause f the arrest. *Austin* v. *Debnam*, 2 Law J. K.B. 20 s. c. 3 B. & C. 139, s. c. 4 D. & R. 653.

In an action for a malicious arrest, malice or th want of probable cause must appear: Hence it w holden, that the defendant having discontinued th action, and paid the costs, was evidence of a wa of probable cause; and that, being an act of the part himself, and the grounds for so doing within h knowledge, the burthen of proving a probable cau for the arrest lay on him. *Nicholson* v. *Coghill*, B. & C. 21, s. c. 6 D. & R. 12.

A person may, on a declaration properly frame recover for being maliciously held to bail, if he ga bail to prevent being arrested.

In a declaration for a malicious arrest, an allega tion that the defendant maliciously caused th plaintiff to be arrested, and to be detained in prison until, in order to procure his release, he was force to procure bail, is not a divisible allegation; and there was a giving bail proved, but no evidence any arrest, that is not sufficient. *Berry* v. *Adamson* 2 C. & P. 503. [Abbott]

Case lies against a creditor for maliciously refu ing to receive from his debtor, in execution under *ca. sa.*, the debt and costs, when tendered to himse or his attorney on the record, and to sign an authe rity to the sheriff to discharge the debtor out c custody. The refusal to sign such authority is su ficient *primâ facie* evidence of malice, in absence evidence to rebut the presumption. *Crozer* v. *Pi ling*, 3 Law J. K.B. 131, s. c. 4 B. & C. 26, s. c. D. & R. 129.

### (B) Costs.

The defendant had been arrested for a sum of money, as to the greater portion of which it appeared the plaintiff knew, at the time of the arrest, that the defendant had obtained his discharge under the Insolvent Debtors Act: Held, that under 43 Geo. 3, c. 46, the defendant was entitled to have his costs as on an arrest without probable cause. *Huntingdon* v. *Keely*, 7 D. & R. 369.

Where the plaintiffs had agreed to accept a composition on the amount of their debts, and induced other creditors to believe that they had done so, and afterwards arrested the defendant for the original demand; the Court gave the defendant his costs under the 43 Geo. 3, c. 46, s. 3. *Jarvis* v. *Merritt*, 1 Law J. C.P. 95.

Where a person had been arrested for a sum of money including a demand for board and lodging at two guineas a week, and the evidence at the trial was of an agreement to pay one guinea per week: Held, that the plaintiff should pay defendant his costs. *Glenville* v. *Hutchins*, 1 Law J. K.B. 32, s. c. 1 B. & C. 91.

Where the plaintiff, an attorney, arrested the defendant for 100*l.* for business done, but it appeared that 40*l.* was due before the plaintiff had taken out his certificate, and which the Prothonotary disallowed on taxation: Held, that the defendant was not entitled to his costs, under the 43 Geo. 3, c. 46, s. 3. *Hinton* v. *Warren*, 5 Law J. C.P. 1.

The defendant had been held to bail for 100*l.* on process issuing out of the Palace Court, and the cause was removed into the Court of King's Bench, where the plaintiff recovered only 30*l.* The Court held, that a motion for making the defendant pay the costs of the plaintiff was properly made in the Court of King's Bench, and they ordered him to pay the costs. *Thompson's bail*, 1 Law J. K.B. 150.

The defendant, having been arrested by virtue of a writ issued out of the Palace Court for 19*l.*, removed the cause to this Court. At the trial the plaintiff had a verdict for 2*l.* The defendant applied for costs under the 43 Geo. 3, c. 46, s. 3: Held, that, as the action was commenced in the Palace Court, this Court had no power to interfere. *Costello* v. *Cawley*, 6 Law J. C.P. 83, s. c. 1 M. & P. 315.

The statute 43 Geo. 3, c. 46, s. 3, giving costs to the defendant, does not apply to cases, in which a defendant, having been arrested for a large sum, pays a small one into court, and the plaintiff taking it out, does not proceed with the action. *Davey* v. *Renton*, 2 Law J. K.B. 152, s. c. 2 B. & C. 152, s. c. 4 D. & R. 186.

A defendant having been arrested for a large sum of money, paid a small one into court, which was taken out by the plaintiff: Held, that the defendant was not entitled to his costs for having been vexatiously holden to bail, under stat. 43 Geo. 3, c. 36. *Potter* v. *Pittman*, 1 Law J. K.B. 86, s. c. 2 D. & R. 266.

Where the defendant has been arrested for a larger sum of money than was actually due, the Court will not order the plaintiff to pay the costs of the defendant if the sum is not reduced below 15*l.*, and there is the least reason for arresting for the larger sum. *Symonds* v. *Gunston*, 1 Law J. K.B. 189.

The defendant was arrested for 30*l.*; at the trial, it appearing that the plaintiff was indebted to the defendant in a small sum, a verdict was taken for the former, for nominal damages, subject to a reference to an arbitrator for ascertaining the amount, and he found that 12*l.* only were due from the defendant to the plaintiff: Held, that the defendant was not entitled to costs under the stat. 43 Geo. 3, c. 46, s. 3, although he had tendered the sum awarded before the commencement of the action, as he ought to have pleaded the tender. *Bryson* v. *Simcox*, 6 Law J. C.P. 90, s. c. 1 M. & P. 355.

The affidavits in support of an application under 43 Geo. 3, c. 46, must clearly and directly shew the want of probable cause for the arrest, to the amount complained of;—a general assertion of a belief of such arrest having been frivolous and vexatious, unless strong facts be stated to sustain it, will not be sufficient. *Turner* v. *Gunn*, 5 Law J. K.B. 102.

When the Court have made an order that the plaintiff shall pay the costs of the defendant, under 43 Geo. 3, c. 46, s. 3, for having, without any reasonable cause, arrested the defendant for too large a sum, there is not any occasion to enter a suggestion on the roll. *Stark* v. *Thorn*, 2 Law J. K.B. 76.

Damages cannot be recovered for the extra costs in an action for a malicious arrest. *Webber* v. *Nicholas*, 1 R. & M. 419. [Best]

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## MALICIOUS INJURY.

[See Cutting and Maiming and Stat. 7 & 8 Geo. 4, c. 30.]

The prisoners were indicted on the 6 Geo. 3, c. 36, for lopping and topping an ash timber tree at eleven o'clock at night; it appeared that the owner died immediately after giving orders for their apprehension, and that the prisoners had run away when detected—it was holden that the jury might infer, the owner had not given them any permission so to do. *Rex* v. *Hazy*, 2 C. & P. 458. [Bayley]

A man by shooting another who is endeavouring to apprehend him, may be convicted on an indictment for shooting with intent to murder, disable, or do him some bodily harm, though shooting with intent to prevent apprehending is also a distinct capital offence under 43 Geo. 3, c. 58. *Rex* v. *Davis*, 1 C. & P. 306. [Garrow]

Upon an indictment for maliciously shooting, if it be questionable, whether the shooting was by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person. *Rex* v. *Voke*, 1 R. & R. C.C.R. 531.

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## MALICIOUS PROSECUTION.

To support an action on the case for a malicious prosecution, the plaintiff must shew, 1st. Malice—2nd. The want of probable cause.

The first is to be decided by the jury: the second by the Court.

*Semble*—That a judge may decide upon the second question, at any time during the progress of the cause; and, though the facts should be proved by the defendant's witnesses, he may yet direct a non-

suit, if, in his judgment, they amount to probable cause. The plaintiff in such a case has not a right to insist upon going to the jury on the facts, unless they are contradictory to those proved by his own witnesses. *Davis* v. *Hardy*, 5 Law J. K.B. 91, s. c. 6 B. & C. 225.

In an action for a *malicious prosecution*, a rule or order of court is admissible in evidence, to shew the termination of a former suit, although such order was obtained on the oath of the party. *Brooks* v. *Carpenter*, 4 Law J. C.P. 70, s. c. 3 Bing. 297.

A person laid before a magistrate information of an assault. He afterwards presented an indictment for that assault to the grand jury at the sessions, which was returned not true. The accused afterwards brought an action for a malicious prosecution, and the magistrate deposed that he returned the information to the clerk of the peace or his agent at the sessions. The clerk said, that he had searched, and could not find it, and that it was probable, if such an information was returned to the sessions, that after the bill was thrown out, it would be ripped to pieces.—The Court held, that sufficient proof of the loss of the information had been given to let in secondary evidence of its contents. *Freeman* v. *Arkell*, 2 Law J. K.B. 64, s. c. 2 B. & C. 494, s. c. 3 D. & R. 669, s. c. 1 C. & P. 137.

In an action for a malicious prosecution the declaration stated, that defendant *charged the plaintiff with having feloniously stolen, &c.* The evidence proved, that defendant *suspected and believed, and had good reason to suspect and believe*, that plaintiff had stolen &c.: It was holden, (Bayley J. *dissent.*) that there was no variance. *Davis* v. *Noake*, 6 M. & S. 29.

In an action for a malicious prosecution by one of two persons who have been the objects of the prosecution, evidence of the defendant's conduct towards the other, with relation to that proceeding, is admissible, with a view of shewing his malicious motives and intention.

Also, the copy of the indictment obtained by one may be used by the other as evidence in the action; nor will the Court, upon motion for a new trial, enter upon the question of its having been fraudulently obtained.

A rule for a criminal information obtained by A, and made absolute, is no bar to such action; nor will a new trial be granted on the ground of excessive damages. *Taddy* v. *Barlow*, 6 Law J. M.C. 19, s. c. 1 M. & R. 275.

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## MANCHESTER AND SALFORD POLICE ACT.

[See Rate.]

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## MANDAMUS.

[See Production and Inspection of Deeds, &c.]

(A) When and how granted.
(B) Form.
(C) Return.
(D) Costs.

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### (A) When and how granted.

[See Bankrupt—Sessions.]

The writ of mandamus is a writ issuable only i defect of any other specific legal remedy.

Where, therefore, a power of appeal is given t the sessions, and, previous to such appeal bein made, application is made for a mandamus, it wi be rejected, and the party so applying be referr to that court. *Rex* v. *the Commissioners of Pavement* 5 Law J. M.C. 65.

Where the right of the party applying for a ma damus is doubtful, the Court will consider the ci cumstance of a long period of time having be allowed to elapse before making the application, good ground for refusing that writ. *Rex* v. *t Mayor of Evesham*, 5 Law J. M.C. 91.

A mandamus lies where a mayor holds over, where actual vacancy is occasioned by death. *R* v. *the Mayor of Truro*, 2 Chit. 257.

The Court will grant a mandamus to swear i new jurat, who has been duly elected as a corpor officer. *Rex* v. *the Mayor of Rye*, 2 Ken. 468.

Several sets of mandamuses will not be issued the same period, without shewing some laches the persons applying for the first, or some gr ground of suspicion that they would not proce properly, and without having first a rule to sh cause. *Rex* v. *the Corporation of Wigan*, 2 Ken. 5

The Court of King's Bench have never grante mandamus to a corporation to elect members of *indefinite* body.

It seems, if a case were made out so strong that the Court were satisfied, that if they did grant it, the corporation would be dissolved, t then they might be induced to grant a mandan for that purpose. *Rex* v. *the Mayor of Fowey*, 2 L J. K.B. 86, s. c. 2 B. & C. 584, s. c. 4 D. & R. 1

The Court will not grant a mandamus to fix day for an election, but they will leave it to the pro officer. *Rex* v. *the Mayor of Bridgwater*, 2 Chit. 2

The Court will not grant a mandamus to com the mayor of a corporation to replace books in town hall, if sufficient cause for their removal shewn. *Rex* v. *the Mayor of Rye*, 2 Ken. 485, 2 Burr. 728.

A mayor cannot be compelled to administer oath of allegiance to inhabitants by a mandan *Rex* v. *the Mayor of Maidstone*, 6 D. & R. 334.

The Court will not grant a mandamus to con a corporate meeting, for the purpose of remo non-resident members. *Rex* v. *the Mayor of Tot* 5 D. & R. 481.

The words "it shall be lawful" for the bailiff admit persons into the corporation of a boro found in a bye-law, are not compulsory on th that they shall admit whosoever is thus quali but leave them with a discretion to refuse person whom they decline to admit, and con quently, the Court refused a mandamus against bailiffs. *Rex* v. *the Bailiffs and Corporation of* 1 Law J. K.B. 41, s. c. 1 B. & C. 85, s. c. 2 D. & 172.

In a prescriptive borough, there is a prescrip court-leet, at which all persons must be prese by the jury before they can be admitted freem and it was for a long time the custom, to present persons who had resided a year and a day wi

the borough, but there was no prescriptive right to demand of the jury to be presented. The Court, on that account refused a mandamus to present and admit a particular individual, who had so resided within the borough. *Rex* v. *the Mayor and Steward of West Looe*, 1 Law J. K.B. 44, s. c. 2 D. & R. 178.

The corporation of Ilchester had, from time immemorial, been the lords of the manor and owners of the Guildhall within that borough, and had, by a charter of Queen Mary, granted to them a right to hold a court-leet and view of frankpledge for the manor, every year in the Guildhall. By an inclosure act, the manor, with its rights, was awarded to Lord H with an exception to the corporation of the Guildhall; and Lord H, for several years afterwards, held the courts in the Guildhall. Being obstructed from entering that place: The Court held, that although some doubts existed as to the right of Lord H to hold the courts in the Guildhall, yet that they would grant a mandamus to bring the question fully before them. *Rex* v. *the Bailiffs and Burgesses of Ilchester*, 1 Law J. K.B. 173, s. c. 2 D. & R. 724.

Where a corporator is in office, and in a situation to exercise his rights, the Court will not interfere by mandamus to try the effect of them.

Accordingly, the Court refused a mandamus to alter the situation of a corporator's name in the books, so as to entitle him to two votes instead of one. *Rex* v. *Corporation of Yarmouth*, 5 Law J. K.B. 69.

A mandamus lies to compel the lord of a manor to hold a court-leet. *Rex* v. *Colebrooke*, 2 Ken. 163.

The Court will, as a matter of course, grant a mandamus for the admission of a person to copyhold premises, that he may try his right to them. *Anon.* 2 Law J. K.B. 93.

A mandamus lies to compel the admission of a person claiming as heir-at-law to a copyhold. *Rex* v. *the Brewers' Company*, 3 B. & C. 172, s. c. 4 D. & R. 492.

It seems, the Court will grant a mandamus to compel the admission of coparceners to copyhold tenements, as one heir, on the payment of one set of fees. *Rex* v. *the Mayor of Bonsall*, 3 B. & C. 173, s. c. 4 D. & R. 825.

By the custom of a manor, the tenants and inhabitants of the manor, pay a much smaller fine upon an admittance to a copyhold tenement, than a stranger. A person who was not a tenant or inhabitant, contracted to buy a large estate within the manor, and finding that he being a stranger, should, by the custom, have to pay a very large sum of money as a fine, purchased a small piece of land to make himself a tenant, and thus reduce the fine on the large estate; the lord refused to admit him to the small tenement, until he had been admitted to the large estate; and in his return to a mandamus to compel him so to do, he insinuated that the second purchase was made to defraud him of the larger fine; but he did not allege any fact of a fraudulent nature. The Court said, that no fraud had been committed, and directed a peremptory mandamus to issue. *Rex* *Boughey*, 1 Law J. K.B. 184, s. c. 1 B. & C. 565, s. c. 2 D. & R. 824.

A royal charter containing words of permission to do an act which is clearly for public benefit, is obligatory; therefore, where a charter of Jac. 1, granted to the steward and suitors of a manor, *power and authority* to hold a court, for the purpose (amongst other objects) of hearing and determining pleas of debt, &c.; but the court had been disused for that purpose during fifty years: This Court granted a mandamus to compel the court to be held again. *Rex* v. *the Steward of Havering atte Bower*, 2 D. & R. 176, (n).

A mandamus will not be granted to compel justices of the peace to do that which might render them liable to an action. *Rex* v. *the Justices of Buckinghamshire*, 2 D. & R. 689, s. c. 1 B. & C. 485: s. P. *Rex* v. *Broderip*, 5 B. & C. 239, s. c. 7 D. & R. 661.

The Court granted a mandamus to compel justices to sign a warrant of distress. *Rex* v. *Justices of Middlesex*, 2 Ken. 163.

The Court granted a rule to shew cause why a mandamus should not issue to compel justices to proceed against a quaker for not paying his *quota* of a church rate. *Rex* v. *Freeman*, 2 Ken. 19.

A mandamus lies to compel justices to set out, in the record of a conviction under the Building Act, the evidence adduced on the hearing of the information as nearly as possible in the words of the witnesses, as directed by the 3 Geo. 4, c. 23. *Re Rex*, 4 D. & R. 352.

The Court will grant a mandamus to justices, to compel the amendment of the record of a game conviction, by setting out the evidence. *Rex* v. *Warnford*, 5 D. & R. 489.

The Court will grant a mandamus to magistrates, to summon a person for not paying poor-rates. *Anon.* 2 Chit. 257.

The Court will grant a mandamus to the commissioners of the inclosure act, to inquire if there is any modus. *Anon.* 2 Chit. 251.

The Court will grant a mandamus to the commissioner appointed by the inclosure act, to make his award. *Anon.* 2 Law J. K.B. 36.

A mandamus cannot be obtained where a discretionary power has been given to commissioners, and they have exercised it, and no ground is shewn that they have acted wrongfully. The words "shall and may" are only imperative, when the cause is for the public good. "Exchange" imports equality of interest. *Rex* v. *Commissioners of Flockwold Inclosure*, 2 Chit. 251.

The Court will grant a mandamus to compel churchwardens to make a rate. *Rex* v. *Wilson*, 5 D. & R. 602.

A mandamus lies to compel a restoration to the office of parish clerk. *Rex* v. *Davies*, 5 Law J. M.C. 46: s. P. *Anon.* 2 Chit. 254.

So to the archdeacon, to swear in churchwardens duly elected. *Anon.* 2 Chit. 254.

The Court will not grant a mandamus to compel a visitor to exercise his power during a vacancy. *Rex* v. *Bishop of Durham*, 2 Ken. 296, s. c. 1 Burr. 567.

A mandamus cannot be obtained to compel a dean to license a second curate. *Anon.* 2 Chit. 253.

Or to compel the churchwardens to deliver a vestry book to the vestry clerk.

Or to deliver up the keys of a church. *Anon.* 2 Chit. 255.

A mandamus will not be granted to compel a court of inferior jurisdiction to grant a new trial in a cause before it, in which alleged injustice has been done to one of the parties. *Ex parte Morgan*, 2 Chit. 250.

The 23 Geo. 3, regulating the affairs of the poor of B, directs the guardians and overseers to adjust their accounts at quarterly meetings of their own body, and an appeal is given to the sessions, in respect of all matters done by virtue thereof; but the statute does not mention as to any submission of the overseers' and guardians' accounts to justices of the peace, as required by 50 Geo. 3, c. 49: Held, that a mandamus would lie from this court to the overseers and guardians to pass their accounts in the manner prescribed by the former statute. *Rex* v. *the Justices of Warwickshire*, 2 D. & R. 299.

If one parish officer applies for a mandamus against another, to compel him to concur in a rate, the writ must be against the former as well as the latter. *Anon.* 2 Chit. 254.

The Court will not, at the instance of one overseer, grant a mandamus to compel another overseer to concur in making a rate. The mandamus must be directed to all the parties whose duty it is to make the rate, and consequently the motion must include the person moving for the writ. *Overton's case*, 2 Law J. K.B. 40.

The Court granted a rule *nisi* for a mandamus to the proprietors of Margate Harbour, to pay a poor rate, though defendants had distrainable goods, it being sworn that the goods were fraudulently seized, and that the parish would be driven to try an action on the ground of the fraud. *Rex* v. *the Company of the Proprietors of Margate Harbour*, 2 Chit. 256.

This Court will grant a mandamus to a canal company, to enter upon their books the probate of the will of a deceased shareholder; leaving any question as to the validity and effect of the probate to be raised by a return to the writ. *Rex* v. *the Worcester and Birmingham Canal Company*, 6 Law J. K.B. 173, s. c. 1 M. & R. 529.

Where a debt is clearly due from a public body, and for the recovery of which the creditor has no remedy, but by a writ of mandamus: *Semble*, that the Court will grant the writ, although if there were a remedy by action, the Statute of Limitations might present a difficulty, if pleaded in bar. *Rex* v. *the Commissioners of the Shadwell Paving Act*, 6 Law J. M.C. 57, s. c. 1 M. & R. 591.

### (B) FORM.

When a mandamus commands the removal of a public nuisance, it need not prescribe any particular mode of removal. And *semble*, that it is better not to prescribe any such mode. *Rex* v. *the Bristol Dock Company*, 5 Law J. M.C. 51, s. c. 6 B. & C. 181.

### (C) RETURN.

If a return to a mandamus does not state the particular facts with great precision, it will be insufficient. *Rex* v. *the Corporation of Liverpool*, 2 Ken. 425, s. c. 2 Burr. 723.

The return to a mandamus must not allege inconsistent causes; must not be argumentative; and must state, clearly and positively, that the parties against whom it was issued have performed all that it directs; that it is impossible to do so; or shew some sufficient and legal reason why they ought not to be compelled to comply with its injunctions.

Thus, where certain commissioners returned as a reason for not considering the claims of a complainant, that it was impossible to settle and agree upon amount of the compensation to which he was titled until he had furnished further evidence, bu not state that they had met for the purpose of sidering those claims and receiving that evide and, as further excuse, objected to the legalit the complainant's notice, and denied his right to compensation whatever,—the return was quashe insufficient, inconsistent, and argumentative, a peremptory mandamus awarded. *Terrott* v. *the missioners of Berwick Harbour*, 5 Law J. M.C. 1

A return to a mandamus, stating that the co ration duly assembled to amove, &c., was ho sufficient. *Rex* v. *the Mayor of Doncaster*, 2 391, s. c. 2 Burr. 738.

Where a member of the common council had commanded by a mandamus to take upon hi that office, he returned, that by a bye-law, per refusing to fill it were subject to a certain fine, w defendant had duly paid. The Court determi that the return was insufficient, as it did not the fine was to be in lieu of service. *Re Bower*, 1 B. & C. 585, s. c. 2 D. & R. 842.

On a mandamus against the lord of the man W, commanding him to admit the claimant as at-law to certain copyholds, the lord in his re did not negative the heirship in certain and exp language, but argumentatively: Held, that th turn was bad, for being argumentative and uncert and the Court quashed the return, and direct peremptory mandamus. *Rex* v. *the Brewers' C pany*, 4 D. & R. 492, s. c. 3 B. & C. 172.

The making a return to a mandamus does not clude the defendant from taking objections to writ, on a motion for a peremptory mandamus. v. *the Bristol Dock Company*, 5 Law J. M.C. 51, 5 B. & C. 181.

The decision of the Court upon a rule nisi f mandamus cannot be controverted in a special until a return to the mandamus has been made. v. *the Justices of Leicester*, 7 D. & R. 708.

When the Court of King's Bench directs an i to be tried on the return to a mandamus, it mu done within a year, or the Court will proceed the applicant for the mandamus had lost the Where it was doubtful whether an attorney had legally elected to the office of vestry clerk, in w capacity, he claimed to have a lien on the p papers for his salary, the Court ordered him to over the papers, upon the amount of the salary paid into court, and directed an issue to try wh he was legally elected vestry clerk. Nothing done for upwards of twelve months, the ordered the money to be paid over to the atto *James May's case*, 2 Law J. K.B. 152.

### (B) COSTS.

A motion was made for a mandamus to co commissioners, to compel them to summon a ju ascertain the amount of certain damages cause them. The Court refused it; but directed an iss try the point. The verdict was given in favo the complainant. The Court refused to allow the costs of the proceedings. *Rex* v. *the Commi ers of the Ancholme Drainage*, 1 Law J. K.B. 1

## MANDATE.

In a proceeding under the statute 7 Geo. 2, c. 16, s. 6, and 16 Geo. 2, c. 2, s. 24, a party having appeared as proxy for an elector, at the annual election of magistrates and councillors of a borough—leaves Scotland in a ship of which he is master, upon a voyage to France and back, having before his departure communicated with his legal agent upon the subject of a petition to the Court of Session against the proceedings at the election, and during his absence, and before the expiration of two months from the election, he transmits to the same agent a letter upon the subject. The agent thereupon presents the petition in the name of the proxy, and the proceeding is commenced before the expiration of the two months. The proxy does not return to Scotland until after the expiration of the two months, but then recognizes the proceeding as instituted by his authority: Held, by the Court of Session, that there was not under these circumstances a sufficient mandatory for the proceeding, and this judgment was affirmed on appeal, but with much hesitation. *Arbuckle* v. *Innes*, 1 Bligh, N.S. 631.

## MANOR.

[See COMMON, COPYHOLD, GAME, TRESPASS.]

The corporation of Ilchester had from time immemorial, until 1810, been lords of the manor of Ilchester, and had, during that time, held a court leet for the manor in the Guildhall. In the reign of Philip and Mary, a charter was granted to them to hold a view of frankpledge in the Guildhall.

In 1810, under an inclosure act, an exchange was made by them with Lord H, and to him was awarded all the manor, courts, view of frankpledge, and appurtenances, except the Guildhall, houses, buildings and ground in front: The Court held, that Lord H had a right to hold the court leet in the Guildhall of the borough. *Rex* v. *the Bailiff of Ilchester*, 2 Law J. K.B. 324, s. c. 2 B. & C. 765, s. c. 4 D. & R. 324.

The office of steward of a manor court may be granted by deed for life, and the devisee of the grantor cannot deprive such steward of his office. *Bartlett* v. *Downes*, 3 Law J. K.B. 90, s. c. 3 B. & C. 616, s. c. 5 D. & R. 526, s. c. 1 C. & P. 522.

## MANSE.

The Scotch statute of the first parliament of Charles 2, s. 3, c. 21, provides, "that where competent manses are not already built, the heritors, &c. shall build competent manses to their ministers, the expenses thereof not exceeding 1000*l.* (83*l.* 6*s.* 8*d.* sterling), and not being beneath five hundred marks; and where competent manses are already built, ordains that the heritors shall relieve the minister of all charges for repairs, declaring that the manses being once built and repaired, &c. by the heritors, they shall be upholden by the incumbent ministers during their possession, or by the heritors out of the stipend in time of vacancy.

Up to the year 1760, the sum allowed for building manses, upon litigation in the Courts Ecclesiastical and of Session, had not exceeded the amount specified in the statutes, except in cases where the heritors consented. But from the year 1760, it had been the practice in both courts, without the consent of the heritors, to grant larger sums.

In 1814, the respondent applied to the Presbytery to ordain the heritors to *build* a new manse, which was decreed accordingly, upon an estimate of the respondent, amounting to 1214*l.*: The question being brought before the Court of Session, 1000*l.* sterling was finally decreed for *building a new manse*. The question upon the construction of the act, whether the expense of building was not limited to 1000*l.* Scots, had been adverted to, but not insisted upon, by the appellant in his pleas before the Presbytery or the Lord Ordinary, but only before the Court of Session in the last stage of the proceedings: The point raised and discussed in the former stages of the cause was, whether 1214*l.* or 700*l.*, or any intermediate sum, should be allowed.

Held, that the case fell within the clause of the statute which relates to the repairing of the manses, and not within that which relates to building of manses; and with this finding the judgment below was affirmed.

The defender, having by his pleadings in the first instance taken issue upon the sum necessary to build a competent manse, and not having then insisted upon the limitation of the statute, *(semb.)* had waived the objection arising out of the statute; but having finally in a reclaiming petition insisted upon that objection, which the Court referred to the Lord Ordinary as a point not before argued, and the pursuer not having objected, or appealed against the interlocutor by which this reference was made, the right to insist upon the objection was restored. *Dingwall* v. *Gardener*, 3 Bligh, 72.

## MANSLAUGHTER.

[See MURDER AND MANSLAUGHTER, and VARIANCE.]

## MARKET.

[See RATE, and TOLLS.]

To support an action by the owner of a market, against those who sell near it, it must appear that no portion of the market was devoted to purposes unconnected with those for which it was granted; —and it seems that notice ought also to be given to the defendant, informing him that there is room in the market for him to dispose of his wares. *Prince* v. *Lewis*, 2 C. & P. 66. [Abbott]

By the common law, the lord of an ancient market may maintain case against persons for selling goods of the market description in their own houses, within the limits of his franchise.

But this right is subject to qualification; and if, from increased trade and population, or any other cause, the market is alleged to have become inconvenient, the question, whether the defendant in such

an action had a reasonable cause for selling in his private house, is a question for the jury. *Moseley*, v. *Walker*, 5 Law J. K.B. 358, s. c. 7 B. & C. 40.

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## MARRIAGE.

[See BARON AND FEME, and DIVORCE.]

(A) VALIDITY OF.
(B) BREACH OF PROMISE OF.
(C) EVIDENCE OF.

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### (A) VALIDITY OF.

A secret marriage between an Englishman and a Sicilian woman, celebrated in Sicily, and valid by the laws of that kingdom, held also to be valid in England. *Herbert* v. *Herbert*, 3 Phil. 58. [Abbott]

The marriage of two British subjects in France, when invalid in that country is invalid in this. *Lacon* v. *Higgins*, 1 D. & R. N.P.C. 38.

The celebration of a marriage in Ireland by a person in holy orders, is valid; though in a private house, and at any hour in the day or night. *Bruce* v. *Burke*, 2 Add. 471: s. p. *Smith* v. *Maxwell*, 1 C. & P. 271. [Best]

Where a papist and a protestant married in Ireland,—it was holden, that such marriage was valid, though it would have been void if in England; and, therefore, where a party assumed that such marriage was illegal, and married again in England, he was holden to be guilty of bigamy. *Bruce* v. *Burke*, 2 Add. 471.

In Scotland, a long period of cohabitation by a man and woman, as husband and wife, may amount to a marriage, even though they did not intend to contract matrimony.

Consent *per verba de præsenti*, by persons not minors in Scotland, will constitute a marriage. *Montague* v. *Montague*, 2 Add. 375.

Where the marriage of two British subjects was solemnized at Madras by a Catholic priest, according to the forms and rites of that faith, but without the licence of the governor, which it was usual to obtain: Held, nevertheless, valid. *Lautour* v. *Teasdale*, 8 Taunt. 830.

A marriage solemnized by licence, is null and void, if the husband be a minor. *Johnston* v. *Parker*, 3 Phil. 39.

Under the 26 Geo. 2, c. 23, and 3 Geo. 4, c. 75, s. 2, a marriage by licence was deemed null and void, on the ground of minority, and want of legal consent. *Bridgwater* v. *Crutchley*, 1 Add. 473.

A marriage by licence null and void, by reason of minority, and want of legal consent, under 26 Geo. 2, c. 33, held to be rendered a good and valid marriage by the retrospective operation of 3 Geo. 4, c. 75;—it being held, that the parties, though not actually cohabiting up to the time of the passing of 3 Geo. 4, c. 75, did still "continue to live and reside together as husband and wife," in legal construction, within its true intent and meaning, up to that time, sufficiently to render the retrospective provisions of 3 Geo. 4, c. 75, applicable to such their marriage. *King* v. *Sansom*, otherwise *King*, 3 Add. 277.

The 4 Geo. 4, c. 76, does not repeal the retrospective clause in the 3 Geo. 4, c. 75. *Rex* v. *Blakemore*, 1 R. & M. 382. [Abbott]

A marriage, celebrated by licence, between parties, one of whom is a minor, without the consent required by the 4 Geo. 4, c. 76, is not void, although the offending party may be deprived of a benefit in respect of property through the marriage. *Rex* v. *Birmingham*, 6 Law J. M.C. 67, s. c. 8 B. & C. 29, s. c. 2 M. & R. 230.

The marriage of a wife, an infant at her marriage, and who had been married by the consent of her mother, who was then supposed to be a widow, was declared null and void, after a cohabitation of eighteen years, as it appeared that her father was at the time living. *Hayes* v. *Watts*, 3 Phil. 43.

The consent of guardians, not appointed by instrument, attested by two witnesses, is inoperative and such marriage is void. *Reddall* v. *Leddiard*, 1 Phil. 256.

Where marriage is required to be with the consent of trustees, generally, it is sufficient if the marriage be had with the consent of such of the persons named trustees, as accept the office. *Worthington* v. *Evans*, 1 Law J. Chanc. 126, s. c. 1 S. & S. 165.

To render a marriage void on the ground of misnomer, there must be fraud; therefore, if a man be known by two names, and it be questionable which is the right name, he may be married in either. *Diddear* v. *Faucit*, 3 Phil. 580.

A L was married to one J B, who died; A L was soon afterwards married again by banns to W R, by the name and description of "A L, widow:" Held that as it appeared that A L had assumed her maiden name without any intention of fraud, that it was a valid marriage, and that her settlement was in the parish where W R resided. *Rex* v. *St. Faith's, Newton*, 3 D. & R. 348.

The publication of banns of an illegitimate child by the surname of the mother, as well as that of the father, is valid. *Sullivan* v. *Oldacre*, 3 Phil. 45.

A marriage had in virtue of false banns, (the wife *de facto* personating, at the time of the marriage, the female as for whose marriage with the husband *de facto* the banns had been published,) pronounced null and void under the statute 26 Geo. 2, c. 33, statute still in force as to the particular marriage under 3 Geo. 4, c. 75, and 4 Geo. 4, c. 76. *Stace* v. *Farquharson*, 3 Add. 282.

Natural malformation is a ground for nullifying a marriage. *Briggs* v. *Morgan*, 3 Phil. 425.

But a marriage cannot be annulled by a man pleading his own impotency. *Norton* v. *Seton*, 1 Phil. 147.

The Court will not pronounce a marriage null and void, on the ground of a legal objection, unless the nullity be satisfactorily and clearly proved. *Nelson* v. *Milward*, 2 Add. 386.

### (B) BREACH OF PROMISE OF.

If, in an action for a breach of promise of marriage, the defendant shew, that he was induced to make the promise, or continue the connexion, by wilful misrepresentation, or suppression of the circumstances of the plaintiff's family and previous life, it is a bar to the action. *Wharton* v. *Lewis*, 1 C. & P. 529. [Abbott]

But if it be shewn in such an action, that he w

cognizant of those facts at the time he made the promise, it is no bar.

In an action for a breach of promise of marriage, the defendant may, in mitigation of damages, prove that his relations disapproved of the match on account of the plaintiff's immodest conduct.

And if the father be incompetent to prove that fact, because he employed the attorney, other relatives may be admitted to prove such disapprobation. *Irving* v. *Greenwood*, 1 C. & P. 350. [Abbott]

To support an action for a breach of promise of marriage, if the defendant has not married another, there must be evidence of an offer to marry on the part of the plaintiff, and a refusal by the defendant. But if the plaintiff's father go to the defendant, and ask him if he means to fulfil his engagements to his daughter, and he reply, "certainly not"; proof of this will be sufficient. *Gough* v. *Farr*, 2 C. & P. 631. [Bosanquet]

In an action by a lady for a breach of promise of marriage, it is not necessary, for the purpose of making out the mutual promises, which are necessary to support the action, that the plaintiff by words consented to accept the defendant; but the jury may infer such consent from the circumstances of her making no objection at the time of the offer, and her afterwards receiving visits from the defendant in the character of a suitor. *Daniel* v. *Bowles*, 2 C. & P. 553. [Best]

In an action for a breach of promise of marriage, the promises declared on were—first, to marry on request; secondly, the like, assigning for breach, that the defendant had married another; thirdly, to marry within a reasonable time; and, lastly, to marry generally. The proof was, that the defendant had said that he would marry the plaintiff in July: Held, that, notwithstanding this variance, the jury were warranted, by the evidence, in inferring a promise to marry generally; and that the plaintiff was entitled to recover on the last count of the declaration. *Phillips* v. *Crutchley*, 6 Law J. C.P. 63, s. c. 1 M. & P. 239, s. c. 3 C. & P. 178.

### (C) EVIDENCE OF.

[See *Bain* v. *Mason*, 1 C. & P. 203.]

A certificate of a marriage from Gretna Green cannot be pleaded in proof of a marriage. *Montague* v. *Montague*, 2 Add. 375.

Where in ejectment the plaintiff relies on the invalidity of a second marriage, by reason of a former marriage by licence, one of the parties being a minor, and defendant has notice that the question intended to be raised, is whether the first marriage was with consent of the minor's parents, it lies upon the defendant to disprove consent. *Doe d. James* v. *Price*, 6 Law J. K.B. 157, s. c. 1 M. & R. 683.

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## MARRIAGE ARTICLES AND SETTLEMENTS.

[See SETTLEMENTS.]

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## MASTER AND SERVANT.

[See PARENT AND CHILD.]

(A) LIABILITY OF MASTER.
(B) CONTRACT BETWEEN.

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### (A) LIABILITY OF MASTER.

If a horse takes fright, and damage is committed through the negligence of a master in not having his tackle good, an action is maintainable; hence, where an action was brought against a master for an accident, which happened in consequence of the chain-stay of a cart breaking, through which the horse ran away and damage was done, it was holden that the action was well brought. *Welsh* v. *Lawrence*, 2 Chit. 262.

If a master sends his servant forth into the world, wearing his livery, to hire horses, which the former afterwards uses, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given, and the master is bound to pay the hire, though the master has agreed with the coachman, that he will pay him a large salary to provide horses—unless the lender of the horses had some notice that the coachman hired them on his own account, and not for his master. *Rimell* v. *Sampayo*, 1 C. & P. 254. [Littledale]

In an action against the defendant for the negligence of his servant, in riding over the plaintiff, it appeared that the man was only occasionally employed by the defendant; that he was also occasionally employed by another person, who kept a horse in a stable which was jointly occupied by him and the defendant; that on the occasion in question, the man, having been sent to town by the defendant, took that horse, and that he rode over the plaintiff. It was left to the jury, at the trial, to say, whether or not the horse was used with the consent, either express or implied, of the defendant; and the jury having returned a verdict for the plaintiff, the Court refused to disturb it. *Goodman* v. *Kennell*, 6 Law J. C.P. 61, s. c. 1 M. & P. 241, s. c. 3 C. & P. 167.

### (B) CONTRACT BETWEEN.

The law founded upon usage, which justifies the discharge of domestic servants on giving a month's notice, though there was a yearly hiring, does not apply to a person in the situation of a clerk to an army agent, receiving a salary of 500*l.* a-year. *Beeston* v. *Collyer*, 2 C. & P. 607. [Best]

The plaintiff lived for many years in the service of the defendant, as clerk, and it was proved that his salary had formerly been paid quarterly, although of late years he had received it monthly: Held, that, notwithstanding the monthly payments, this was a yearly hiring. *Beeston* v. *Collyer*, 5 Law J. C.P. 180, s. c. 4 Bing. 309.

If a clerk be engaged at a salary of 100*l.* a year, and having received his wages up to a certain time, serve for some time longer, and then leave the service before the year expires, without due cause, and without any notice; whether he is entitled to recover wages up to the time of his quitting—*Quære*. At all events he is liable to a cross action for leaving the service without notice. *Huttman* v. *Boulnois*, 2 C. & P. 510. [Abbott]

If the contract between master and servant be the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to be for an entire year: and he cannot, on the common count for wages, recover for any further period than that

during which he had served. *Archard* v. *Horner*, 3 C. & P. 349. [Tenterden]

If a servant be hired for a year, and his salary is to be paid *yearly*, and after the expiration of six months he be dismissed, he is not bound to wait until the end of the year, but may commence an action for the whole year's wages immediately. *Pagani* v. *Gandolfi*, 2 C. & P. 370. [Best]

A person whose name is added to that of the regular officer in a warrant under a *fi. fa.*, by the plaintiff's attorney, and who is employed to watch the goods after they have been taken by the officer, is not a labourer within the jurisdiction of justices of the peace under 20 Geo. 2, c. 16. *Bramwell* v. *Penneck*, 6 Law J. M.C. 47, s. c. 7 B. & C. 536, s. c. 1 M. & R. 409.

## MERGER.

Where a mortgage was created for 1000 years, and the executors of the mortgagee took an assignment of another term in the same premises for 500 years, and assigned to the trustees of a lady both the terms, which lady was entitled to them under the will of A E: Held, that the term for 1000 years was merged in the reversionary term for 500 years. *Stephens* v. *Bridges*, 6 Mad. 66.

In order to constitute a merger, the equitable or legal estate must be of the same quality; hence, an equitable estate tail in a copyhold will not merge by the accession of the legal fee. *Merest* v. *James*, 6 Mad. 118.

The owner of a close, divided from an adjoining close by a fence, endeavoured to cast upon the owner of that adjoining close the burthen of repairing the fence. This he sought to do by evidence, that the owners and occupiers of that close had repaired the fence as far back in point of date as living memory could carry it. From this he wished the jury to be allowed to draw the presumption of a liability to repair. But it appearing that, about thirty years before, both closes had been the freehold of one person, the presumption was not allowed; because, even supposing that there had been anciently an obligation in the owner of one close to repair the fence, that obligation had become merged in the unity of *seisin* in the two closes; and could only be revived by deed, which, if it really existed, ought to have been produced in evidence. *Boyle* v. *Tamlyn*, 5 Law J. K.B. 134, s. c. 6 B. & C. 329.

A tenant for life of an estate settled in strict settlement, buys up some of the charges on the estate, and has them assigned to a trustee: he next purchases the ultimate remainder, and has it conveyed to him subject to the subsisting charges: he then devises the estate, subject to the charges that might be thereon at his decease: the intermediate remainders fail at his death. The charges so purchased are merged. *Astley* v. *Miller*, 1 Sim. 298.

## MESNE PROFITS.

A judgment by default against the casual ejector does not preclude an action for *mesne profits* being brought in the name of the nominal plaintiff in ejectment. *Aslin* v. *Parkin*, 2 Ken. 376, s. c. Burr. 665.

Several lessors of the plaintiff may maintain a j action for mesne profits, after they have recov in ejectment, although there were several dem by each. *Chamier* v. *Plestow*, 2 Chit. 410.

Although between mortgagor and mortgagee latter is entitled to emblements, the principle not apply to a case where they have been car away before the mortgagee obtains possession, between the time of his demand and recover possession; and although he might recover for mesne profits from the time of the demise laid, he cannot recover beyond that amount such occ tion-rent as any other tenant might have been li for. *Ex parte Temple*, 1 G. & J. 210.

In an action of ejectment where the defen appears and pleads, the plaintiff having obtain verdict, cannot, in the execution of a writ of inq to assess damages in an action for mesne pr give in evidence the extra costs beyond his t costs, in order to increase the damages. *Brad Bridges*, 1 Law J. C.P. 11.

In an action for mesne profits, the plaintiff recover by way of damages, costs incurred by in a court of error in reversing a judgment in ej ment obtained by the defendant. *Nowell* v. *Ro* 6 Law J. K.B. 26, s. c. 7 B. & C. 404, s. c. 1 & R. 170.

Rule, in ejectment, calling on the tenant in p session, under 1 Geo. 4, c. 57, to shew cause w upon his being admitted defendant, besides enter into the common consent rule, and giving the c mon undertaking, he should not undertake, case a verdict should pass for the plaintiff, to the plaintiff judgment, to be entered up against real defendant of the term next preceding the of trial, and also why he should not enter into a cognizance by himself and two sufficient suret in a reasonable sum, conditioned to pay the c and damages which should be recovered by plaintiff in the action. The Court, no cause be shewn, made the rule absolute, and gave a reason amount for the costs of the action, and for mesne profits, the amount of which they directe be ascertained by the Prothonotary. *Doe d. Sam* v. *Roe*, 6 B. Mo. 54.

In an action for mesne profits, the judgmen ejectment is conclusive of the plaintiff's righ the premises, from the day of the demise laid in declaration in ejectment, but is no proof of defendant's possession at that time. The con rule admits the possession at the time of the ser of the declaration in ejectment; but if the plai intends to go for mesne profits antecedent to time, he must give distinct evidence of the fendant's possession. *Dodwell* v. *Gibbs*, 2 C. & 615. [Garrow]

## MINES.

[See INJUNCTION, INSPECTION, and MORTGAGE

## MISDEMEANOR.

It is a misdemeanor to sell the dead body

capital convict for dissection, where dissection is no part of the sentence. *Rex* v. *Cundick*, 1 D. & R. N.P.C. 13. [Graham]

It is a misdemeanor to prejudge a criminal case by representing, in a theatrical exhibition, a man in the act of committing the offence. *Rex* v. *Williams*, 2 Law J. K.B. 30.

Misdemeanors are not at all altered by the 3 Geo. 4, c. 24. *Rex* v. *Cale*, 1 R. & M. C.C.R. 11.

A boy under the age of 14, cannot be convicted of an assault with an intent to commit a rape. *Rex* v. *Aldershaw*, 3 C. & P. 396. [Vaughan]

## MISNOMER.

[See ABATEMENT, ARREST, BAIL, and PRACTICE.]

In an attachment against an attorney for not paying money directed to be paid by an order of court, a misnomer of the party (an attorney,) in the order for changing attornies, by calling him "John," instead of "James," held unavailable in an application for the attachment made against him by his right name, he having attended and consented to summonses when he was incorrectly called. *Stevenson* v. *Power*, 9 Price, 384.

Error was assigned upon a misnomer in the christian name of one of the plaintiffs below, in the warrant of attorney; the Court of Exchequer Chamber held it immaterial, and permitted the transcript of the record to be amended, before amendment in the court below, where there had been no verdict and judgment entered in the Nisi Prius record and judgment-roll. *De Tastet* v. *Rucker*, 6 B. Mo. 135.

The Court permitted a misnomer in a codicil to be amended, by substituting A F and R D, for S F and J D. *Forster* v. *Forster*, 1 Add. 468. (n.)

Where a defendant had been arrested by the name of John Thomas G, his real name being James Thomas G, and had signed a bail-bond by his initials J T G: Held, that he was not estopped from availing himself of the misnomer. *Coles* v. *Gum*, 2 Law J. C.P. 64, s. c. 1 Bing. 424, s. c. 8 B. Mo. 526.

Where a defendant, on being arrested by a wrong christian name, pays the debt and costs, the Court will not direct the latter to be returned, though they will grant a rule to refer it to the Prothonotary to ascertain if too much has been paid. *Knibbs* v. *Turner*, 2 Law J. C.P. 97.

## MONEY.

[See COIN.]

There is no lawful money of Ireland, it is merely conventional; there is neither gold nor silver coin of legal currency, nothing but copper; there is no such thing as Irish money, it is Irish currency. *Lansdowne* v. *Lansdowne*, 2 Bligh, 79.

## MONEY COUNTS.

[See LOAN.]

(A) IN GENERAL.
(B) MONEY HAD AND RECEIVED.
(C) MONEY PAID.

### (A) IN GENERAL.

In an action on a joint and several promissory note, payable by instalments, if the day on which one of the instalments become due be mis-stated in the declaration, it is a fatal variance; and if the defendant sign such note as a surety for the other maker, the plaintiff cannot resort to the common money counts. *Wells* v. *Girling*, 8 Taunt. 737, s. c. 3 B. Mo. 79, s. c. 1 Gow, 21.

A broker having contracted a purchase for his principal, being compelled to complete the purchase, sued the principal for the money so paid, and endeavoured to recover the same under the money counts. But the judge who tried the cause, reserved the point. *Josephs* v. *Pebrer*, 1 C. & P. 341. [Littledale]

Where in the absence of an authority, A indorsed a bill to C and D, who received the amount from the acceptor: It was holden, that the acceptor, on discovering the mistake, might recover the money from C and D as money had and received—or from A as money paid. *East India Company* v. *Prince*, 1 R. & M. 407. [Abbott]

Plaintiff assigned his vessel to the defendant as a security for the re-payment of a sum of money, but it appeared on the register to be an absolute assignment. The defendant sold the ship, and told the plaintiff that he had received the purchase-money, and would account with him for the balance of the proceeds of the sale. In an action upon the money counts, it was determined that the plaintiff was entitled to recover this balance, as the acknowledgment was sufficient to support the action. *Prouting* v. *Hammond*, 8 Taunt. 688, s. c. 1 Gow, 41.

### (B) MONEY HAD AND RECEIVED.

An action for money had and received, cannot be supported by an infant who pays money with his own hands, although there be no valuable consideration. *Holmes* v. *Blogg*, 8 Taunt. 508.

An infant, who was entitled to certain personal property on coming of age, had joined her father in a bond and bill of exchange, to secure to the plaintiff the amount of rent incurred by their joint occupation of premises belonging to him. The infant, on coming of age, had given the plaintiff a power of attorney to receive the amount of the property, and of which he accordingly possessed himself. The infant then gave the plaintiff an order on the defendant to pay him the amount of his debt, which order was presented to the defendant, who acknowledged that he possessed adequate funds; but, before the order was actually paid by the defendant, the infant countermanded the order: Held, that, under the circumstances, it must be inferred that the defendant had agreed to appropriate a sum sufficient to pay the plaintiff his demand, and that he was liable to an action for money had and received. *Robertson* v. *Fauntleroy*, 1 Law J. C.P. 55.

An action for money had and received does not lie by one of several persons against the others, who have been jointly engaged in raising a sum of money by a mere bubble—for the money so raised. *M'Gregor* v. *Lowe*, 1 C. & P. 200, s. c. 1 R. & M. 57. [Abbott]

Where a scheme, which was to be carried into effect by subscription, failed previous to its arriving at maturity: it was holden, that those persons who

had become subscribers might, in an action for money had and received against the projectors, recover the money so advanced, without deduction of any part towards the payment of the expenses incurred. *Nockells* v. *Crosby*, 3 B. & C. 814, s. c. 5 D. & R. 751.

Where the plaintiff purchased certain shares from the defendant, in a projected concern to be called "The Northern and Western Railway Company," and received scrips for the sum advanced, and it appeared that no application had been made to parliament for an act at the time of the sale: Held, that the plaintiff was entitled to recover back his purchase-money, in an action for money had and received. *Kempson* v. *Saunders*, 5 Law J. C.P. 6, s. c. 4 Bing. 5.

Assumpsit for money had and received lies for excessive charges extorted by a broker under a threat of removing goods distrained upon for rent. *Hills* v. *Street*, 6 Law J. C.P. 215, s. c. 5 Bing. 37, s. c. 2 M. & P. 96.

An action for money had and received does not lie to recover money paid under a broken contract —the proper remedy being for a breach thereof. *Davis* v. *Street*, 1 C. & P. 18. [Park]

Where three persons were jointly concerned as provision brokers, one of whom consigned goods to the defendant to be sold, and the profits were to be divided equally between them; and the defendant promised the third partner, that in case he would accept bills drawn by the consignor, to the amount of the goods consigned, he (the defendant) would provide for the bills, when they arrived at maturity, out of the proceeds already received by him: Held, that such partner, having accepted and paid the bills, might recover against the defendant in a count for money had and received, although he declared specially on the undertaking, and there was a variance between the contract as laid, and that proved at the trial. *Coffey* v. *Brian*, 3 Law J. C.P. 151, s. c. 3 Bing. 54, s. c. 10 B. Mo. 341.

For the purpose of erecting booths, that the public might view the procession at the late coronation, A & Co. applied for the ground in front of their own houses at Westminster. B & Co. took the whole of the ground from the Board of Works, on an understanding that A & Co. should have the part they desired. B & Co. let A & Co. have that ground, and they paid a sum of money into the hands of some bankers, to be returned to them, in case the coronation did not take place, and the government in consequence remitted the rent of B & Co.

The coronation was celebrated; but the rent was remitted to B & Co. The court, in an action for money had and received, held, that a verdict obtained by A & Co, to recover the amount from the bankers, was right. *Truscott* v. *Marsh*, 1 Law J. K.B. 164, s. c. 2 D. & R. 712.

Exchequer bills, if received as cash, may be treated as money, under a count for money had and received. *Frost* v. *Bolland*, 4 Law J. K.B. 277, s. c. 5 B. & C. 611, s. c. 8 D. & R. 384: s. p. *Dougan* v. *Bolland*, 4 Law J. K.B. 278, s. c. 5 B. & C. 622, s. c. 8 D. & R. 435.

*Indebitatus assumpsit* for money had and received, &c. will not lie to recover the value of foreign securities paid to the defendant, where it appears that he had no opportunity of converting such securities into *British* money. *M'Lachlan* v. *Evans*, 1 Y J. 380.

The defendant having, as administrator, recei a sum of money, which, it was agreed by the par entitled to it, was to be applied in discharge of funeral expenses of the testator's widow, which been paid by the plaintiff, promised so to apply Held, that the plaintiff was entitled to recover it an action for money had and received. *Mee Moessard*, 6 Law J. C.P. 3, s. c. 1 M. & P. 8.

Three bills of exchange were presented for p ment at the place named in the acceptance. notary public, observing among the indorsem the names of Heywood & Co., country bank to whom the plaintiffs were the town bankers, plied to them to pay the bills for the honour of country bankers. The bills were immediately p and the clerk struck his pen through the name the subsequent indorsers. Before five o'cloc was discovered that the bills had been forged, also the names of Heywood & Co. Notice immediately given to the defendants, for whom notary had presented the bills, and a demand made for repayment of the money, which refused. The defendants had sufficient time to g the subsequent indorsers notice of the dishonou

The Court held, 1st, That the money had b paid through a mistake, arising as much from fault of the defendants, as from the negligenc the plaintiffs; and, as notice of it had been give the defendants in time to secure themselves f loss, that they ought not to claim the money. 2 That as the erasure of the indorsements was m by a mistake capable of explanation, it did not the rights of the parties. *Wilkinson* v. *Johnsto* Law J. K.B. 58, s. c. 3 B. & C. 428, s. c. 5 D R. 403.

In an action by the owner of a lost bank against the supposed finder, it will suffice for plaintiff to shew circumstances satisfying the j of the fact, without giving direct evidence. *Hol* v. *Sigil*, 2 C. & P. 176. [Abbott]

Where the master and part-owner of a ve agreed to purchase the moiety of his partner, having paid the purchase-money, and received title deeds, which he deposited as a security wi third person, had the entire possession of the ve given up to him, but his partner afterwards refu to execute a bill of sale, or refund the money: H that an action for money had and received wo not lie to recover the purchase-money, as the p ties could not be restored to their original situat *Beed* v. *Blandford*, 2 Y. & J. 278.

J B chartered a vessel to convey a cargo f London to Port-au-Prince, engaging to retur home cargo. On the ship's arrival at Port-au-Pri the cargo was assigned by J B to Messrs. C & The defendants, the owners, attached the carg Port-au-Prince (for the ship's hire) whilst in hands of C & B. J B's agents at Port-au-Pr having refused to supply the ship with a home ca the captain procured one himself for his own who received the freight for the same on the sh arrival in London. Subsequently to the assignm to C & B, J B became bankrupt. His assig sued the defendants in assumpsit for money had received, to recover the proceeds of the cargo tached by them, and also the freight received

the home cargo: Held, that they were not entitled to recover either. *Kymer* v. *Larkin*, 6 Law J. C.P. 237, s. c. 5 Bing. 71, s. c. 2 M. & P. 183.

*Semble*—That no action can be maintained to recover back money paid without consideration, or even upon an illegal consideration, if the contract has not been rescinded, and has been performed. *Davis* v. *Bryan*, 5 Law J. K.B. 237, s. c. 6 B. & C. 651.

Unless the special contract in assumpsit has been clearly rescinded, the plaintiff cannot resort to the money counts, to recover back money paid on entering into the contract.

Accordingly, in an action upon the warranty of soundness of a horse, sold for 20*l*., the plaintiff did not prove the warranty, as declared upon. He then endeavoured to shew, that the original contract had been rescinded, and proved that the defendant, on being informed that the horse was unsound, promised to call and see the horse, and said, "Nothing should be the matter." He did not call; the horse was sent back to him, and refused: he offering 5*l*. back, the plaintiff demanding 16*l*. The Court held, that these facts did not amount to a rescinding of the special contract; and, failing in the proof of that as averred, the plaintiff could not resort to the count for money had and received. *Addis* v. *Harris*, 5 Law J. K.B. 124.

The defendant, the contractor for the Neapolitan loan of 1822, sold to J S a portion of that stock, and received from him a deposit of 10 per cent. on the amount, giving him scrip-receipts for the same, entitling *the bearer* to the amount of the stock therein mentioned, on payment of the balance, on or before the 1st February 1823. These receipts were sold by J S to the plaintiff. Before the 1st February 1823, the defendant issued notices to the holders of scrips to the effect, that he granted, on certain conditions, an extension of time for the payment of the balances, requiring those who chose to avail themselves of the offer to send their receipts to be marked. The plaintiff, accordingly, accepting the terms offered, sent his receipts, which were indorsed by the defendant with the plaintiff's name. Some of the holders having neither accepted the new nor performed the old conditions, the defendant again gave notice, saying, that, unless the balances were paid by a particular time, he would "dispose of, or keep the certificates, and put the proceeds or value of them to the credit of the holders, on account of the balances and interest due, and hold them answerable to him for any loss or deficiency." The forfeiture of the deposits was not a condition of the original contract, as evidenced by the receipts. The plaintiff failed in paying his balance at the time specified, but afterwards tendered it. The defendant refused to receive it, and also refused to return the deposit-money paid by J S: Held, that the plaintiff might recover it as money had and received to his use. *Hennings* v. *Rothschild*, 5 Law J. C.P. 182, s. c. 4 Bing. 315.

### (C) MONEY PAID.

An action for money paid, laid out, and expended, cannot be maintained in the absence of an express or an implied authority. *Tappin* v. *Broster*, 1 C. & P. 112. [Hullock]

Where a payment is made under protest that it is not voluntary, but merely to obtain possession of property or papers of value, and without admitting any lien, such payment will be no impediment to the money being recovered back by action. *Shaw* v. *Woodcock*, 5 Law J. K.B. 294, s. c. 7 B. & C. 73.

Although no one has a right, of his own motion, to pay the debt of another person; yet if he, whose debt has been thus paid, should afterwards assent to the payment, or recognize, or adopt it, or shew by his conduct at the time that he does not object to it, the person who has thus paid the debt may recover the amount in an action for money paid on his account. And, if he be present at the time, it seems that he is liable to an action for money lent. *Roberts* v. *Champion*, 5 Law J. K.B. 44.

Money paid with a knowledge of the facts, but in ignorance of the law, cannot be recovered back, unless it be against good conscience to retain it.

A party who has the means of knowledge of the facts, but neglects to avail himself of them, will be concluded as though he had actual knowledge.

If a fact is *bonâ fide*, but incorrectly, stated by one party to another, who therefore pays money under a belief of the accuracy of that fact, and the means of knowledge as to its correctness are as much within the reach of one party as the other, the party who has paid the money may recover it back on a discovery of the mistake, provided it would be against good conscience that it should be retained.

Accordingly, the holder of a bill neglected to present it when due; in consequence of which the previous parties refused to be bound by it. The holder then insisted that the bill was on a wrong stamp, and therefore void; and he insisted on being paid back the consideration which had been received for the bill, and threatened to sue if he were not paid. The bill was inspected, and appearing to be on a wrong stamp, the holder was paid the amount. It turned out that the bill was on a proper stamp, it being drawn in Ireland on an Irish stamp: Held, that the money was recoverable back; though no fraud was imputed to him that had received it. *Milnes* v. *Duncan*, 5 Law J. K.B. 239, s. c. 6 B. & C. 671.

The indorser of a bill of exchange, who has been compelled to pay a subsequent indorsee a part of the amount, may recover that amount in an action for money paid against the acceptor; it being considered that a bill of exchange creates a sufficient privity of contract. *Pownall* v. *Ferrand*, 5 Law J. K.B. 176, s. c. 6 B. & C. 437.

A party to a bill of exchange is not liable for money paid to his use by a person who takes up the bill for his honour, unless a formal protest of payment to his honour be made before payment of the bill. *Vandewall* v. *Tyrrell*, 1 M. & M. 87. [Tenterden]

A mortgaged an estate, his sole property, to C, and B joined A in charging an estate, their joint property, as a further security, and A and B gave their joint bond for the payment of the sum advanced. A subsequently, by an indenture, to which B was no party, sold the estate, his sole property, to D, who covenanted with A to pay C the sum advanced on mortgage to A, and to indemnify A and B from the payment of it. B was called on by C for payment of the principal and interest of the money lent on mortgage, which B paid: Held, that the money was not recoverable from D in an action against him for money paid. *Crafts* v. *Tritton*, 8 Taunt. 365, s. c. 2 B. Mo. 411.

## MONEY, PAYMENT OF.

[See Payment of Money.]

## MONUMENT.

[See Church and Legacy.]

## MORTMAIN.

[See Charity and Will.]

## MORTGAGE.

(A) Rights and Interests of the Mortgagor.
(B) Rights, Interests, and Liabilities of the Mortgagee.
(C) Priority or Postponement.
(D) Redemption.
(E) Foreclosure.
(F) Accounts.
(G) Costs.

### (A) Rights and Interests of the Mortgagor.

Mortgage by demise for a term of years. The mortgagor does not deliver to the mortgagee the purchase deed, conveying the freehold to the mortgagor, but keeps it back, and subsequently deposits it with another person as a security for a loan: the conveyance to the mortgagor and the mortgage were executed within a day of each other, and were both registered on the same day; the deposit was not made for a considerable time afterwards; but no notice by the subsequent incumbrancer of the mortgage being proved, and being denied by his answer,—it was held, that he was entitled to the benefit of the deposit, as against the mortgagee; and was not bound to deliver up to him the conveyance. *Wiseman* v. *Westland*, 1 Y & J. 117.

If an estate descends subject to a mortgage, and the heir creates a new mortgage for securing the old debt, and also one contracted by himself, and fixes a new day of payment, he makes himself liable to both debts, notwithstanding he exempts, in the new security, his person and his property, except what is comprised in the new mortgage, from liability in respect of the debts. *Lushington* v. *Sewell*, 1 Sim. 435.

### (B) Rights, Interests, and Liabilities of the Mortgagee.

The Court will not grant an injunction to restrain a mortgagee from selling under a power in a mortgage-deed. *Anon.* 6 Mad. 10.

Where a mortgagee had been robbed of the title-deeds, the Court decreed payment of the mortgage-money within a limited time, but ordered, on payment of the same, a bond of indemnity to be given. *Shelemardine* v. *Harrop*, 6 Mad. 39.

In an action of covenant, the Court granted a rule for delivering up mortgage-deeds on payment of debt, interest, and costs. *Anon.* 2 Chit. 264.

A trustee, having the legal fee, and a tenant for life of a moiety of certain premises, create a m gage in 1745—the person beneficially entitle the fee, subject to the life interest of his moth a moiety, being then a minor: he, and those clai under them, continue in undisturbed possessio the profits of the premises from the time he at his full age, without any claim being made them for principal or interest: Held, that u such circumstances the Court will, as against a chaser, presume a reconveyance of the legal e from the mortgagee of 1745. *Cooke* v. *Sallan*, 2 J. Chanc. 30, s. c. 2 S. & S. 154.

Where a person creates an equitable mort and dies intestate before he has conveyed the estate, leaving an infant heir, the equitable mo gee can obtain only a modified decree against infant. *Oldaker* v. *Petford*, 2 Law J. Chanc.

To deprive the mortgagee of the possess mines, on the ground of mismanagement, it be clear and unequivocal.

The mortgagee in possession of mines is not b to expend more than a prudent owner.

A motion made for the appointment of a rec upon a mortgage of mines, the mortgagee ha by purchasing shares in them, become partner, the motion being made on the ground of misma ment, and to exclude the mortgagor from interfer was refused; the parties having, by a subseq agreement, regulated their rights, and the mortg not admitting that his mortgage was satisfied. the rights and duties of a person in this situ are not to be governed solely by principles app ble to one who stands only in the character mortgagee or partner. *Rowe* v. *Wood*, 2 J. & 553.

By a *mortgage* deed, a certain sum was adva for three years, subject to a proviso, that in default should be made in payment of the inte on certain days therein specified, the mortg might sell the premises assigned; and the mortg having made default in one payment, the mortg brought ejectment—the Court refused to stay proceedings on payment of the arrears of int and costs. *Goodtitle d. Green* v. *Notitle*, 4 La C.P. 187.

*Semble*, That an express security of a highe ture does not destroy an implied security of a lo Thus a mortgage given as a security for m lent, does not preclude the lender seeking remedy in an action of assumpsit for the mo lent, though, at the time of the commencem the action, the mortgage may have become abs by forfeiture. The mortgage is not to be treat a satisfaction, or as a suspension of the commo right of action. *Allenby* v. *Dalton*, 5 Law J. 312.

A mortagee of a West India estate not ta possession, will not be appointed consignee by Court, unless the mortgage-deed contains a cove for that purpose. *Cox* v. *Champneys*, 1 Jac. 57

Where the mortgaged estate of a bankrupt is under the order in Chancery of 8th March 179 the request of the mortgagee, and the mortgag the purchaser at the sale, he is liable, in an actio money paid, to re-imburse the solicitor under commission the expenses of the sale. *Bowles* v. *ring*, 2 B. & B. 457, s. c. 5 B. Mo. 290.

A first incumbrancer in possession, cannot

surplus rents to a debtor after a bill has been filed by a second incumbrancer. *Parker* v. *Calcraft*, 6 Mad. 11.

The costs of suit are to be paid before the demand of an incumbrancer. *White* v. *the Bishop of Peterborough*, 1 Jac. 402.

(C) PRIORITY OR POSTPONEMENT.

The registry of a deed is not of itself notice as against a subsequent purchaser or incumbrancer. *Wiseman* v. *Westland*, 1 Y. & J. 117.

If a third incumbrancer, having constructive notice of the second mortgage, fails to keep the first security on foot for his protection, he is not entitled to stand in the place of the first mortgagee against the second.

Accordingly, an estate is subject to one mortgage for a term of years to A, and to a subsequent mortgage for another term to B. The owner of the equity of redemption agrees with C, who has notice of the existing incumbrance, to charge the estate with an annuity to C, and to apply part of the money which he is to receive from C in satisfying A's mortgage. In pursuance of this agreement, A is paid out of the money received from C, and assigns his term to T, as a trustee for M, the owner of the equity of redemption. Then, by another deed, of the same date, M grants an annuity to C, and, to secure it, T, by the direction of M, assigns the premises for a term of years to a trustee for C: Held, that, under these circumstances, the old mortgage will not be considered as subsisting for the purpose of protecting C's annuity, by way of collateral security; and that the incumbrance of B is in every respect prior to that of C, and must be satisfied, before any part of the rents or profits can be applied to the payment of C's annuity. *Parry* v. *Wright*, and *Parry* v. *Parry*, 6 Law J. Chanc. 174, s. c. 1 S. & S. 369; and see *Parry* v. *Parry*, and *Parry* v. *Maddock*, 1 Law J. Chanc. 161.

A mortgagee of a leasehold house gave up the indenture of lease to his mortgagor, in order that it might be shewn to an intended purchaser, who wished to see what the covenants in it were; the mortgagor concealed from the purchaser the fact of the existence of an incumbrance on the property, and produced the lease to him, and left it in his possession: within a week afterwards, the purchaser accepted a conveyance, paid his purchase-money, and took possession of the house without any notice of the existence of the mortgage; but the solicitor of the mortgagee deposed, that, in an interview which he had had before the completion of the purchase with the solicitor of the purchaser, he had informed the latter that a client of his was to receive a considerable sum out of the purchase-money, and had requested to have notice of the time when the money was to be paid; and, though the solicitor of the purchaser denied that any such interview had taken place, before the completion of the purchase, a jury gave a verdict in favour of the statement made on that point by the solicitor of the mortgagor: Held, That the mortgagee was not to be postponed to the purchaser. *Martinez* v. *Cooper*, 2 Russ. 198.

Where, by the custom of a manor, no time is limited for presenting surrenders of copyholders, an incumbrancer whose security has not been enrolled until long after a subsequent incumbrance, will not be postponed, although the subsequent incumbrancer had no notice of the prior charge. *Horlock* v. *Priestley*, 2 Sim. 75.

(D) REDEMPTION.

Acknowledgment of mortgage title within twenty years of bill filed, maintains the equity of redemption. *Hodle* v. *Healey*, 6 Mad. 181.

A mortgagor will be entitled to redemption against a mortgagee, who, after more than twenty years' possession, makes admissions, which prove, that he has all along considered himself only as mortgagee. *Cutler* v. *Cremer*, 1 Law J. Chanc. 108.

The lapse of twenty years after a mortgagee has entered in the lifetime of the tenant for life of the mortgaged estate, will bar the remainder-man of his right of redemption. *Harrison* v. *Hollins*, 1 S. & S. 471.

The parties entitled to the equity of redemption, must have been tenants in fee simple, to raise the presumption, after twenty years' quiet possession by the mortgagee, that the equity of redemption has been legally conveyed. *Cowne* v. *Douglas*, 1 M'Clel. & Y. 321.

If A, as mortgagee, and B, as the owner of the equity of redemption, join in conveying premises to a purchaser, and this purchaser treats A's incumbrance as a subsisting mortgage at the time of the conveyance; if B's title to the equity of redemption proves to be bad, the person in whom the equity of redemption actually is, may redeem within twenty years from the date of that conveyance. *Price* v. *Copner*, 1 Law J. Chanc. 178, s. c. 1 S. & S. 347.

In a bill for redemption against a mortgagee, stated to be in possession without acknowledgment of a mortgage title, it is not necessary to allege that such possession, without acknowledgment of mortgage title, has not been for twenty years. *Green* v. *Nicholls*, 4 Law J. Chanc. 118.

Husband and wife *mortgage* the wife's freehold for a term of years, reserving the equity of redemption to them and their heirs, and covenanting to levy a fine, the uses of which, subject to the mortgage, are to enure to the husband and his heirs; afterwards a fine is levied, pursuant to this covenant, and the husband releases the equity of redemption: Held, that the equity of redemption was taken out of the wife, and that she has no right to redeem. *Reeve* v. *Hicks*, 4 Law J. Chanc. 85, s. c. 2 S. & S. 403.

Lands subject to a mortgage, had been long since conveyed to a trustee, upon trust to sell and apply the proceeds to certain purposes which had been long since effectuated: Held, that the trustee for sale was not entitled to redeem the mortgage. Receipt of interest by a mortgagee is not proof as against him that the title to the equity of redemption is in the person from whom he received it. *Owen* v. *Flack*, 4 Law J. Chanc. 202, s. c. 2 S. & S. 600.

Husband and wife mortgage the wife's estate, for the benefit of the husband; after the husband's death, the wife, being his personal representative, pays the interest of the mortgage during her life: her devisees are entitled to have the mortgage redeemed out of the real assets of the husband. *Wilkinson* v. *Beale*, 1 Law J. Chanc. 89.

A married woman, before marriage, mortgaged her leasehold estate, and afterwards joined her husband in assigning the mortgage, and the husband covenanted to pay the money, and during his lifetime by payments considerably reduced the debt,

and by will disposed of the premises: Held, that although there might be no act done by him sufficient to reduce this chattel into possession, yet, having acted as if he were persuaded that it was his own, there was an equity on the part of his estate to be reimbursed the payments made in his lifetime. Upon a bill being filed by his widow to redeem: Held, that it ought to be on the terms of the husband's family being permitted to stand in the place of the mortgagee to the amount by which the husband had reduced the debt.

Where money is paid off by individuals not having an absolute permanent interest in the premises, the Court will be influenced by their intention. *Pitt* v. *Pitt*, 1 Turn. 183.

Tenant in tail in remainder, after a preceding estate for life and estates tail, pays off a mortgage during the continuance of the prior life estate, and takes an assignment of a term by which it was secured; afterwards, he comes into possession, and dies without suffering a recovery, when the remainders over take effect: Held, that the mortgage is a subsisting charge for the benefit of his personal estate. *Wigsell* v. *Wigsell*, 4 Law J. Chanc. 84, s. c. 2 S. & S. 364.

A redemption or foreclosure cannot take place unless the parties entitled to the whole of the mortgage-money are before the Court. *Palmer* v. *Carlisle*, 1 S. & S. 423.

A mortgagee devises the mortgaged premises to trustees upon certain trusts: to a bill for redemption, the *cestuis que trust* must be parties; and it is not enough to bring before the Court the trustees, in whom the legal estate is. *Osbourne* v. *Fallows*, 5 Law J. Chanc. 29.

Where a testator, who was a mortgagee, devised all the rest and residue of his freehold and copyhold estates in possession or reversion, together with all his goods, chattels, &c. mortgages and debts, to a legatee, subject to the payment of his debts, &c.; and also appointing the legatee executor of his will: Held, not to have thereby devised the legal estate in the mortgaged premises to such legatee; and that such legal estate did not vest in him, but descended to his heir-at-law; because, although the words of the devise would, standing alone, have been sufficient to have carried the legal estate, the mortgaged premises were subject to the payment of debts: Held, therefore, on a bill filed for a re-conveyance of the mortgaged premises, on payment of the money remaining due on the mortgage, that the heir-at-law of the testator was a necessary party to the re-conveyance of the estate. *Silvester* v. *Jarman*, 10 Price, 78.

*Quære*, Whether, where a bill, filed by plaintiffs, of whom some are infants, seeks to set aside a mortgage as fraudulent and void, and the Court is of opinion that the mortgage is valid, a decree can properly be made in such a suit for the redemption of the mortgage? *Martinez* v. *Cooper*, 2 Russ. 198.

The Court of Exchequer will not interfere under the 7 Geo. 2, c. 20, upon an application by the mortgagor to compel the mortgagee to re-convey the mortgaged premises, where the right to redeem is disputed upon the affidavits. *Goodtitle d. Fisher* v. *Bishop*, 1 Y. & J. 344.

Where, in a suit for redemption, the Master is ordered to inquire, whether the defendants have treated the premises as a mortgage title, he is confined to the consideration of the particular m gage title stated in the bill.

If the defendants think, that his considera should be so confined, the course is not by ex tions to the report, but by re-hearing the decre

*Semble*, In such a case, the Court will not li the inquiry to the title stated in the bill, w other titles are disclosed in the answer. *Pric Copner*, 1 Law J. Chanc. 178.

## (E) FORECLOSURE.

The power of courts of equity relative to fo closure is not extended by the 7 Geo. 2, c. *Praed* v. *Hull*, 1 S. & S. 331.

A mortgagee of part of an estate is not entitle file a bill of foreclosure for that part. *Palme Carlisle*, 1 S. & S. 423.

On a bill by a mortgagee, where the payme the mortgagor of the money secured by the m gage deed, is not put in issue by the answer, mortgagee need only prove her mortgage deed, is not obliged to prove also the payment of the sideration. *Minot* v. *Eaton*, 4 Law J. Chanc. 1

Upon a bill of foreclosure against an infant titled to the equity of redemption, no sale wil ordered, nor any other decree than the com decree of foreclosure made, unless by the consen the mortgagee. *Adkins* v. *Graves*, 3 Law J. Chanc.

*Quære*, Whether a mortgagee of an estat Jamaica, who has obtained a bill of foreclosur this court, is entitled to a decree for sale of estate, according to the laws of the colony.

An injunction will be granted against mortga of a West India estate, to restrain them from ceeding on a bill of foreclosure in the Colo Court, after a decree has been made in this co *Beckford* v. *Kemble*, 1 Law J. Chanc. 5, s. c. 1 S S. 7.

Where, in a suit of foreclosure, pending except to the Master's report, which are afterwards allowed, and after the time fixed by the repor the payment of the money, the plaintiff negoti with the defendants, with respect to the payn of his debt, he cannot apply to have them forecl from the day originally given them. *Grove* v. Co 1 Law J. Chanc. 197.

The common decree in foreclosure does not di the delivery up of the title deeds by the mortg to the mortgagee in case of foreclosure; but, me that the mortgagee shall be absolutely barred foreclosed of all right and equity of redemp And it is only where there is a covenant to del them, in case of default in payment of the princ money and interest, that the Court make su decree. *Wiseman* v. *Westland*, 1 Y. & J. 117.

Mortgagors should apply to the Court to have time appointed for payment of the principal interest enlarged, until exceptions taken to Master's report in a suit for foreclosure are disp of. *Renvoize* v. *Cooper*, 1 S. & S. 364.

A motion to enlarge the time for foreclosing, is a motion of course, although the interest and c be paid up. But, in general, if there is no opp tion, the Court will grant further time. *Quai Knight*, 8 Price, 630.

A first application by a mortgagor, to enlarge time given him to redeem, refused; no reason b

assigned why the money was not to be paid on the day fixed by the report. *Nanny* v. *Edwards*, 6 Law J. Chanc. 20.

On a bill of foreclosure, an order being obtained, enlarging the payment of the principal money, on condition of the interest being paid, the defendant neglecting to pay the interest, the plaintiff obtained the usual decree absolute as of course. *Jones* v. *Roberts*, 1 M'Clel. & Y. 567.

The equity of redemption of a mortgage in fee having been conveyed to trustees, upon trust, to sell and pay off incumbrances, and divide the surplus among persons specified in the deed, which contained a proviso that the receipt of the trustees should discharge the purchaser: Held, that this did not enable the trustees alone to defend a bill of foreclosure, but that the *cestuis que trust* were necessary parties to the suit. *Calverley* v. *Phelp*, 6 Mad. 229.

Mortgage of J W to B and D, to secure 2,500*l.* and interest, and as an additional security a mortgage by J W. M purchased the premises mortgaged by J W, subject to the mortgage. Bill of foreclosure against M, and the representatives of J W to foreclose the two mortgages. It was decreed, that in case M should redeem the plaintiff, and the premises mortgaged by J W should be conveyed to M, and those mortgaged by J W to the representatives of J W. But, in case the representatives of J W should redeem the plaintiff, the premises comprised in each of the mortgages should be conveyed to them, and in case of failure by M, or the representatives of J W to redeem, that to the parties should stand foreclosed as to all the mortgaged premises. *Beckett* v. *Micklethwaite*, 6 Mad. 199.

### (F) ACCOUNTS.

If a mortgagee receiving the rents of a mortgaged estate after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money, and ought to be charged with interest.

Annual rests are directed on an account of occupation rent, as well as on an account of rents and profits received.

After the time is ascertained, at which the mortgage debt of a mortgagee in possession was paid off, annual rests from that date will be made in the accounts against him, though rests were not directed by the previous orders and decrees, under which these accounts were taken. *Wilson* v. *Metcalf*, 1 Russ. 530.

A mortgagee who is merely in possession for the purpose of satisfying his demand, is not justified in paying any surplus over to the mortgagor, after notice from a prior incumbrancer not to do so.

And if such a mortgagee receives more than his debt, and retains the surplus for a considerable period, he will be ordered to pay it, with interest on the amount at the rate of 4 per cent.; for the Court will not allow 5 per cent. unless a very strong case be made out against the party. *Archdeacon* v. *Bowes*, M'Clel. 149, s. c. 13 Price, 353.

A mortgagee, who has taken possession, will be allowed in his accounts the expense of buildings substituted for decayed old buildings, even though the new erections should be on an improved scale.

A mortgagee of a house, having taken possession of it,. will not be charged with an occupation rent for it during a time when it was in so ruinous a state, that rent could not have been obtained for it. *Marshall* v. *Cave*, 3 Law J. Chanc. 57.

Where the mortgagee was also a partner—The Court determined, that notwithstanding an agreement as to management, and which was then litigating, the mortgagor could not be excluded from having accounts duly kept, and being allowed concomitant access to them. *Rowe* v. *Wood*, 2 J. & W. 559.

A decree for redemption, &c. having been made in the original and revived causes in favour of the supposed devise, it cannot be restricted in the supplemental suit to an account to be taken as between the executors and mortgagees, &c. to the time of the death of the devisor, dismissing the bill as it regards the interest of the devisee; for the devisee is a necessary party to the account. *Rylands* v. *Latouche*, 2 Bligh, 567.

### (G) COSTS.

A subsequent mortgagee, who, in his answer to a bill of foreclosure by a prior incumbrancer, disclaims and offers to assign on having his costs paid, may be brought to a hearing, and will not be allowed his costs. *Land* v. *Wood*, 1 Law J. Chanc. 89.

If the devisee of lands, subject to the payment of legacies, mortgages them: upon a bill filed by the legatees for the payment of their legacies, the mortgagee is not entitled to his costs as against the legatees. *Anon.* 3 Law J. Chanc. 141, s. c. as *Shackleton* v. *Shackleton*, 2 S. & S. 242.

A mortgagee in possession for the purpose of satisfying his debt, is entitled to costs incurred by him in that capacity: but that rule does not apply to a case where he has been overpaid. *Archdeacon* v. *Bowes*, 13 Price, 353, s. c. M'Clel. 149.

In a suit to redeem a mortgage, costs of exceptions allowed to a report of impertinence in an examination put in by defendants, to be costs in the cause. *Bally* v. *Williams*, 1 M'Clel. & Y. 334.

Where a prior decree has ordered the costs of a defendant mortgagee to be taxed, he will be entitled to his costs, though it appears, at the hearing on further directions, that his debt was paid off before the commencement of the suit, and that he has set up an improper defence. *Wilson* v. *Metcalfe*, 1 Russ. 530.

A mortgagor is not chargeable with the expense of preparing a deed of declaration of trust from the mortgagee to a *cestui que trust* to whom the money advanced belonged; such deed not essentially forming a part of the securities of the mortgage. *Martin, demandant; Baxter, tenant; Grubb and wife, vouchees*, 6 Law J. C.P. 242, s. c. 5 Bing. 160.

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## MURDER AND MANSLAUGHTER.

If a man encourages another to murder himself, and is present abetting him while he does so, such person is guilty of murder as a principal.

If two encourage each other to murder themselves together, and one does so, and the other fails in the attempt upon himself, he is a principal in the murder of the other.

But if it be uncertain whether the deceased really

killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. *Rex* v. *Dyson*, 1 R. & R. C.C.R. 523.

If two persons quarrel, and previous to the fight, in cool moments, one of them draw his knife and stab his adversary, it is murder, if death ensue. But, if the fight have been commenced, and one of them find himself overpowered, and endeavour to escape, but, upon being overtaken, take his knife and stab the other, it is only manslaughter. *Rex* v. *Kessal*, 1 C. & P. 437. [Park]

An inquisition for murder, charging that the prisoner upon a new-born female child did make an assault, and the said new-born child, with "both her hands, in a certain piece of flannel, of no value, then and there feloniously, wilfully, and of her malice aforethought, did wrap up and fold, by means of which said wrapping up and folding the said new-born female child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered, of which said suffocation," &c. she instantly died; is good, although the inquisition does not go on to allege that the flannel was folded over the child's mouth, or inclosed the head, or the like. *Rex* v. *Huggins*, 3 C. & P. 414. [Vaughan]

A servant employed to guard his master's premises, is not justified in shooting at, or injuring in any way, persons who may come into those premises even in the night, and though he sees them enter into his master's hen-roost, it being incumbent on him to take measures for apprehending them; but if he conceives his life to be in danger, he is justified in shooting any person who may cause that impression. *Rex* v. *Scully*, 1 C. & P. 319. [Garrow]

If the servant of the owner of property find a party actually committing an offence against the stat. 7 & 8 Geo. 4, c. 29, (the larceny act) and apprehend him under sect. 63 of that act, and, while taking the party to a magistrate, such party kill him, this will be murder; but if the servant *either* did not see him in the actual commission of the offence, *or* be taking him to any other place than before a magistrate, it will not be murder. *Rex* v. *Curran*, 3 C. & P. 397. [Vaughan]

If game-keepers attempt to apprehend a gang of night poachers, and one of the game-keepers be shot by one of the poachers, this will be murder in all the poachers, unless it be proved that either of them separated himself from the rest, so as to shew that he did not join in the act. *Rex* v. *Edmeads*, 3 C. & P. 390. [Vaughan]

Where game-keepers had seized two persons who were poaching in the night, and they (having surrendered) called to a third, who came up and killed one of the game-keepers: Held, murder in all, though the two struck no blow, and though the game-keepers had not announced in what capacity they had apprehended them. *Rex* v. *Withorne*, 3 C. & P. 394. [Vaughan]

If a man attempting to make an illegal arrest be killed, the crime will be manslaughter, though the prisoner arms himself with a deadly weapon previous to such attempt, if the prisoner was in such a situation that no escape could be effected. *Rex* v. *Thompson*, 1 R. & M. C.C.R. 80.

A party, causing the death of a child, by gi it spirituous liquors, in a quantity quite unfit fo tender age, is guilty of manslaughter. *Rex* v. *M tin*, 3 C. & P. 211. [Vaughan]

A man by driving a cart at a furious rate, r withstanding he calls to a person to get out of way, yet if the person be killed, is guilty of m slaughter, though the party who was run over drunk, and might, if he had been sober, have esca from the accident. *Rex* v. *Walker*, 1 C. & P. 3 [Garrow]

The length, depth, or breadth of wounds occasi ing a person's death, need not be stated in an dictment for murder; and the declarations of deceased immediately after the wounding are missible. *Rex* v. *Morley*, 1 R. & M. C.C.R. 97.

The Court will not arrest a judgment on a c viction upon an indictment of murder by striki with stones—on the grounds, first, that the numb of stones are not specified in the indictment; a secondly, that the indictment does not state t the stones were thrown by the prisoner's right han and—*semble*—thirdly, that the sentence to a cert extent being ungrammatically constructed in th part of the indictment which relates to the mann of the killing, is no support to the application, sinc if it shew the manner in which the offence w committed, it will suffice. *Rex* v. *Dale*, 13 Pric 172, s. c. 1 R. & M. C.C.R. 5.

## MULTIFARIOUSNESS.

[See PLEADING, and PRACTICE, IN EQUITY.]

## MUTINY.

Making, or endeavouring to effect a revolt in ship, with a view to procure a redress of what th prisoners thought grievances, though without an intent to run away with the ship, or to commit an act of piracy, is an offence within 11 & 12 Wil. c. 7. *Rex* v. *Hastings*, 1 R. & M. C.C.R. 82.

## NAVIGATION LAWS.

[See SHIP and SHIPPING.]

Every country has a right to enforce its own p ticular navigation laws, provided it does not int fere with the rights of others. *Le Louis*, 2 Dods, 2

Where a declaration on the 43 Geo. 3. the Na gation Act, charged the owner of a ship with *gaging* to take on board more persons than allow —It was holden to be supported, by proving su persons were on board.

Informations for penalties for breach of navigat law, are not to be considered as informations in *tam* actions, merely penal. Therefore, where jury found a general verdict, which was taken o defective, unsupportable count, the Court suffe it to be entered on another count. *Attorney Gen* v. *Vew Llette*, 10 Price, 9.

A cargo of American flour was brought from Am rica in an American ship, into the island of Cu and there immediately transferred into a British sh and in that imported into Jamaica: Held, to ha been properly condemned on an information fi

under 28 Geo. 3, c. 6, s. 2, and 45 Geo. 3, c. 57: there being circumstances to induce a suspicion that the transfer was fraudulent. *Eliza*, 1 Hag. 257. [See 3 Geo. 4, c. 44, and 6 Geo. 4, c. 114, repealing the above acts.]

## NE EXEAT REGNO.

The Court will not grant a *ne exeat regno* to obtain a demand from one usually resident in Jamaica *Curry* v. ——, 2 Ken. 29.

A writ of *ne exeat regno* cannot be maintained against a *feme covert* administratrix, though her husband is out of the jurisdiction. —— v. *Taylor*, 1 Law J. Chanc. 139.

Writ of *ne exeat regno* granted against husband and wife, executrix, the plaintiff undertaking not to serve more than one of the writs. *Moore* v. *Hudson*, 6 Mad. 218.

In a suit for specific performance by a vendor, a writ of *ne exeat regno* ought not to issue against the purchaser, unless the Court deems it quite clear that there must be a decree for the specific performance of the contract. *Morris* v. *M'Neil*, 2 Russ. 604.

*Ex parte* applications for *writs of ne exeat regno*, in the court of the *Vice Chancellor*, are to be made, for the future, at the commencement of the sittings of the Court, instead of at its rising. *Reg. Gen.* 1 Law J. Chanc. 60.

A writ of *ne exeat regno* cannot be obtained upon an affidavit made before the bill is filed. *Anon.* 6 Mad. 276.

Writ of *ne exeat regno* granted upon motion made without notice, after the appearance of the defendant. *Elliott* v. *Sinclair*, 1 Jac. 545.

A court of equity on writs of *ne exeat regno* proceeds, with regard to bail, by analogy to the proceedings at law. *Pannell* v. *Taylor*, 1 Turn. 103.

The Court refused to quash a writ of *ne exeat regno*, although obtained for a larger sum than due. *Pannell* v. *Taylor*, 1 Turn. 105, s. c. 1 Law J. Chanc. 139.

Where a writ of *ne exeat regno* issues at the suit of a legatee against an executor, it must be marked for the whole sum which is due, not only to the plaintiff, but to other persons. *Pannell* v. *Taylor*, 1 Turn. 100.

## NEW TRIAL.

[See ISSUE, PRACTICE, and VARIANCE.]

(A) WHERE GRANTED OR REFUSED.
(a) *In general.*
(b) *Amount of Damages.*
(c) *Against Evidence.*
(d) *Omission and rejection of Evidence and Absence of Witnesses.*
(e) *Surprise.*
(f) *Misdirection.*
(B) MOTION FOR.
(C) COSTS.

### (A) WHERE GRANTED OR REFUSED.

#### (a) *In general.*

When the Court see that justice has been done between the parties, they will not grant a new trial. *Abbott* v. *Young*, 1 Law J. K.B. 40.

Facts which were proveable before the jury, cannot be received on motions for new trials.

A plaintiff cannot be permitted to take the chance of a verdict by going to the jury, reserving to himself, in case of failure, the experiment of applying to the Court for a new trial, by producing affidavits to impeach the testimony of the defendant's witnesses. *Harrison* v. *Harrison*, 9 Price, 89; and see *Doe d. James* v. *Price*, 6 Law J. K.B. 157, s. c. 1 M. & R. 683, *post*, (*d*).

The Court refused to grant a new trial, where it did not appear that the verdict was contrary to evidence, nor inconsistent with justice. *Deacle* v. *Hancock*, 13 Price, 226, s. c. M'Clel. 85.

Where a verdict has been taken by consent on the trial of a cause, the Court will not afterwards listen to an application for a new trial. *Garratt* v. *Harris*, 1 Law J. K.B. 155.

A cause having been taken as an undefended cause on the last day of the sittings, the Court allowed the defendant to have a new trial on payment into court of the amount of the verdict and costs. *Williams* v. *West*, 6 Law J. C.P. 60.

If a cause, through the negligence of the attorney, be tried as an undefended cause, the Court will not grant a new trial on an affidavit of a good defence, unless there are strong circumstances in the case to induce them to do it. *Andrews* v. *Francis*, 1 Law J. K.B. 30.

But a new trial granted on a nonsuit in ejectment by reason of defendant's attorney's absence, in consequence of his belief that two causes which stood above his own would take up time, although it was not sworn that he had instructed counsel. *Roe* v. *Doe*, 1 Law J. K.B. 154.

A cause having been tried at York, in the absence of the defendant, his attorney, and witnesses, although at that time the briefs had not been delivered to counsel, the Court, upon its appearing that the defendant's attorney had offered to pay the necessary expenses, if the plaintiff's attorney would again enter the cause, granted a rule for a new trial. *Doe d. Frith* v. *Holdsworth*, 1 Law J. K.B. 107.

The Court will not grant a new trial on the ground that witnesses, by whose testimony the verdict was obtained, have been indicted for perjury in the cause. *Seeley* v. *Mayhew*, 4 Bing. 561.

Nor where an indictment for perjury has been found against the witnesses. *Pitt* v. *Parker*, 2 Chit. 269.

Unless an affidavit be produced, that the unsuccessful party was taken by surprise, perjury in one of the witnesses is no grouud for a new trial. *Doctor* v. *Symonds*, 3 Law J. C.P. 1.

A new trial will not be granted, because a grand jury have found a bill against the successful party and others for a conspiracy to obtain the verdict; though, as it was shewn that the defendant was taken by surprise, the Court, on the condition of paying costs, granted a rule *nisi*. *Thurtell* v. *Beaumont*, 2 Law J. C.P. 4, s. c. 1 Bing. 339, s. c. 8 B. Mo. 339.

It is no ground for a new trial that the judge who heard the cause expressed his dissatisfaction as to the verdict. *Atkins* v. *Drake*, 1 M'Clel. & Y. 213.

A new trial will not be granted on the ground of contradictory evidence alone, although the judge directed the jury contrary to their finding. *Sprague* v. *Michell*, 2 Chit. 271.

If a defendant has obtained a verdict in a penal action, the Court will not grant a new trial, on the ground that the verdict was contrary to the judge's direction, and founded on a mistake, if the jury have not misconducted themselves. *Ranston* v. *Etteridge*, 2 Chit. 273.

Where a judge directs the jury, that they are clearly bound to find a verdict for one party, and no objection is taken to the entering of the verdict for that party, the Court will not grant a new trial upon the affidavit of a juryman stating that the jury had not concurred in such verdict. *Saville* v. *Lord Farnham*, 2 M. & R. 216.

Where the judge on the trial of a cause intimates a strong opinion in favour of one of the parties, and that party omits, in consequence, to go into the whole of his case, and it appears afterwards that the judge was wrong, the Court will grant a new trial only, and will not order a verdict to be entered for the other party, though the judge may have reserved leave to enter such verdict. *Lady Flemyng* v. *Simpson*, 6 Law J. K.B. 145, s.c. 1 M. & R. 269.

The Court will not grant a new trial on the ground of an admission by jurymen made after they have separated, though on the day of trial. *Davis* v. *Taylor*, 2 Chit. 268.

If there should be any improper communication with the jury before the trial, or any attempt to influence them by either party, the Court may set aside the verdict, in case it should be given in favour of that party, although no objection may have been taken at the time. *Griffith* v. *Thomas*, 5 Law J. K.B. 126.

The circumstance of a person serving on a jury, who is not returned upon the jury process, will defeat the verdict; and the Court will grant a new trial, if they see no reason to believe that there has been any fraud on the part of the applicant. *Rex* v. *Tremearne*, 4 Law J. K.B. 157, s.c. 5 B. & C. 254, s.c. 7 D. & R. 684.

The Court will grant a new trial on payment of costs, where plaintiff has been nonsuited, on the ground that there was no special memorandum, and the writ was not in court to prove the commencement of the action, and the cause of action accrued after the first day of term. *Smith* v. *Cuff*, 2 Chit. 271.

Where lands were granted in the occupation of A, who had been dead two years prior to the grant, and the jury having found that the intention was to grant certain lands, but that the words were not sufficiently explicit to shew the intention: Held, that the verdict was right. *Beaumont* v. *Field*, 2 Chit. 275.

Executors brought an action of trover to recover possession of a preliminary note, which it was said had been given by the deceased to a confidential friend's servant, who claimed it as *donatio causâ mortis*. The jury found a verdict for the plaintiffs. The Court would not grant a new trial, observing, that it required a strong case to rebut a suspicion of fraud, when the party, had access to keys and drawers. *Simms* v. *Cox*, 3 Law J. K.B. 44.

Where a verdict has been given for the lessors of the plaintiff in ejectment, the Court will not disturb the verdict, but leave the defendant to bring an action; but if they see proper reasons for it, they will impose conditions; and, therefore, they directed, that if the defendants brought an action within one year, the affidavit of an old infirm man should be read in evidence at the trial. *Doe d. Howard* v. *Taylor*, 1 Law J. K.B. 39.

### (*b*) *Amount of Damages.*

[See WITNESS.]

No new trial for the smallness of damages, unless it be a case where the Court have the means of seeing by figures that the damages are too small. *Fayerman* v. *King*, 6 Law J. K.B. 330.

In an action for a libel, which consisted of verses ridiculing the plaintiff in his calling of a sheriff's officer, the judge told the jury, that the composition, being calculated to render the plaintiff ridiculous, and to occasion pain to his feelings, was libellous. The jury asked if a shilling would carry costs; and, being answered in the affirmative, returned a verdict for the defendant. The Court granted a new trial. *Levy* v. *Milne*, 5 Law J. C.P. 153, s.c. 4 Bing. 195.

The Court will not, in an action for a breach of promise of marriage, grant a new trial on the ground of excessive damages, unless they be so large as to induce the Court to infer that the jury were actuated by undue motives, or acted upon a misconception of the facts. *Gough* v. *Farr*, 1 Y. & J. 477.

A new trial will not be granted on the ground of a small error in the amount of damages, which was not communicated to the judge at the trial. *Brown* v. *Tanner*, 1 C. & P. 655. [Hullock]

In the absence of the jury's conduct being improper, the Court will not grant a new trial where the damages recovered are under 20*l*. *Manning* v. *Underwood*, 1 M'Clel. & Y. 266.

The Court refused to grant a new trial, on the ground that the verdict was against evidence, where the damages given were 4*l*. 4*s*. *Brown* v. *Ray*, 9 B. Mo. 583.

The jury having found a verdict for the defendant, in a cause where the damages sought to be recovered were less than 20*l*., the Court refused to grant a new trial, although perjury was imputed to the defendant's principal witness. *Ingham* v. *Butterfield*, 5 Law J. C.P. 107.

Where the verdict is perverse, the Court will grant a new trial, although the damages given for the plaintiff are less than 20*l*. *Freeman* v. *Price*, 1 Y. & J. 402.

The Court will not, where the damages are below 20*l*., entertain a motion for a new trial in a Welch cause, upon the ground of the verdict being against the evidence. *Bevan* v. *Jones*, 2 Y. & J. 264.

### (*c*) *Against Evidence.*

A verdict being contrary to evidence, but consonant to reason and justice, is no sufficient ground to induce the Court to grant a new trial. *Burton* v. *Thompson*, 2 Ken. 375, s.c. 2 Burr. 664.

The Court will not grant a new trial on the ground of the verdict being against evidence, where there is sufficient proof to sustain the verdict, independently of the facts brought into court by the affidavits in support of the application. *Hartwright* v. Badham, 11 Price, 383.

The Court will not grant a new trial on the ground that the verdict is against the weight of evidence, where that verdict is for the defendant in a penal action.

But an action by a landlord, under the 11 Geo. 2, c. 19, s. 3, for double the value of goods fraudulently removed to prevent a distress, is not considered as a penal action for the purpose of the above rule. *Brooke* v. *Noakes*, 6 Law J. K.B. 375, s. c. 8 B. & C. 537.

Defendant, according to one witness, having admitted taking "from his bankers, or at Doncaster," and according to another, "from a stranger at Doncaster races, for bets won," a 30*l*. bank of England note, without inquiring or taking any account of the number of the note; and the jury, in an action by plaintiffs, who had lost the note, and duly published their loss, having found a verdict for them, the Court granted a new trial. *Snow* v. *Saddler*, 3 Bing. 610.

The Court will not grant a new trial on the ground that the jury have undervalued the weight of the evidence. *Deacle* v. *Hancock*, 13 Price, 226, s. c. M'Clel. 85.

(*d*) *Omission and Rejection of Evidence, and Absence of Witnesses.*

Where, in ejectment, the plaintiff relies on the invalidity of a second marriage, by reason of a former marriage by licence, one of the parties being a minor, and defendant has notice that the question intended to be raised is, whether the first marriage was with consent of the minor's parent, it lies upon defendant to disprove consent. And the Court will not grant a new trial to let in evidence negativing such consent, where that evidence might have been produced at the first trial. *Doe d. James* v. *Price*, 6 Law J. K.B. 157, s. c. 1 M. & R. 683.

The Court will not grant a new trial, because evidence was inadvertently omitted to be produced, if it were such as a prudent and reasonable man would have provided for at the trial. *Doe d. Howard* v. *Taylor*, 1 Law J. K.B. 39.

The Court will not grant a new trial on the ground that evidence has been improperly received, provided they be satisfied—

1. With the verdict;
2. That the evidence was not material to the issue;
3. That it was not relied upon in the course of the trial; and,
4. That it could not, within any reasonable possibility, have had any influence on the minds of the jury. *The King* v. *Ramsden*, 4 Law J. M.C. 133.

A new trial of an issue will not be granted, merely because, on the former trial, evidence was rejected, which ought to have been received. *Barker* v. *Ray*, 2 Russ. 63.

Where a witness, called for the defendant at the trial, was rejected on the ground of his being interested, he having refused to release his interest; and he afterwards swore that he had not understood the meaning of the question put to him, and was ready then to release, but there was no affidavit of merits,—the Court refused to grant a new trial. *Kellen* v. *Bennett*, 5 Law J. C.P. 140, s. c. 4 Bing. 171.

The Court will not grant a new trial, even on payment of costs, to a party who has been unsuccessful because he was not prepared with an attesting witness, in a case wherein he erroneously thought the attendance of that witness was not necessary. *Doe d. Sawbridge* v. *Morley*, 6 Law J. K.B. 334.

When a party has once taken his chance before a jury, the Court will not afterwards grant him a new trial, on the ground that a material witness was absent, although it is shewn that an attempt was made to serve him with a subpœna, unless it be also shewn that a prudent man could not have found him; but if they see that the verdict would have been materially altered by that evidence, then they will compel the opposite party to refer all matters in dispute. *Beard* v. *Bennett*, 1 Law J. K.B. 126.

The omitting to call a witness, who could have proved a material fact, no ground for a new trial. *Russell's case*, 1 Law J. K.B. 5.

The Court will not grant a new trial because a witness, who was subpœnaed, was not called, from the circumstance of its not being known that she could prove a material fact. *Abbott* v. *Young*, 1 Law J. K.B. 40.

The Court will not grant a new trial when an executor has obtained a verdict, on the ground of the absence of material evidence. *White* v. *Gompertz*, 1 Law J. K.B. 52.

The Court will not grant a new trial, on the ground that witnesses were not examined by counsel according to the request of the attorney. *Hall* v. *Stothard*, 2 Chit. 267.

Where a witness had committed an error on his examination, the Court refused to grant a new trial, on the ground that the confusion in his evidence had arisen from a sudden attack of a paralytic affection. *Richard* v. *Hammond*, M'Clel. 179.

(*e*) *Surprise.*

A new trial refused where the plaintiff applied on affidavits stating that the defendant's witnesses swore falsely to an acknowledgment by the plaintiff, and that he had received money of the defendant, and imputing perjury, in that and other respects, to the defendant's witnesses. *Harrison* v. *Harrison*, 9 Price, 89.

The Court refused a rule for a new trial, on the ground that a witness had proved a fact which the other party did not expect, and who, consequently, was not cross-examined, or was any evidence given to contradict him. *Bell* v. *Thompson*, 2 Chit. 194.

In an action on a warranty of a horse, it is no ground for a new trial, that the defendant was taken by surprise by the proof of a particular kind of unsoundness, of which he had no previous notice. *Atterbury* v. *Fairmanor*, 1 Law J. C.P. 63.

Where the defendant makes an affidavit of surprise, the Court will grant a new trial, on the terms of his bringing the money into court, and that judgment should be given of the term, in case plaintiff again obtained a verdict, and that defendant should forthwith pay the costs of the former trial, and of his application. *Greatwood* v. *Sims*, 2 Chit. 269.

### (*f*) *Misdirection.*

Where trespass is brought which involves a question of right to land, although evidence of acts of ownership, &c., be given on both sides, if the judge who tried the cause should consider that the testimony on either side preponderates, and so direct the jury, the opposite party is not bound by the verdict, and the Court will grant a new trial. *Cooke* v. *Green*, 11 Price, 730.

A new trial will not be granted, merely because the judge made to the jury an inaccurate representation of the effect of the defendant's answers. *Barker* v. *Ray*, 2 Russ. 63.

Objectionable expressions used by a judge in his direction to the jury, are no ground for a new trial, if they substantially lead to a just conclusion. *Gascoyne* v. *Smith*, 1 M'Clel. & Y. 338.

The Court refused to grant a new trial, on the ground of a misdirection, where the judge directed the plaintiff's counsel to call a witness; saying, if he did not, he would nonsuit, and upon his being called, did nonsuit, there then not being sufficient evidence to go to the jury,—in which the counsel asquiesced. *Elsworthy* v. *Bird*, M'Clel. 69.

Where, in an action of *replevin* for taking the plaintiff's cattle, the defendant avowed the taking, alleging that the cattle were damage feasant on his soil and freehold; and the plaintiff claimed under I S, who had a manor in the parish of A, and the defendant had a manor in the adjoining parish of B, and I S had immemorially exercised acts of ownership over the *locus in quo*, and the defendant had also exercised such acts, but not to so great an extent as I S, and an act of parliament was passed for the enclosure of waste land in A, in which I S was stated to be the owner of A; but no mention was made in the act of the parish of B, nor of any claim of I S in respect of property there; and by an adjudication of the quarter sessions under the act, the *locus in quo* was found to be in the parish of B, and the judge left it to the jury to say, whether it was in I S or the defendant: Held, that it was properly left, and, they having found a verdict for the defendant, the Court refused to disturb it, although it was insisted, that it should have been left to them to say, whether the parishes and manors were coextensive and conterminous, and as there was no mention in the inclosure act for the parish of A of I S having any property in the adjoining parish of B, it was sufficient to warrant the jury to infer that the manor of I S did not extend into the latter parish. *Lester* v. *Kemp*, 9 B. Mo. 85.

### (B) MOTION FOR.

The notice formerly required to be given to the judge who tried the cause, two days before moving for a new trial, is now dispensed with. *Ruthven* v. *Brown*, 5 Law J. C.P. 54.

Applications for new trials arising out of issues from the equity side of the Exchequer, need not be made within the four first days of the succeeding term, since it will suffice if they be made at any time during that term; and before such an application is made to the Court, a motion should be made to the Chief Baron sitting in equity. *Pulley* v. *Hilton*, 11 Price, 880.

Previous to the application for a new trial of an action tried in the Great Seasions in Wales, the transcript of the record ought to be transmitted from the inferior to the superior court. The 5 Geo. 4. c. 8, which authorizes this removal, leaves the costs of the application in the discretion of the Court above. *Tyson* v. *Thomas*, 1 M'Clel. & Y. 119.

Affidavits in support of a motion for a new trial in criminal or civil cases, must be made before the expiration of the first four days of the term following the trial, if the cause be tried in vacation; and before the expiration of the first four days after the returning of *distringas*, if the cause be tried in term, without the special permission of the Court for that purpose. Reg. Gen. 3 B. & C. 176; 4 D. & R. 856.

The Court will not grant a motion for a new trial, when a bill of exceptions has been tendered, unless the bill of exceptions be first abandoned. *Doe d. Roberts* v. *Roberts*, 2 Chit. 272.

A motion in arrest of judgment divests the party of his right to move for a new trial. *Philpot* v. *Page*, 4 B. & C. 160, s. c. 6 D. & R. 281.

Where the judge, on the trial of an issue from Chancery, gave leave to move, the motion for a new trial may be made in the Court of King's Bench. *Holworthy* v. *Richards*, 2 Chit. 270.

But held, that applications for new trials arising out of an issue directed by the Lord Chancellor, must be made in Chancery, and not in the court of law to which it was sent. *Stone* v. *Marsh*, 8 D. & R. 71.

A motion for a new trial cannot be made in criminal cases, unless the defendant is present in court, although the counsel for the prosecution consent. *Rex* v. *Field*, 2 D & R. 46.

After conviction for a misdemeanor, a new trial cannot be moved for, till the defendant is personally in court; nor will his confinement under civil process excuse him from the rule. *Rex* v. *Hollingberry*, 3 Law J. K.B. 226, s. c. 4 B. & C. 329, s. c. 6 D. & R. 345.

On motion for a new trial, affidavits impugning the integrity of the jury, are not admissible. *Hartwright* v. *Badham*, 11 Price, 383.

A rule for a new trial cannot be amended, by providing that the action shall not abate by the death of a party, where a surety has previously entered into a bond, for payment of the damages and costs of the second trial. *Lopez* v. *De Tastet*, 8 Taunt. 712.

### (C) COSTS.

A defendant having obtained a verdict, the Court, on the ground that it was against evidence, granted a new trial, and ordered that the costs of the former trial should abide the event of the second; and on that trial the plaintiff obtained a verdict: Held, that he was only entitled to the costs of the second trial. *Brown* v. *Boyn*, 5 B. Mo. 309.

Where the plaintiff obtained a verdict on the first trial, and the defendant on the second, through a misdirection of the judge, and on the third on the merits; and the costs of the first were to abide the event of the second; and nothing was said about the costs of the second: Held, that the defendant might have the option of taking the costs of the first or second, and also the costs of the third; but, that if he took the costs of the second, the plaintiff should be entitled to the costs of the first. *Body* v. *Esdaile*,

3 Law J. C.P. 220, s.c. 3 Bing. 174, s.c. 10 B. Mo. 569.

A cause is turned into a special case for the opinion of the Court, who, in consequence of the defective manner in which the case is stated, direct a new trial to be had between the parties. At the time of the trial, the cause is referred, and damages awarded to the plaintiff. He is not entitled to the *costs* of the first trial. *Summers* v. *Formeby*, 1 Law J. K.B. 34, s.c. 1 B. & C. 100.

An attorney, imagining that the two causes above his own would take up some time, left the Court at the assize. On his return, the tenant had been called to confess lease, entry, and ouster. It was not sworn that counsel had been instructed. The Court granted a new trial, on the attorney paying the costs out of his own pocket. *Doe* v. *Roe*, 1 Law J. K.B. 154.

A new trial was granted, and the attorney ordered to pay the costs, where it appeared that the attorney, at the trial of the cause, contradicted the testimony given by one of the defendant's witnesses; who had sworn that he never had had any conversation with the former on the subject in question, by positively stating that he had, and what the conversation was; in consequence of which the defendant's witness was committed for perjury, but was afterwards discharged, on the attorney stating the next day, that he might have mistaken the person of the witness for that of his brother. *Trubody* v. *Brain*, 9 Price, 76.

Where the verdict of a jury is perverse, the Court will grant a new trial, on the terms that the costs shall abide the event. *Hodgson* v. *Barris*, 2 Chit. 268.

## NEXT OF KIN.

[See PARTIES TO SUITS, and WILL.]

## NON PROS.

[See JUDGMENT.]

## NONSUIT.

There may be a nonsuit after a plea of tender. *Anderson* v. *Shaw*, 2 C. & P. 85. [Best]

In an action against several joint defendants, if one of them have a verdict, the plaintiff cannot be nonsuited as to the others. *Revett* v. *Browne*, 6 Law J. C.P. 194, s. c. 5 Bing. 7, s.c. 2 M. & P. 12.

A plaintiff may elect to be nonsuited in preference to having a verdict against him, though the action be against two defendants, one of whom has suffered judgment by default. *Murphy* v. *Donlan*, 4 Law J. K.B. 124, s. c. 5 B. & C. 178, s.c. 7 D. & R. 619.

Where the defendant carries down the record, the plaintiff cannot claim, as a right, to be nonsuited; and if he fail in establishing his case, a verdict must pass against him. *Mann* v. *Lovejoy*, 4 Law J. K.B. 172.

A plaintiff cannot be nonsuited without his consent, where the question depends on the evidence given by him.

The Court will set aside a nonsuit on the ground of non-assent, although the plaintiff's counsel did not expressly object to it. *Ward* v. *Mason*, 9 Price, 291.

Unless the judge at the trial gives the defendant leave to move to enter a nonsuit, he cannot do so, but he may move for a new trial. *Gates* v. *Ryan*, 2 Chit. 271.

The Court will not permit a nonsuit to be entered upon a valid legal objection taken at the trial, but not reserved by the judge who tried the cause. *Matthews* v. *Smith*, 2 Y. & J. 426.

The Court will not, at the instance of the plaintiff, substitute a nonsuit for a verdict against him. *Brain* v. *Hardy*, 4 Law J. K.B. 168.

When a defendant has obtained a verdict, the Court will, in its discretion, order a nonsuit to be entered, so as to enable the plaintiff to bring another action. *Hodgson* v. *Forster*, 1 Law J. K.B. 35, s.c. 1 B. & C. 110, s. c. 2 D. & R. 222.

The Court will set aside a nonsuit, and give summary redress, where the ordinary course of practice has been rendered subservient to the promotion of unjust designs. *Cross* v. *Cross*, 2 Ken. 65.

The Court will not set aside a nonsuit, and grant a new trial on the ground of *surprise*, unless they see that new facts can be spoken to by other competent witnesses. *Andrews* v. *Mercer*, 1 Law J. K.B. 78.

## NOTICE OF ACTION.

[See JUSTICE OF PEACE.]

## NUISANCE.

[See LIGHTS.]

(A) WHAT.
(B) INFORMATIONS AND INDICTMENTS FOR.
(C) ACTION FOR.
(D) ABATEMENT AND REMOVAL.

### (A) WHAT.

[See *post*, B.]

An encroachment on the banks of a navigable river is not necessarily a nuisance; but the jury ought, on the facts of the case, to say whether the public are in any way inconvenienced; for, if they are not, then it is not a nuisance. *Rex* v. *Shepard*, 1 Law J. K.B. 45.

That which is not a nuisance at the time it is done, cannot become so by length of time.

It was proved that two butts or heaps of stones, made use of in throwing and landing nets, had been used in the *Tweed* time before the memory of man; and although they were admitted to be nuisances now, yet the Court could not presume that they were so at the time of the erection, but on the contrary, intimated an opinion, that the presumption ought to be, that at first they were not nuisances. *Rex* v. *Bell*, 1 Law J. K.B. 42.

If a party set up a noxious trade, remote from habitations and public roads, and after that new houses are built, and new roads constructed near it, the party may continue his trade, although it be a nuisance to persons inhabiting such houses, or passing along such roads. *Rex* v. *Cross*, 2 C. & P. 483. [Abbott]

### (B) INFORMATIONS AND INDICTMENTS FOR.

The Court will not grant an information against a party for a nuisance, unless it be shewn that he has had notice to abate it. *Rex* v. *Green*, 1 Ken. 379.

If the prosecutor move to quash an information for a nuisance, the Court will not listen to the application without an affidavit that the nuisance is abated. *Rex* v. *Stankfield*, 1 Law J. K.B. 112.

The compliance of a party convicted of a nuisance with the prosecutor's proposal for payment of costs goes in mitigation of a fine. *Rex* v. *Grey*, 2 Ken. 307.

To support an indictment for a nuisance, it is not necessary that the smells produced by it should be injurious to health, it is sufficient if they be offensive to the senses. *Rex* v. *Neil*, 2 C. & P. 485. [Abbott]

If, by a private act of parliament, all houses for the slaughtering of horses within one thousand yards of a certain workhouse, are to be deemed public nuisances and removed; but if they existed before the act, the owners are to receive a compensation: Held, that if an indictment be framed at common law with counts on that act, the defendant may be convicted if he so carried on the trade as to make it a public nuisance, and that he is not then entitled to any compensation. *Rex* v. *Watts*, 2 C. & P. 486. [Abbott]

The obstruction of the freedom of passage, in a port, or a public navigable river, is *primâ facie* a nuisance, and as such is properly the subject of indictment.

A writ *ad quod damnum*, and licence thereupon to erect that which causes the obstruction, will be no bar to such indictment; but the jury have a right, notwithstanding this licence, to exercise their judgment in declaring whether it be a public nuisance.

Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there for loading ships with coals, the jury were directed by the learned judge to acquit the defendants if they thought that the abridgment of the right of passage occasioned by the erections was for a public purpose, and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and he pointed out to the jury, that by means of the staiths coals were supplied at a cheaper rate, and in a better condition than they otherwise would be, which was a public benefit: Held, by Bayley and Holroyd, Js., that this direction was proper. Lord Tenterden. C. J. diss. *Rex* v. *Russell*, 5 Law J. M.C. 80, s. c. 6 B. & C. 566.

On an indictment for a nuisance in the highway, at the instance of the surveyors, a question arose whether they were properly described under the statute W. 3, as it did not state that the prosecutor was the party injured, or a peace officer,—the Court, upon an affidavit that the prosecutors were the *surveyors*, granted a rule *nisi* to pay the prosecutor his costs. *Rex* v. *Smith*, 1 Ken. 378.

### (C) ACTION FOR.

The defendant's landlord defended an action for a nuisance, and the defendant was told that he need not attend at the trial; the attorney employed by the landlord entered into a consent rule to abate the nuisance without the consent, and against the directions of the defendant. But the Court, upon strong affidavits to shew that the grievance complained of was no nuisance, set aside an attachment which had been issued on the consent rule, and granted a new trial. *Bodington* v. *Harris*, 1 Bing. 187.

A stream of water is *publici juris*. Whoever appropriates it to his own use, has an interest in it no farther than he is accustomed beneficially to make use of it, and he cannot complain of any thing done to the water by another person which does not prejudice his prior right.

Hence, the Court held, that the erection of a pentstock, which caused a stream of water to flow more rapidly than it had been accustomed to do, was not any injury to the man through whose premises the stream afterwards ran, and whose lands were not injured by it. *Williams* v. *Morland*, 2 Law J. K.B. 191, s. c. 2 B. & C. 910, s. c. 4 D. & R. 583.

A notice to remove a nuisance, left at the premises, is sufficient to charge a subsequent occupier, since a person who takes premises upon which a nuisance exists and continues, takes them subject to all the restrictions imposed upon his predecessors by the receipt of such notice. *Salmon* v. *Bensley*, 1 R. & M. 189. [Abbott]

Any (the least) special damage is sufficient, to enable the party injured to maintain his action against the obstructor of a public highway. *Greasley* v. *Codling*, 5 Law J. C.P. 262, s. c. 2 Bing. 263.

### (D) ABATEMENT AND REMOVAL.

When persons, having been convicted of a nuisance, in not having an apparatus for consuming the smoke of their engines, undertake to abate it, the Court will make a rule for a barrister occasionally to inspect the premises, and report to them whether the nuisance continues abated. *Rex* v. *Simonds*, 2 Law J. K.B. 39.

A stack of chimnies belonging to a house close to a highway, which, by reason of a fire, were in immediate danger of falling on the highway, were thrown down by some firemen: Held, that they were justified in so doing, and were not answerable for damages unavoidably done to an adjoining house of a third person. *Dewey* v. *White*, 1 M. & M. 56. [Best]

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## OFFICE AND OFFICER.

[See ARMY, CHURCHWARDEN AND OVERSEER, and CLERK OF THE PEACE.]

A collector of rates for the repair of a highway, is a parish officer within the meaning of the 11 W. 3. *Rex* v. *Davies*, 1 Ken. 329.

The offices of capital burgess and town clerk are incompatible. *Rex* v. *Bond*, 6 D. & R. 333.

The statute 1 Eliz. does not preclude bishops from granting ancient offices with the ancient fees annexed. *Trelawney* v. *Bishop of Winchester*, 1 Ken. 256, s. c. 1 Burr. 219.

An assignment of all offices which A might acquire is legal, and it will be construed to mean such offices as may be legally assigned. The office, however, of private secretary does not come within the meaning of the 5 & 6 Edw. 6. *Harrington* v. *Kloprogge*, 2 Chit. 475; and see *Palmer* v. *Bate*, 2 B. & B. 673, s. c. 6 B. Mo. 38, n.

The Court granted a *quo warranto* against the de-

fendant, who had purchased an office in a court leet, contrary to the 5 & 6 Edw. 6. *Rex* v. *Aythorp*, 2 Ken. 17.

The 49 Geo. 3, c. 126, prohibiting the sale of offices by the East India Company, applies only to their public offices, and not to the commanders of their ships. *Richardson* v. *Mellish*, 2 Bing. 253, s. c. 1 C. & P. 24.

A, who held an office for life, of B, agreed with C to procure him the appointment, and resign if he would allow him one moiety of the profits. A resigned, and C was appointed; and executed the deed to that effect, without the knowledge of B: Held, in an action on the deed by A against C for half the profits, that it was a fraud on B, and therefore illegal. *Waldo* v. *Martin*, 4 B. & C. 319, s. c. 6 D. & R. 364.

Where the plaintiff filed his bill for an account of the captain's profits of a voyage to India, in one of the company's ships, to a share of which the plaintiff was entitled under an agreement with the captain, and it was alleged by the captain's executors that the agreement was made in consideration of the plaintiff having procured for the captain the command of the ship:—an issue was directed to ascertain the consideration, reserving the question, whether such an agreement would or not be void. *Money* v. *Macleod*, 2 S. & S. 301.

*Semble*, the Court will take notice of the duration of an office, which under statute has continuance for a limited period only, without the same being specially pleaded. *Leadley* v. *Evans*, 2 Law J. C.P. 108, s. c. 2 Bing. 32, s. c. 9 B. Mo. 102.

The Act of Uniformity requires the oath to be subscribed as soon as possible.

The omission to take the oath, according to the Act of Uniformity, vacates an office without judicial sentence being pronounced, it being *ipso facto*. *Case of Queen's College, Cambridge*, 1 Jac. 45-6.

A person duly elected churchwarden by his parish, will be compelled to take the oath of office. *Cooper* v. *Allhutt*, 3 Phil. 165.

The sub-seneschal or under-steward to the corporation of Gravesend, has not the power to appoint a deputy to perform the duties of his office. *Rex* v. *Mayor of Gravesend*, 2 Law J. K.B. 94, s. c. 2 B. & C. 602, s. c. 4 D. & R. 117.

The office of parish clerk is a temporal office; and a mandamus lies to compel a restoration to it, where there has been a removal without sufficient cause.

The cause insisted upon to justify removal or suspension may be stated upon the return to the mandamus. The Court will not decide it upon affidavit. *Rex* v. *Davies*, 5 Law J. M.C. 46.

## OUTLAWRY.

(A) PROCEEDINGS.
(B) REVERSAL.
(C) PLEADINGS.
(D) EFFECT OF.

### (A) PROCEEDINGS.

In process of outlawry, it is sufficient that the four days of exaction happen between the teste and the return of the *exigent*, although some of those days were prior in time to the day on which the *exigent* actually issued.

An *allocatur exigent* may be issued, tested on the preceding general exaction day.

The third proclamation must be made at least one month before the *quinto exactus*.

*It is doubtful*, if a proclamation has actually been made, but not at a proper time, in consequence of which the outlawry is reversed, whether the Court can consider it as not being any proclamation at all, and direct the defendant to put in bail to satisfy the condemnation. *Taylor* v. *Waters*, 2 Law J. K.B. 37, s. c. 2 B. & C. 353, s. c. 3 D. & R. 573.

It appears that unless the writ of proclamation upon an outlawry be in conformity with, and framed as prescribed by the 31 Eliz. c. 3, s. 1, it is unavailable.

In outlawry the demand of the defendant will be irregular, unless the sheriff has the writ of exigent in his hands at the time it is made. *Volet* v. *Waters*, 3 D. & R. 55.

The third proclamation in an outlawry, was made at the door of the church belonging to the parish in which the defendant was described to live, in the bond on which the action was brought. The place where he actually resided, at the time the *exigent* was awarded, was at a great distance from that church, but in the same county. The Court reversed the outlawry, on the defendant putting in bail to pay the condemnation money. *Rayer* v. *Cook*, 3 Law J. K.B. 74, s. c. 3 B. & C. 529, s. c. 5 D. & R. 302.

On proceedings by original, to induce the jury to presume that the defendant went out of the country to avoid the outlawry, it need only be proved, that, instead of giving bail, he evaded the officer and went abroad; but, if the proceedings had been by bill, a different rule would have obtained. *Bryan* v. *Wagstaff*, 2 C. & P. 125, s. c. 1 R. & M. 329. [Abbott]

A departure from the realm before the award of the *exigent*, though for the express purpose and intent of defeating the creditor, will not justify a proceeding to outlawry. *Bryan* v. *Wagstaff*, 4 Law J. K.B. 173, s. c. 5 B. & C. 314, s. c. 8 D. & R. 208.

As an outlawry can be only prosecuted where the party proceeded against absconds, or cannot be found, if it appear that he was in prison at the time the several processes were sued out, and that the plaintiff was cognizant of that fact, the outlawry is irregular. *James* v. *Jenkins*, 3 Law J. C.P. 2, s. c. 9 B. Mo. 589.

### (B) REVERSAL.

The Court will not relieve an outlaw, in a summary way, unless he appears, or will forward the the plaintiff's action. Therefore, where a writ of *cap. ad resp.*, with an *ac etiam* on promises, was issued by the plaintiffs against A, resident, and B, a foreigner, not resident in this country, whereupon A was arrested, and put in bail, and an original *quare clausum fregit* (in which the singular pronoun was used instead of the plural,) giving B no addition, and without an *ac etiam*, was issued by the plaintiffs against A and B, followed by writs of *alias pluries exigent* and proclamation, all properly worded and containing clauses of *ac etiam*, and a

*supersedeas* was issued against B, who was thereupon outlawed on motion; the Court refused to reverse or set aside the outlawry for irregularity, but left him to his writ of error. *Solly* v. *Forbes*, 8 Taunt. 516, s. c. 2 B. Mo. 567.

If an affidavit, in support of a motion to set aside an outlawry, be made by an attorney, it must shew that the defendant, who has not appeared, expressly authorized him so to do. *Volet* v. *Waters*, 3 D. & R. 55.

When an application is made to the Court, to reverse an outlawry, the defendant must appear in court in person; or it must be distinctly stated in the affidavits, that the application is made by his direction. *Plunkett* v. *Buchanan*, 3 Law J. K.B. 106, s. c. 3 B. & C. 736, s. c. 5 D. & R. 625.

In outlawry it appeared that the plaintiff was cognizant of the defendant's residence, and that the outlawry had in consequence been obtained by an abuse of the process of the court: The Court on motion set aside the judgment of waiver, with costs. *James* v. *Jenkins*, 3 Law J. C.P. 2, s. c. 9 B. Mo. 589.

### (C) Pleadings.

Attaching a defendant for want of an answer, does not preclude him from filing a plea of outlawry. *Waters* v. *Chambers*, 1 S. & S. 225.

A plea of outlawry, to which neither an office copy of the record of the outlawry, nor of the *capias utlagatum* was annexed, but only a certificate from the clerk of the outlawries, was held to be bad; but leave was given to amend it, because the defect was caused by a mistake of the clerk of the outlawries, and not of the defendant, and did not affect the substance of the plea. *Waters* v. *Mayhew*, 1 Law J. Chanc. 20, s. c. 1 S. & S. 220.

On error to reverse an outlawry on the ground that the plaintiff (in error) was beyond sea at the time when the *exigent* was awarded, the defendant pleaded that "he left the realm of his fraud and covin, and to defeat him of his just debt, and for the purpose of avoiding the outlawry:" Held, that the defendant in error was entitled to begin. *Bryan* v. *Wagstaff*, 2 C. & P. 125, s. c. 1 R. & M. 327. [Abbott]

### (D) Effect of.

A party outlawed in K.B. in an action to recover the arrears of an annuity, cannot be heard in C.P. on a motion to set aside the annuity. *Loukes* v. *Holbeach*, 6 Law J. C.P. 37, s. c. 4 Bing. 419, s. c. 1 M. & P. 126.

The King is entitled to property forfeited upon outlawry at the suit of a private individual. *Rex* v. *Cooke*, 1 M'Clel. & Y. 196.

Under process of outlawry, even in a civil action, as the defendant's goods are in point of law forfeited, his landlord is not entitled to rent by the statute 8 Ann. c. 14, s. 1. *Bradling* v. *Barrington*, 5 Law J. K.B. 181, s. c. 6 B. & C. 467.

## PALACE COURT.

Bail in the Palace Court have no right to take their principal into custody. *Rex* v. *Hughes*, 3 C. & P. 378. [Tenterden]

Where a cause is removed by habeas corpus the Palace Court, and bail is put in on the day the rule for bail expires, the plaintiff's attorney serve a rule for better bail on the same day. *ward* v. *Wright*, 6 Law J. K.B. 359, s. c. 8 C. 386.

## PARENT AND CHILD.

Many circumstances influence the Court in ing children in a particular custody, where the fant is a ward in court, which will not weig common cases. *Anon.* 1 Jac. 254.

The Chancellor restricted a father's auth over his children, on the ground of immoral vicious conduct. *Shelly* v. *Westbrooke*, 1 Jac.

The Court has no jurisdiction to deprive a fa though living in adultery, of the custody o child, unless he brings the child into contact the woman with whom he is so living; nor to o him to permit the mother to have access to the c unless misconduct on his part is shewn with r ence to the management and education of the c *Ball* v. *Ball*, 2 Sim. 35.

A father, when resident abroad, has no righ the custody of his children.

The Court of Chancery will interfere to dep a father of the custody of his children on the gro of general immoral conduct; particularly if acc panied with acts of specific misconduct towards t

If a father is living in such a manner that he o not to have the charge of an infant daughter, Court will also exclude him from the custody o fant sons, who have been brought up along with daughter. *Wellesley* v. *the Duke of Beaufort*, 5 J. Chanc. 85, s. c. 2 Russ. 1.

The Chancellor ordered children to be delive up by the mother to the father, although provisi were contained in deeds of separation for their siding with the mother. *Ex parte Westmeath*, 1 251, n.

The Chancellor refused to deliver over, to father, children who resided with an aunt, who their guardian, with a discretionary trust for t maintenance. *Lyons* v. *Blenkin*, 1 Jac. 245.

The mother of natural children being a another person appointed guardian, with direct for intercourse between the infants and their mo *Courtois* v. *Vincent*, 1 Jac. 268.

A sum of money being left to an infant, wi direction that her education should be committe trustees, with a legacy to the father, on conditio his not interfering in it: The condition enforced his undertaking not to interfere. *Colston* v. *Me* 1 Jac. 247, n.

The husband of a woman entitled to a fund cause, signed, after the marriage, a written ag ment that he would settle half the wife's for upon her: Held, that the agreement enured to benefit of the children of the marriage, and therefore, the wife could not waive it. *Fenn* *Taylor*, 5 Law J. Chanc. 143, 1 Sim. 169.

The Court of Chancery, representing the K as *parens patriæ*, has jurisdiction to control right of a father to the possession of his child, the Court of C.P. has not any of that delegated thority. Where, therefore, a father and his in child, six years of age, were brought up und

writ of habeas corpus, in order that the child might be placed under the care of its mother, the Court refused to interfere, although the husband and wife had separated in consequence of his cruelty towards her, and the father at the time of the application, was confined in gaol, and cohabiting there with another woman, who took the child to him daily. *Ex parte Skinner*, 9 B. Mo. 278.

If a father, possessing a power of appointment among children, induces them, by threats of using that power of appointment in a particular manner, to join in securities for his relief from pecuniary embarrassments, that is an exercise of undue influence. To affect the person to whom the security is given, with notice of that undue influence, it is not enough to shew that he or his agents were aware of the reluctance of the children to concur in the security. *Rhodes* v. *Cooke*, 4 Law J. Chanc. 147, s. c. 2 S. & S. 438.

A boy, two years and a half old, was run over by a carriage, and much injured. The parent, having expended some money in his cure, brought an action against the owner of the carriage in the usual form, for the loss of the services of his son, as his servant: The Court held, that the parent could not maintain the action, because it was impossible that such a boy could render any services to him; and because the expenses incurred were not the gist of the action. *Hall* v. *Hollander*, 4 Law J. K.B. 39, s. c. 1 B. & C. 660, s. c. 7 D. & R. 133.

In an actio n for an injury occasioned to the plaintiff's son, it appeared that the plaintiff was a stage-coach proprietor, and that his son used, as his servant, to deliver the parcels: Held, that the plaintiff was entitled to a sum for the loss he had sustained in being deprived of the assistance of his son: but that, in the measure of damages, the parental feelings were not to be taken into consideration. *Flemington* v. *Smithers*, 2 C. & P. 292. [Abbott]

A tradesman cannot recover from a father, the value of clothes furnished to his son, an infant, in the absence of a n express or an implied authority. *Blackburn* v. *Mackey*, 1 C. & P. 1. [Abbott]: s. p. *Fluck* v. *Tollemache*, 1 C. & P. 5. [Burrough]

But, *semble*, that if the father sees the son wear the clothes, it is an adoption of the contract. *Fluck* v. *Tollemache*, 1 C. & P. 5. [Burrough]

## PARISH.

A parish cannot be legally divided into distinct districts, unless it plainly appear that the parish at large is not capable conveniently of maintaining its poor according to the provisions of the statute 43 Eliz. c. 2, or, in the language of the 13 & 14 Car. 2, c. 12, of reaping the benefit of that statute.

But it will be presumed, that a parish cannot derive that benefit, provided the separation into legal districts has subsisted from time immemorial, or for a long course of years; or took place either before or at the time of the passing of the act 13 & 14 Car. 2, c. 12, s. 21.

A mere agreement, however, between the districts of a parish to separate, in consequence of disputes not substantially interfering with the mode of maintaining the poor under the statute of Elizabeth, and where the funds of those districts, as well as the collection of the rates, do not plainly appear to have been distinct, will not be such a subdivision as to entitle either of those districts to the right of having separate overseers, or to be considered in other respects as a distinct parish. *Bastock* v. *Ridgway*, 5 Law J. K.B. 139, s. c. 6 B. & C. 496.

## PARISH BOOKS.

[See Infant, Production and Inspection of Deeds, Books, &c.]

## PARLIAMENT.

Where a voter at an election for members of parliament had received money after the election was over, but there was no proof of a prior agreement to accept it: Held, that this was not an offence within the 2 Geo. 2, c. 24, s. 7. *Huntingtower* v. *Gardiner*, 1 Law J. K.B. 120, s. c. 1 B. & C. 297, s. c. 2 D. & R. 450.

A mercer furnished ribbons to a person who was a candidate for the representation of a city in parliament; the ribbons were partly used as presents to voters; the mercer was himself a voter, and received orders for some of the ribbons, from the candidate himself, in his committee room, but was not told for what purpose they were wanted: Held, that he was entitled to recover the price of the ribbons from the candidate, notwithstanding the provisions of the statute 7 & 8 W. 3, c. 4. *Richardson* v. *Webster*, 3 C. & P. 128. [Best]

At a general election, A was, after a contest, returned to serve in parliament; A died before the next meeting of parliament: Held, that, immediately on his death, the representation of that place "became vacant," within the meaning of the Treating Act, 7 & 8 W. 3, c. 4; and that if B, who was neither a candidate nor the agent of a candidate, canvassed for C, and ordered beer for the voters, after such vacancy, this was within the act, even though it was not proved that C either knew of the canvass or of the treating: and it was therefore held, that an innkeeper could not recover against B for beer supplied to those voters by his order.

The Treating Act extends to an unsuccessful candidate who did not come to the poll. *Ward* v. *Nanney*, 3 C. & P. 399. [Park]

The Court granted an information against the defendant, for offering a bribe at an election, upon the affidavit of two witnesses. *Rex* v. *Isherwood*, 2 Ken. 202.

A man brought four actions on the act against bribery at elections for members of parliament, against the same persons in different counties. In the first he failed, and went to prison for the costs. Although it was sworn that the same individual must necessarily give the evidence to support the other actions, the Court would not compel the plaintiff to give security for costs before he was allowed to proceed in other actions. *Felton* v. *Easthope*, 1 Law J. K.B. 156.

Hustings were erected in a borough at the expense of the candidates for a seat in parliament. They were much injured by the populace, and repaired by the candidates. The mayor brought an action, on

the statute 57 Geo. 3, c. 19, against two of the inhabitants to recover the amount of the damages. The Court held, that the erection was not a building within the act of parliament, and the injury was not such as was contemplated by the legislature; and that the property in it was not in the mayor, who, therefore, could not maintain an action, even if it had been a building. *Allen* v. *Ayre*, 1 Law J. K.B. 204.

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## PARTIES TO SUITS.

[See COMPANY, MORTGAGE, PRACTICE, and SPECIFIC PERFORMANCE.]

(A) WHO MAY BE.
(B) OBJECTION FOR WANT OF.
(C) WHAT PARTIES NECESSARY.
(*a*) *Plaintiffs.*
(*b*) *Defendants.*
(D) INTEREST OF.

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### (A) WHO MAY BE.

A foreign government cannot sue except in the name of individuals entitled to represent the state.

Where the plaintiff was described as the Government of the State of Colombia: Held, on demurrer, that the bill could not be sustained. *The Colombian Government* v. *Rothschild*, 5 Law J. Chanc. 43, s. c. 1 Sim. 94.

A mere attorney has no right to sue in equity in his own name. *The King of Spain* v. *Machado*, 6 Law J. Chanc. 61.

*Semble*—That two persons cannot join in a suit as co-plaintiffs, where they aver that the title is in one or the other of them, and each contends that it is in himself. *Cholmondeley* v. *Clinton*, 1 Turn. 117.

But if a co-plaintiff be unnecessarily joined, the Court will order the cause to proceed without his interference. *Rowlinson* v. *Hallifax*, 1 S. & S. 27.

A, a creditor, and B, the administrator, with the will annexed of a testator, cannot join as co-plaintiffs in a bill against C, who holds part of the testator's assets. *Barnes* v. *Lever*, 1 Law J. Chanc. 165.

### (B) OBJECTION FOR WANT OF.

Where, at the hearing, want of parties is alleged, it is not necessary that the defect should appear from matter stated in the pleadings, or contained in the evidence. *Reynolds* v. *Dixon*, 1 Law J. Chanc. 93.

A, B, C, and D, being partners, in a bill by B against A for an account of partnership dealings, if the answer of A alleges, that C, another partner, has no interest in the accounts, and if that allegation is admitted at the bar by the plaintiff's counsel to be true, the defendant cannot, on a petition for a rehearing, object that D ought to be a party to the suit.

Neither can the defendant, if he has examined C as a witness in the cause, avail himself of the objection, that C ought to have been a party. *Bodin* v. *Farquhar*, 1 Law J. Chanc. 21.

If a plea in bar is bad, (although it appears on the matter contained in it, that the suit is defective for want of parties,) the objection for the want parties cannot be urged on the argument of the p *Cockell* v. *Whiting*, 3 Law J. Chanc. 6.

Where a cause is ordered to stand over for w of parties, the plaintiff, it seems, is bound to the costs of the day. *Hill* v. *Kirwan*, 1 Jac. 1

Where the Court is satisfied that a person has insolvent, and that he has no personal representat an objection for want of parties, founded on the cumstance, that there is no personal represent of that individual before the Court, will not pre *Hawkins* v. *Miles*, 4 Law J. Chanc. 139.

If a bill states a fact, according to which A w not be a necessary party, a plea that A ought a party, not denying the allegation of that fa bad. *Blackmore* v. *Shirley*, 4 Law J. Chanc. 1

A demurrer for want of parties is good, if, sistently with the case stated in the bill, a pe who is not before the Court may have an intere the accounts which are prayed. *Munoz* v. *De Ta* 4 Law J. Chanc. 109.

If a person is, in respect of interest, a neces party to a suit, it is not enough to allege, that out of the jurisdiction of the Court, unless pr be prayed against him. *Munoz* v. *De Tastet*, 5 J. Chanc. 151.

The objection that a co-plaintiff is not a p ought to be taken by way not of general demu but of demurrer for want of parties.

If a general demurrer is filed, which fails, demurrer *ore tenus* for want of parties prevails plaintiff will be allowed to amend by adding par *Lester* v. *Meddowcroft*, 2 Law J. Chanc. 181.

### (C) WHAT PARTIES NECESSARY.

#### (*a*) *Plaintiffs.*

The heir and personal representatives mus parties to a bill for the discovery of assets. *F* v. *Coplepepper*, 1 Ken. 133.

To a bill for establishing a *modus*, the ordina a necessary party. *Cook* v. *Butt*, 6 Mad. 53.

It is a general rule that persons appointed, a pointees under the will of a feme covert, are n sary parties to a suit concerning the fund whic the subject of appointment. *Court* v. *Jeffery*, & S. 105.

But where appointees under the will of a ma woman are very numerous, they need not al made parties. *Manning* v. *Thesiger*, 1 Law J. C 28, s. c. 1 S. & S. 106.

A fund being settled to such uses as husban wife shall appoint, and, in default of appointm in trust for them, and the survivor of them, the band and wife assign it: the wife is the surv Held, that, in a suit by the wife's personal repr tative to set aside the assignment, the persona presentative of the husband need not be a p *Dowlin* v. ———, 1 Law J. Chanc. 169.

Where the subject of the suit is a lottery ti bought and registered by a married woman third person, she, as well as her husband, to be parties. *Kenod* v. *Lawless*, 2 Law J. C 195.

Where a sum of money (part of the price estate) is set apart in the hands of trustees, security to the purchaser against the claims of j ment creditors of the vendor, who have a ge equitable lien on the estate sold, the judgment

ditors must be parties to a bill which seeks to have this money disposed of. *Anon.* 1 Law J. Chanc. 16.

Lands being devised to a trustee, upon trust to apply a certain sum annually in payment of A's debts; and, as to the surplus, upon trust for A, an incumbrancer of A's interest files a bill against A and the trustee, to have his security made available; a creditor of A ought to be made a party. *Cloves* v. *Wildmore*, 1 Law J. Chanc. 177.

Where the object of a bill is to restrain proceedings against the sheriff, it is not improper to make the sheriff a party. *Farquharson* v. *Pitcher*, 2 Russ. 61.

A decree directed the sale of premises, held under a proviso, that the lessee shall not assign without the landlord's licence; A B having purchased the premises and paid the purchase-money into court, the representatives of the lessee filed a bill against the landlord, praying that he might be decreed to give his licence: on demurrer, it was holden, that the vendees were necessary parties. *Maule* v. *Beaufort*, 1 Russ. 349.

Where a copyhold estate is to be surrendered to A in trust for others, A must be a party in a bill to compel the performance of a covenant. *Cope* v. *Parry*, 2 J. & W. 538.

If a great number of shareholders in a joint stock company assign their interest in the concern to two or more shareholders, upon trust, to recover what has been paid by them, and to hold the surplus which shall remain, after expenses have been defrayed, for the benefit of the assignors, the assignors must be parties to a bill filed by the assignees in trust, in order to obtain relief with respect to the interest so assigned. *Blain* v. *Agar*, 5 Law J. Chanc. 1, s. c. 1 Sim. 37.

A and B being indebted jointly, and each of them also separately, all their property is by deed conveyed to trustees, upon trust for the joint creditors of A and B, and the separate creditors of each of them; and these creditors, who are very numerous, are parties to this deed: Held, that any creditor, standing in any of the separate classes, may sustain a bill on behalf of himself and the other creditors of A and B, without making a creditor of each class of parties. *Weld* v. *Bonham*, 2 Law J. Chanc. 193, s. c. 2 S. & S. 91.

All the parties to a contract must join. *Humphreys* v. *Holles*, 1 Jac. 75.

A ships goods from Cadiz, in 1793, for B, in Flanders, and receives payment for them from B: Flanders being occupied by the French, the ship enters an English port, and C, being agent for the ship-owners, and acting and holding himself out also as agent for the persons interested in the cargo, possesses himself of the cargo, sells it, and retains the proceeds. Upon a bill filed by the representatives of B against C for an account: Held, that A ought not to be made a party to such a bill.

As C was the agent of the ship owners, it is not necessary to make them, or the captain, parties to such bill, in respect of the freight due on B's share of the cargo. *Moons* v. *Bernales*, 1 Law J. Chanc. 53.

If several plaintiffs join in instituting a suit, one of them will not be allowed to withdraw from the prosecution of it, unless he makes out, to the satisfaction of the Court, that it is not consistent with prudence to prosecute the suit further. *Jeffcoat* v. *Jeffcoat*, 3 Law J. Chanc. 45.

### (b) *Defendants.*

If a creditor's bill is filed against an administrator *de bonis non*, the suit is imperfect, unless the former administrator, or his personal representative, be made a party. *Watson* v. *Ridge*, 1 Law J. Chanc. 15.

A creditor, who claims a specific lien on the part of the testator's assets, which, at the time of his death, was at the testator's disposition, is properly made a defendant to a creditor's suit, for the administration of the estate, though the bill does not charge collusion between him and the executor. *Tyler* v. *Manson*, 5 Law J. Chanc. 34.

If in a suit in which A, a creditor, and B, an administrator, are made co-plaintiffs, B dies, after a decree for the administration of the personal estate, B's personal representatives ought, in the further prosecution of the suit, to be made parties in respect of B's possession of assets; but as they are accounting parties in respect of such possession, they must be made defendants, and not co-plaintiffs. *Barnes* v. *Lever*, 1 Law J. Chanc. 165.

An information and bill charged, that the trustees of certain funds (the surplus of which, after some specific purposes had been satisfied, were to be paid over to the overseers of the poor for distribution,) had borrowed money improperly upon the security of these funds, and had improperly adopted the acts of preceding trustees, who had misapplied the funds; and it prayed that, in taking the account against these trustees, they might not be allowed the sums which they had so borrowed improperly, or which had been unduly expended by the former trustees, whose acts they had adopted, and that the balance which, upon an account so taken, should be found due from them, might be paid over to the overseers of the poor: Held, that, to such an information, the former trustees, or their representatives, ought to be made parties;—that the creditors, from whose claims the funds were sought to be withdrawn, ought also to be parties;—that the overseers of the poor ought not to be parties. *Attorney General* v. *Heelis*, 2 Law J. Chanc. 35.

All the obligors to a joint and several bond must be joined in a suit by the obligee. *Bland* v. *Winter*, 1 S. & S. 246.

Where a bill was filed against the principal obligor, and the representatives of another obligor, who was surety in a joint and separate bond, and the bill stated that the latter was insolvent: Held, that he was properly made a party, and was not entitled to his costs. *Haywood* v. *Ovey*, 6 Mad. 113.

On the death of a defendant, against whom the bill seeks to set aside a contract entered into by him for the sale of his wife's estate,—it is regular to revive against his personal representative, without making his wife a party. *Humphreys* v. *Holles*, 1 Jac. 73.

## (D) INTEREST OF.

Demurrer for joining a plaintiff in a suit, who appears on the face of the bill to have no interest in the matters in litigation. *Cuff* v. *Platel*, 1 Law J. Chanc. 2.

A suit is imperfect, when a plaintiff, who may have an interest in a fund, either as a real representative, or as next of kin, is before the Court only in

the character of a real representative. *Slawin* v. *Farnese*, 1 Law J. Chanc. 12.

Without a supplemental bill, an assignee of an interest in a suit cannot be a party, but he may petition to secure the fund. *Forster* v. *Deacon*, 6 Mad. 59.

An undertaking on the part of the plaintiff, which will prevent a suit from affecting certain interests, dispenses with the necessity of bringing before the Court the persons who sustain those interests. *Harvey* v. *Cooke*, 6 Law J. Chanc. 84.

## PARTICULARS OF DEMAND.

[See PRACTICE.]

## PARTITION.

Exceptions will not lie to the return of commissioners in a suit for partition, on the ground of inequality of value in the lots. In all cases of improper conduct in the commissioners, a motion must be made to suppress the return. *Jones* v. *Tolley*, 5 Law J. Chanc. 105, s. c. 1 Sim. 136.

After a partition under a decree, the Court cannot give a party any right as to the property, which the certificate of the commissioners and the deeds of partition do not give him: nor will it interfere to reform the deeds, in order to give a party the more convenient and complete use or enjoyment of his portion of the premises. *Burley* v. *Moore*, 5 Law J. Chanc. 170.

## PARTNERS.

[See BANKRUPT, COMPANY, and SET-OFF.]

(A) PARTNERSHIP.
- (a) *How constituted.*
- (b) *Articles, Construction and Operation of.*
- (c) *Property.*
- (d) *Dissolution.*

(B) PARTNERS.
- (a) *Rights and Interests.*
- (b) *Liabilities.*

(C) ACTIONS AND SUITS.
- (a) *In general.*
- (b) *Pleadings.*
- (c) *Evidence.*

### (A) PARTNERSHIP.

#### (a) *How constituted.*

One of several partners cannot admit a third person as a partner, but he may give him a division of his share. *Bray* v. *Fromont*, 6 Mad. 5.

What shall amount to evidence of partnership between parties having a joint interest in certain property. *Nerot* v. *Burnand*, 6 Law J. Chanc. 81.

If a man engage to purchase articles of commerce for another person, and agree to take a proportion of the profits for his labour, and to bear a proportion of the loss; he is not a partner as to the world in general: and if the person for whom the article purchased, obtain a bill of exchange upon them pay it to his bankers on his own account, and become a bankrupt, the other person cannot f it, and is not entitled to the proceeds. *Sm Watson*, 2 Law J. K.B. 63, s. c. 2 B. & C. 401, 3 D. & R. 751.

The plaintiff, a merchant in L, and A B, a b at C, entered into a cotton speculation, by whic latter was to purchase the cotton, and have one interest therein in lieu of commission; he purcl cotton in his own name, which was paid for b plaintiff; the broker informed the plaintiff tha cotton was deposited in a warehouse rented by and that he held the key for their joint security the course of their correspondence the transa was spoken of as a "joint account," "joint conc "joint purchase," "joint speculation," "joint ton adventure:" the broker pledged the cott the defendant for a debt due from himself, and came bankrupt: Held, that the transaction amou to a partnership, and that therefore A B had a rity to pledge in the absence of fraud. *Reid* v. *linshed*, 4 B. & C. 867, s. c. 7 D. & R. 444.

Where the plaintiff and defendant ran a coach from Bath to London, the former provi horses for one part of the road, and the latte another; and the profits of each party were c lated according to the number of miles his h went; and the plaintiff received the fares of the sengers, and gave a weekly account thereof to defendant: Held, that the plaintiff and defen were partners; and that, in an action by the fo against the latter, upon a separate transaction could not set off a balance which had been decl to be due to him upon such weekly accounts. *mont* v. *Coupland*, 2 Law J. C.P. 237, s. c. 2 B 170, s. c. 9 B. Mo. 319, s. c. 1 C. & P. 275.

A, B, &c. were common carriers from L to separate portion of the road being allotted to e and it having been stipulated also, that no part ship should exist between them. A for himself the other parties agrees with the Mint to carry from L to F, and afterwards makes another ag ment with the Mint to carry other coin to place on the road: Held, that all the parties were ent to share in the profits of this agreement. *Ram Austwick*, 1 S. & S. 52.

A, having undertaken to negotiate for the chase of certain property, on behalf of an inte partnership, which was to consist of himself a and C, and a contract for the purchase of the perty having been concluded by A, B, and C, the vendors, those vendors at the same time to give, and they afterwards pay to A 12,000 his private benefit, without the knowledge of B C: Held, that A was to be considered as havin ceived that sum for the benefit of the new par ship, and that B and C were entitled each to a part of it. *Fawcett* v. *Whitehouse*, 4 Law J. C 64.

In an action for goods and work applie equipping a mine (the defendant being charg one of a company concerned in working it): H that the mere payment of deposits without any nature of a deed, or interference in manage was not enough to make her liable, unless the believed from the evidence that an actual con

ance of an interest in the mine had been made to her. *Vice* v. *Lady Anson*, 1 M. & M. 98. [Tenterden]

A party paying a deposit on shares in a trading company, and afterwards signing the deed of partnership, is to be considered as a partner from the time of his paying the deposit. *Quære*, if the mere payment of the deposit, without the subsequent signature of the deed would make him a partner? *Lawler* v. *Kershaw*, 1 M. & M. 93. [Tenterden]

A joint interest in, and occupation of a farm, is not a partnership, and therefore will not convey an implied authority to one of two persons, to bind the other by the acceptance of bills of exchange for payments in respect of the farm.

Therefore, it is incumbent upon the holder of bills accepted by one party so jointly interested, in the name of both, who seeks to recover against the other, to prove express authority has been given to make such acceptance.

Thus, where A agreed to take a farm, in which B was to be jointly interested, and stipulated to pay for the stock and crop thereof, in good bills at three months, and B, afterwards, without the knowledge of A, made a new arrangement relative to such payment, in pursuance of which he accepted bills in the name of himself and A, payable at twelve months, which acceptances were not subsequently ratified by A, it was held that the holder of the bills was not entitled to recover against A. *Greenslade* v. *Dower*, 6 Law J. K.B. 155, s. c. 7 B. & C. 635, s. c. 1 M. & R. 640.

(*b*) *Articles, Construction and Operation of.*

A clause in a partnership deed, that if either partner should die during the term, that the survivor should admit the deceased's widow or other personal representative: Held, not to be imperative on the widow or the representative, but merely to give the power of election. *Pigott* v. *Bagley*, 1 M'Clel. & Y. 569.

Partnership articles direct a yearly settlement on 25th March, and if a partner die, his estate is to share in no profits subsequent to the last yearly settlement. The last settlement is on the 5th November 1811, and a partner dies in February 1813, his estate shares in profits up to the 5th November 1812. *Pettyl* v. *Janeson*, 6 Mad. 146.

B and C, being the sole proprietors of a newspaper, by indenture divide the concern into a certain number of shares, and confer certain rights of pre-emption, according to fixed rates of price, and in a certain order, on each other mutually, and on all future holders of shares. Having all along continued to be, and still being, the sole proprietors, they afterwards assign certain shares, with their appurtenances, and all their right, title, and interest in these shares to A; and various new conditions, with respect to A's interest, are introduced into the deeds of assignment, but nothing is said as to the right of pre-emption: Held, that A is entitled to the rights of pre-emption annexed by the first-mentioned indenture to his shares. *Stewart* v. *Stuart*, 1 Law J. Chanc. 61.

Partnership amongst a number of persons, to be managed by a committee of five, and by general meetings, at which the vote of the majority was to be binding; with a provision, that any one wishing to retire should first offer his share to the committee at a certain price, and if they declined to buy, might sell it to any other person: Held, that the majority were not able to sell the whole concern without the consent of all; but that where all but two were desirous of retiring, they might sell their own shares without making an offer of them to the committee. *Chapple* v. *Cadell*, 1 Jac. 537.

On a suit between three partners of a numerous trading company,—the Court will not decide a point of general interest upon the construction of the articles of partnership. *Baldwin* v. *Lawrence*, 2 S. & S. 26.

A agreed to take B's son into partnership as an attorney; the consideration was to be paid within two years from the date thereof, no date being mentioned for the commencement of the partnership:—It was holden, 1st, that the partnership commenced *in præsenti;* 2d, that parol evidence might be received to shew that B's son was not an attorney when the instrument was executed; and, 3d, that no oral testimony could be admitted to prove that the memorandum was not to take effect until the party had been admitted, as directed by 2 Geo. 2. *Williams* v. *Jones*, 5 B. & C. 108, s. c. 7 D. & R. 548.

Transactions between partners may amount to a waiver of a written agreement, or evidence of a new agreement different from written articles, provided those transactions shew a probability, amounting almost to demonstration, that the articles were otherwise intended. *Geddes* v. *Wallace*, 2 Bligh, 271.

Articles of partnership, providing that, upon its expiration, the stock in trade should be divided, received, and taken by the partners, according to their respective interest: Held, that they could not be carried into execution literally, and that, therefore, by the general law of partnership, the settlement must be by a sale and division of the whole. *Cook* v. *Collingridge*, 1 Jac. 607.

(*c*) *Property.*

The Court will not be induced to interfere by injunction in the case of temptation to the abuse of partnership property. *Glassington* v. *Thwaites*, 1 S. & S. 124.

The Court decreed an account of profits derived by a surviving partner from the employment of capital belonging to his deceased co-partners, *minus* what was a sufficient remuneration to the former for his carrying on the business. *Brown* v. *De Tastet*, 1 Jac. 284.

If a writ of *fi. fa.* be sued out against one of several partners, for a debt due from him alone, there is great doubt as to what interest in the partnership property can be sold by the sheriff. *Burton* v. *Green*, 3 C. & P. 306. [Tenterden]

Where all partners in a publication, except one, were partners also in a rival publication, an injunction was refused to restrain the using of the effects of the former partnership in assisting the latter, in consideration of an annual sum, where there had been an agreement permitting the use on those terms, which had been acted on for many years; but an injunction was granted to restrain the use of partnership effects not included in the agreement. *Glassington* v. *Thwaites*, 1 S. & S. 124.

Where a partner in trade liable for a sole debt contracted before his partnership, and also liable for

partnership debts, pays money to the creditor on account, the creditor cannot apply such payment to the first debt, if the money paid was in fact the money of the partnership. *Thompson* v. *Brown*, 1 M. & M. 40. [Abbott]

If one of several partners obtain property fraudulently, although his co-partners were deceived, and had no participation in the fraud; still the property so obtained does not vest in the partnership. *Kilby* v. *Wilson*, 1 R. & M. 178. [Abbott]

(*d*) *Dissolution.*

The general right which every member of a partnership has to dissolve the partnership, will not be controlled except by clear expressions—that right will not be controlled by the partners taking a lease for years of the premises where the trade is to be carried on; nor by provisions in the articles as to the amount of capital to be brought in by the several partners in successive years; nor by provision for the event, where the partners are in number more than two, of the exclusion of one of them by the others. *Baxter* v. *Plenderleath*, 2 Law J. Chanc. 119.

*Quære*—Whether a partnership, not under an express agreement, that the partnership shall continue for any precise duration of time, is dissolved on notice by either party. *Littlewood* v. *Caldwell*, 11 Price, 97.

Where there is a proviso in an indenture of partnership, that either of the partners may, if he is desirous of quitting the trade, determine the partnership: Held, that one of them cannot dissolve the partnership, and then set up a partnership elsewhere, but must either continue the partnership or entirely give up such trade. *Cooper* v. *Watlington*, 2 Chit. 451.

A, B, and C, carry on business as bankers, under articles of partnership for a term of years, by which A, in case of his death, has the power of bequeathing his share of the business in favour of his wife or children: A died, having bequeathed his share of his concern to his executors, in trust for his children; and his executors interfered in the management, and shared in the profits of the bank, which continued to be carried on under the same firm as before: Held, that on the death of A, a new banking partnership was formed. *Pemberton* v. *Oakes*, 6 Law J. Chanc. 35.

Where a partnership is dissolved, and one of the partners, being in possession of partnership property, carries on the same business in the same house with the partnership property, in the course of which business, part of that property is consumed and replaced by other property,—the property which, at the time of the decree declaring the partnership to be dissolved, is on the premises, for the purpose of carrying on the business, is not to be treated as in specie the property of the partnership. *Nerot* v. *Burnand*, 6 Law J. Chanc. 81.

A court of equity will enforce an agreement made upon a dissolution of partnership, that a particular book, used in the trade, should become the exclusive property of one of the partners, and that a copy of it should be delivered to the other.

If, upon a dissolution of partnership, it is agreed that certain articles of the partnership stock shall become the exclusive property of one of the partners, and that a certain fund shall be appropriated to the payment of the debts, and that fund afterw proves insufficient for the purpose, the other pa has no lien on those articles in respect of such ciency. *Lingen* v. *Simpson*, 1 S. & S. 600.

A bill, accepted by one of several partners af dissolution, though for a partnership debt, is binding unless he has so conducted himself induce the world to believe that he was still in nership—as, by suffering his name to appear o door of the counting-house. *Dolman* v. *Orcha* C. & P. 104. [Abbott]

(B) PARTNERS.

(*a*) *Rights and Interests.*

A, B, C, and D, being partners in a parti venture, and money on the partnership accoun ing in the hands of B, and D being indebted A is not entitled, in the account between hi B, to have credit for D's share of the money i hands. *Bodin* v. *Farquhar*, 1 Law J. Chanc.

B and C having refused to pay A his sh the profits, unless he would sign a receipt, con ing a protest by B against A's claim to any ri pre-emption, A is entitled to file a bill for pa of his share of the profits, and for a declarati the Court with respect to his rights of pre-em *Stewart* v. *Stuart*, 1 Law J. Chanc. 61.

Interest allowed at 5*l.* per cent. on sums pa to a deceased partner's estate. *Cook* v. *Colling* 1 Jac. 607.

A, B, C, D, and E, having been in partne as bankers, under the firm of A, B, & Co., partnership is dissolved as to A, but the name is retained for some time in the firm, and he l in the hands of his co-partners 7100*l.*, secur their joint and several bond: they also covena indemnify him against all liabilities arising the past or future use of his name in the firm: the partnership is dissolved as to C, D, and E afterwards these three persons, who carried o a distinct trade, become bankrupt; afterward name of A ceases to be used in the firm, and a commission of bankrupt issues against B, the ing joint estates of the firm, and also unsatisfied debts:

Held, that A was not entitled to prove the am of the bond against the separate estate of B;

That he was not entitled, upon indemnifyin estate against the joint creditors, to prove the am of what he might pay in respect of his liabilit joint debts, but that it was necessary for hi satisfy all the joint creditors before he could p *Ex parte Ellis*, 6 Law J. Chanc. 44, s. c. 2 G. & J.

Money paid by a solvent partner to defend use, out of his separate property, subsequent t bankruptcy of his partner, but in pursuance contract made previous to the bankruptcy o partner, may be sued for in the name of the so partner only, without joining the assignees o bankrupt partner. *Thacker* v. *Shepherd*, 2 Chit.

Where a retiring partner had obtained a l sum for his interest than subsequent losses jus being given, the Court refused to interfere. *R bottom* v. *Parker*, 6 Mad. 5.

A co-partner cannot originate a suit for acco in the Court of Admiralty. *Apollo*, 1 Hag. 31

If one of several shareholders for building a bri undertake the surveyor's department, he can n

tain no action against his co-subscribers, he being viewed in the character of partner. And it seems that if the committee employed the surveyor, and under the act of parliament the trustees of the bridge are made liable for the surveyor's bill, the surveyor cannot maintain an action for it against the committee. *Moneypenny* v. *Hartland*, 1 C. & P. 352. [Abbott]

A subscriber to an association for bringing a bill into parliament to make a railway cannot maintain an action for work and labour done by him in the character of a surveyor in carrying on the railway, against all or any of the other subscribers. *Holmes* v. *Higgens*, 1 Law J. K.B. 47, s. c. 1 B. & C. 74, s. c. 2 D. & R. 196.

(*b*) *Liabilities.*

Where one of several partners borrowed money, saying it was for the firm, and misapplied it,—it was holden that the other partners were not liable, if it were lent out of the ordinary course of trade, and the lender did not exercise due caution; and that the circumstance of his applying a portion of that money to the liabilities of the firm would not render them answerable for its repayment. *Lloyd* v. *Freshfield*, 2 C. & P. 325. [Abbott]

A dormant partner, who is not known to the world to be a partner, is not liable on a bill given by one of his partners in a transaction not relating to the partnership. *Lloyd* v. *Ashby*, 2 C. & P. 138. [Abbott]

If a partner borrow a sum of money, and give his own security only for it, it does not become a partnership debt by being applied for partnership purposes, with the knowledge of the other partner. *Beson* v. *Lewis*, 1 Sim. 376.

Where money belonging to other persons has been brought into the partnership fund by one partner with a knowledge of either of the others, the partners are all liable to make it good. *Stone* v. *Marsh*, 5 Law J. K.B. 201, s. c. 6 B. & C. 551.

One partner, by accepting a bill in the name of the firm, for his separate debt, does not bind his copartners, in the absence of proof that he was authorised so to do. *Ex parte Goulding*, 2 G. & J. 118.

In an action against partners, on a bill of exchange, it is no legal objection that the bill has been drawn or indorsed by one in his own name only. The liability of the parties may be collected from their course of business, and other circumstances, shewing that the partner who drew or indorsed, had authority to bind the partnership by that mode of drawing or indorsing.

Nor is it sufficient for the other partners to shew, that, in the particular instance, the partner who drew or indorsed the bill in question, violated his private instructions in so doing. *The South Carolina Bank* v. *Case*, 6 Law J. K.B. 364, s. c. 8 B. & C. 427, s. c. 2 M. & R. 459.

One of two partners had committed a secret act of bankruptcy unknown to the other; he afterwards accepted a bill of exchange in the name of the firm, and applied it to his own private use; a commission was taken out and properly worked; an action against the two partners, by an innocent holder, was held by the Court to have been well brought. *Lacy* v. *Woolcott*, 1 Law J. K.B. 145, s. c. 2 D. & R. 458.

Where a promissory note was signed by one partner for himself and his co-partners, but began, "I promise to pay," &c.: Held, that the partner signing was liable to be separately sued upon the note. *Hall* v. *Smith*, 1 B. & C. 407.

Where a submission to an award was signed by three of five joint contractors: Held, that it would not bind the five, as it was not an act within the ordinary course of business of a trading firm. *Stead* v. *Salt*, 3 Law J. C.P. 175, s. c. 3 Bing. 101, s. c. 10 B. Mo. 389.

Partners being answerable for the acts of each other as regards their business, they cannot set up as a defence that entries had been fraudulently made by a co-partner, and they never had received the money in their house;—therefore, where bankers, employed to receive dividends in the funds, had in their own books credited their employers with the dividends as received, and had allowed them to draw without having any other funds in their hands: Held, that the bankers were bound by the entries so acted on, although the partners were not cognizant of it. *Hume* v. *Bolland*, 1 R. & M. 371. [Best]

Where a lease of a wharf was granted to one of several partners,—it was holden, that they all might be sued for gas furnished to the wharf, if they used it. *London Gas-Light Company* v. *Nicholl*, 2 C. & P. 365. [Best]

Where a debt is due to a partnership, the mere circumstance of one of the partners taking a security in his own name alone from the debtor, does not affect either the rights or the liabilities of the partnership.

Accordingly, where a partner (a dissolution of the partnership being in contemplation) took a warrant of attorney in his own name from one of the debtors to the firm, and afterwards received sums on account, the other partner, who survived him, was held liable to the assignees of the debtor for the sums so received, they having been paid under circumstances which gave the assignees a right to recover them under the bankrupt law. *Biggs* v. *Fellowes*, 6 Law J. K.B. 357, s. c. 8 B. & C. 402, s. c. 2 M. & R. 450.

A, being, entitled as a partner, to a share of extensive ironworks, and of the lands and premises on which they were carried on, agreed, for valuable consideration, to assign to B his interest in the property and business; B interfered and acted as a partner; but afterwards he assigned his share, and gave notice to the other partners, that he had withdrawn from the business, and when called upon to complete his purchase, resisted the performance of the contract successfully, on the ground that a good title could not be shewn: Held, that B, as between him and the other partners, was to be treated as a partner, and was to contribute to the partnership's losses, until the time when he gave notice of his withdrawal from the concern and assigned his share:—that his liability ceased upon his assigning his share, and giving notice to the other partners of his withdrawal from the concern:—that the assignment of his share, though made to an insolvent person, was not for that reason the less effectual in putting an end to his liability:—that the assignee, not having been acknowledged a partner, or permitted to act as such, did not, by his acceptance of

the assignment, incur any liability as between himself and the co-partners. *Jefferys* v. *Smith*, 3 Russ. 158.

The manager of a partnership concern, having a salary with a share of the profits according to a proportion of capital and stock, not advanced by him, but assigned by way of nominal interest, (for the purpose of creating an addition to his salary, depending upon the contingency of the success which might be consequent upon his skill and industry,) is not a partner subject to loss in account with the other partners.

In such a case, the manager is not liable for loss, although it is expressed in the articles of partnership, that the partners (not excepting the manager) are to be "subject to profit and loss": and, although the manager signed the partnership books, joined in securities given by the partnership, and in most other partnership acts, including the advertisement for a dissolution, because it appeared from the general structure, and all the provisions of the contract taken and construed together, as well as from the transactions between the parties, and the conduct of the other partners, that the provision, as to profit and loss, was not intended to apply to the manager.

If it were so intended originally, it could not be enforced at the date the suit commenced, because the other partners, upon the dissolution of the partnership, and for many years afterwards, made no mention of the subject; and particularly as, in a former suit between them and their manager, respecting the amount of his salary, they omitted to make any claim against him as partner for a share of loss; and more especially as the court below, and the House of Lords on appeal in that suit, estimated the salary on the supposition, that the manager was entitled to a share of profit as an addition to his salary, without being subject to loss; no mention or claim having been made on that subject, either in the original suit in the court below or upon appeal.

A partner may be liable for loss, as to the creditors of the partnership, and not so as to his co-partners.

The most positive expressions, as to liability to loss in the articles of a partnership, may be controlled and superseded by transactions between the parties, the conduct of the co-partners, and the special circumstances of the case, including non-claim and inconsistent representation during a protracted litigation, which furnished occasion to make the claim, if the right existed. *Geddes* v. *Wallace*, 2 Bligh, 270.

A retiring partner is liable for the debts due by the partnership on his retirement, although the creditor may assent to the carrying of the debt into a new account with the remaining partners. *David* v. *Ellice*, 4 Law J. K.B. 125, s. c. 5 B. & C. 196, c. s. 7 D. & R. 690, s c. 1 C. & P. 368.

A, after his dissolution of partnership with B, suffered his name to remain on a cart, and over the place of business: subsequently an injury having arisen to the plaintiff, in consequence of the carter's improper driving, an action was brought against A: Held, that the action was sustainable, though the cart belonged to B; because A, by permitting his name to remain on the cart, held himself out to the world as the owner of it. *Stables* v. *Eley*, 1 C. & P. 614. [Abbott]

The personal representatives of one of two ners demanded from the surviving partner count of the partnership transactions. He re to render the accounts, unless they would giv security for a balance which he claimed to be him. They then filed a bill for an account. He a cross bill. On the Master's report, a balanc found due from him to the representatives deceased partner: Held, that the costs of both must be given against the surviving partner. v. *Felton*, 4 Law J. Chanc. 175.

Where the defendant, a part owner of a told the plaintiff, who had supplied the mine credit of the firm, that he, the defendant, ha his share of the mine to A and B, who for the would be his paymasters, and that he, the defe would be no longer responsible: Held, th operation of the notice was a question for the *Vice* v. *Fleming*, 1 Y. & J. 227.

(C) Actions and Suits.

(*a*) *In general.*

[See *ante*, B.]

A & B, partners in trade, dissolved partne and one of them afterwards carried on the bu solely on his own account, but in the joint n Held, that an action of assumpsit might be tained by him alone for goods sold and deli during the existence of the partnership. *A* v. *Laing*, 1 D. & R. N.P.C. 16. [Abbott]

Where one of several partners signed a con tion deed in the name of the firm, as a partne debt: It was holden, that he might sue alo non-payment of an instalment. *Metcalf* v. *Ry* 6 M. & S. 75.

If a person be ostensibly, but not really a pa he need not join in actions by the firm. *Dar* v. *Rackstrow*, 1 C. & P. 89. [Hullock]

An action, by one of several partners, for m due to the firm, cannot be maintained for the even though the defendant suffer judgment b fault, and the amount of the debt be clearly p before the sheriff upon a writ of inquiry. *Bi* v. ——, 4 Law J. K.B. 78.

Where a partnership firm is under a liabilit has a remedy over against another person, an of the partners alone pays the amount, he may the action over against the other person in hi name without joining his partners. *Hopley* v. 5 Law J. K.B. 174.

Six persons had agreed to establish a stage to be conveyed by them respectively, from and back; and, for carrying the agreemen effect, they bound themselves each to the oth pay the plaintiff all penalties that might acc any party to the agreement who should not the coach over the line of road allotted to h his part of the journey; or that, in default o ment of such penalties, the plaintiff might su the same, and the amount was to be divided a the parties to the agreement who should not subjected themselves to any penalties, to the sion of the defaulter: Held, that an action ag defaulter for the breach of the agreement mig maintained by the plaintiff alone, without jo the other parties who had not been defaulters. *denhurst* v. *Bates*, 4 Law J. C.P. 192, s. c. 3 463.

If one of several partners be concerned in preparing the prospectus of a projected newspaper, which prospectus states, that he and others will act as treasurers and managers, and also that the subscribers are not to be partners, nor to be answerable for more than their subscription; and be also aware, that a particular individual is to be sole nominal proprietor; the firm of which such partner is a member (although he has not taken any share in the paper), cannot sue the subscribers who have taken shares, for the price of goods furnished for the paper.

Money, the property of two partners, misapplied by a person at the instance of one of the partners, and with his concurrence, cannot be recovered back in an action in the names of the two. Consequently, it cannot be the subject of set-off in an action against the two; but the partner who has been damnified by the misapplication may maintain a special action on the case, against the person who misapplied the money, though he did so with the concurrence of the other partner. *Jones* v. *Fleming and Jones*, 6 Law J. K.B. 113, s. c. 7 B. & C. 217.

Where an original member of a company lent money to the company,—it was holden, in the absence of proof that he had ceased to be a member, he must be taken to be a partner, and therefore not entitled to sue his co-partner. *Perring* v. *Hone*, 2 C.& P. 403. [Best]

The Court will not, on the application of one partner, restrain another from using the partnership property, or name, unless a case of misrepresentation or abuse is made out against him. Neither will it restrain a partner in a patent from publishing a book containing an account of the invention. *Hawkins* v. *Blackford*, 1 Law J. Chanc. 142.

If the proprietors of a morning newspaper agree, for a pecuniary consideration, with the proprietors of an evening paper, to give the latter the use of types, &c. belonging to the former, the Court will not, on the complaint of a plaintiff, who had himself long acquiesced in that agreement, grant an injunction against this application of the partnership property; neither will it grant an injunction under such circumstances, even when the whole property of the evening paper belongs to the majority of the proprietors of the morning paper. *Glassington* v. *Thwaites*, 1 Law J. Chanc. 113, s. c. 1 S. & S. 124.

Where one of several partners had, without the privity of his co-partners, accepted a bill of exchange, the Court granted an injunction to restrain the negotiation by a holder, who had given a valuable consideration for it, but who had notice that it had been accepted without authority. *Hood* v. *Aston*, 1 Russ. 412.

A and B contract for the purchase of an estate, which, two years afterwards, is conveyed to A absolutely, who pays the purchase-money, and treats the estate as his own: upon B's death, A, as the husband of one of his next of kin, settles accounts of B's personal estate with C, one of B's personal representatives, and makes no claim in respect of the above-mentioned purchase during C's life; he will not be allowed, after C's death, to say, that the purchase was a partnership transaction, and to claim a moiety of the price out of B's personal estate. *Hughes* v. *Evans*, 1 Law J. Chanc. 129.

A, who was one of several partners, who were carriers, was in the habit of keeping wool in his warehouses at T, until it was convenient for the vendee to receive it; and after the partnership was dissolved, and notice to the vendor, the wool was destroyed in the warehouse by fire: Held, that upon the goods being received into A's warehouse, under a special agreement with the vendor, the liability of the partners, as carriers, ceased, and that A did not retain it as one of the carriers, but as warehouseman; having, therefore, settled the loss with the vendor, he was not entitled to contribution in settling the accounts with his partners. And it seems he would not have been liable for the loss in the character of a warehouseman. *In re Webb*, 8 Taunt. 443, s. c. 2 B. Mo. 500.

Where two persons jointly undertook to procure a cargo for a vessel for certain commission, which they agreed to divide equally among themselves, and one of them received, on account of such commission, a certain sum of money: Held, that the other could not maintain money had and received for a moiety, the demand arising out of a partnership transaction, and no account having been settled between them—Bayley J. *dub.* *Bovill* v. *Hamond*, 5 Law J. K.B. 145, s. c. 6 B. & C. 149.

Several persons entered into partnership as manufacturers, in December 1806, on the terms, *inter alia*, that one partner should have the management of the business and accounts, and that three of the partners should have no votes, or voices, in the general affairs, but should be bound by the acts of the majority of the other partners. One of those other partners was also partner in a bank, with which the firm kept an account. On the dissolution of the first firm in 1820, a bill was filed against the partners, or their representatives, by the bankers for an account, and payment of a large balance claimed to be due to them, charging several stated accounts, alleged to have been delivered and approved of. One of the defendants (being one of the partners excluded from the management,) by his answer disputed the account, and, by a cross bill, alleged that the superintending partners had, by misconduct and neglect, suffered the acting partner to embezzle the partnership property; that, if a balance were due to the bankers, it had arisen through such misconduct; and that the superintending partners, including the partner in the bank, ought to bear the loss. By the decree, dismissing the cross bill, it was referred to the Master, to take the account, with liberty to state special circumstances. The Master declined, under this direction, to take the account on the footing of a stated amount, and the defendant insisted on the account being taken and vouched, item by item; on which the plaintiffs presented their petition for a re-hearing, which was refused, the petition not having been presented within six months after the decree pronounced; the Court, however, expressing a strong opinion, that no other decree could, according to the pleadings, have been made.

The direction to the Master, not to disturb settled accounts, applies only to mutual accounts between the parties, by which they would be bound, and is a special direction; but the direction to report special circumstances is one of course, and very often introduced without any object. *Milford* v. *Milford*, 1 M'Clel. & Y. 150.

An action of covenant was brought upon a partnership deed, by which it was agreed, that at the

expiration of ten years, the plaintiff was to be repaid the sum of 20,000*l.* which he had advanced, and was to receive 2000*l.* per annum, and to be indemnified against all losses: the defendant pleaded, that the execution of the deed was by way of colour, and in effect, an usurious contract to secure to the plaintiff ten per cent.; which pleas upon issue being joined, were denied by the jury: Held, after such finding by the jury, the Court could only take the contract from the deed, and if it was a partnership of ever such an unusual nature, there was no loan of money, and could not be pronounced usurious; therefore, the Court refused to grant a new trial or arrest the judgment. *Enderby* v. *Gilpin*, 5 B. Mo. 571, s. c. 5 B. & A. 954, s. c. 1 D. & R. 570.

(*b*) *Pleadings.*

Where a surviving executor brought an action of assumpsit in his own right, against the surviving partner of a deceased co-executor, without stating him to be a surviving partner, the Court determined that the action was not maintainable. *Fitzgerald* v. *Beeden*, 6 B. Mo. 332.

A and B being in partnership, A files a bill for an account on the footing of certain articles; B transfers shares to persons, who are made parties to the suit by supplemental bill, and, in the deeds of assignment, covenants that the shares so transferred shall be free from all debts and engagements; a decree for an account is made on the footing of the articles; the shares assigned by B come, by intermediate assignments, to C and D; B files a supplemental bill to enforce the former decree against C and D, alleging the whole property of the partnership to be now in them:—a plea of B's deeds of assignment, and of title derived under them, held to be bad, as not covering those shares of the partnership which C and D claim, otherwise than through those deeds of assignment. *Barber* v. *Crankshaw*, 1 Law J. Chanc. 196.

In an action against a surviving partner,—it was held, that a demand due from him as survivor, might be joined with a demand due in his own right. *Gidlow* v. *Vaughan*, 2 Chit. 456.

Upon dissolution of partnership, a covenant is entered into between A and B, that B is to leave 1000*l.* in bankers' hands until March 1822, as security towards payment of any demands which might be made on A, in respect of debts contracted by B on account of the credit of the partnership; the sum, after March 1822, subject to such claims as might have been made aforesaid, to be paid over to B. Breach, that although B had contracted no such debts as aforesaid, and although no claim had been made, still A would not permit the banker to pay the same over to B after March 1822. Plea, stating that a claim or demand was made on A, in respect of a debt of 900*l.*, by one T H, as being a debt contracted by B, on account of the credit of the said partnership: Held, that the plea was bad. *Want* v. *Reeve*, 1 Bing. 18, s. c. 7 B. Mo. 244.

(*a*) *Evidence.*

A partnership is not proved by shewing, that A has for a long time traded under the firm of A & B, when the former resided in England, and the latter in Spain. *Burgue* v. *De Tastet*, 3 Stark. 53. [Abbott]

Where an action is brought against A, B and C as partners, the office copy of an answer to a bill in Chancery, filed by A against B and C, may be received in evidence, without producing the original, in order to establish the partnership; and to prove the identity of the defendant's clerk, their solicitor is a competent witness, although he knows nothing of the defendants, except that he is conducting the suit for them. *Studdy* v. *Sanders*, 1 Law J. K.B. 96, s. c. 2 D. & R. 347.

An agreement that a person shall become a partner generally, cannot be enforced in the absence of evidence to shew the terms upon which the parties had agreed to become partners. *Figes* v. *Cutler*, 1 Stark. 139. [Abbott]

Notice of the cessation of a partnership given by an individual may be evidence to prove the dissolution; but a conversation between one of the partners and the witness, in which the former stated that they had ceased to be partners, is inadmissible. *Delmar* v. *Orchard*, 2 C. & P. 104. [Abbott]

Where an agreement for letting was signed "B C & Co." and it appeared that there were two persons trading under that firm, but it was not proved through the absence of the attesting witness, in whose handwriting it was signed: It was holden, upon evidence that both persons acted in the business, that there was sufficient proof of an execution by the partnership. *Evans* v. *Curtis*, 2 C. & P. 296. [Abbott]

If only one of two partners be sued, and there be no plea in abatement, the party who is not sued is a competent witness for the plaintiff. *Fawcett* v. *Wrathall*, 2 C. & P. 305.

One partner cannot release another, for the purpose of making him a competent witness in a particular action. *Simons* v. *Smith*, 1 R. & M. 29.

The declarations and conduct of co-plaintiffs are evidence against any one of them. *Hughes* v. *Evans*, 1 Law J. Chanc. 129.

Where an issue is to try the defendants' liability as partners, and an attorney is subpœnaed to produce a composition-deed, executed between them and another firm, shewing the partnership; an objection to the production of the instrument may be taken, on account that the disclosure might prejudice the latter in disputes with other persons. *Harris* v. *Hill*, 1 D. & R. N.P.C. 17. [Abbott]

## PARTY WALL.

[See REVERSION and REVERSIONER.]

Where a tenant, who occupied under a repairing lease, pulled down and rebuilt a party wall at the joint expense of himself and the occupier of the adjoining house,—it was holden, that no action could be maintained by the tenant against his landlord, on the 14 Geo. 3, c. 78, the former not having obtained the latter's authority. *Pixey* v. *Rogers*, 1 R. & M. 357. [Abbott]

It was certified by an arbitrator, that a party raising a party-wall intended to comply with 14 Geo. 3, c. 78, but did not, in fact, do so, and injured the adjoining house: Held, that the raising of the wall was to be considered as done "in pursuance of the statute;" and that the defendant was entitled to the protection of section 100, respecting notice and limitation of action, before trespass would lie against him.

*Pratt* v. *Hillman*, 3 Law J. K.B. 253, s. c. 4 B. & C. 269, s. c. 6 D. & R. 360.

An action of trespass cannot be maintained by one part-owner of a party-wall against the other part-owner. *Wiltshire* v. *Sidford*, 6 Law J. K.B. 151, s. c. 8 B. & C. 259 n., s. c. 1 M. & R. 404.

An action of trespass cannot be maintained by one tenant in common of a party-wall against the other.

Nor does the altering of such a wall for the purpose of improvement, (for instance, the heightening of it,) render the party who makes the alteration a trespasser; though he may be liable to an action on the case. *Cubitt* v. *Porter*, 6 Law J. K.B. 306, s. c. 8 B. & C. 257, s. c. 2 M. & R. 267.

An account of the expenses of rebuilding a party-wall, delivered in pursuance of the statute, 14 Geo. 3, c. 78, s. 41, containing a correct statement of the quantity of brick-work done and materials allowed for, is a sufficient account, as required by that section, although it also contains a statement of the prices paid for the brick-work and allowed for the materials, which exceed the prices fixed by the statute; and a demand of payment, referring to that account, is sufficient.

The defence relied on, being that the party-wall was not built half on each side of the boundary, as required by sec. 14 of that act: Held, that the question for the jury was, whether it were fairly built so, without regarding any minute inaccuracy of measurement, or by unfairly and intentionally encroaching on the defendant's premises. *Reading* v. *Barnard*, 1 M. & M. 71. [Tenterden]

The defendant took land on a building lease from one N, at the yearly rent of 5*l*. Subsequently he let a part of the ground to one G, who was to build houses upon it, at 20*l*. a year: Held, that he was therefore the owner of the improved rent under the act, and as such liable to contribution to a party-wall used in the erection of a house on such land by G.

*Semble*—That the notice required by the 41st section of the act, does not apply to the erection of a new building, but only to the renewal of an old party-wall: Held, also, that the owner of the party-wall was not confined to ten days to give his notice, but, there being no adjoining house when it was built, might give the notice in reasonable time after the adjoining houses were attached. *Collins* v. *Wilson*, 6 Law J. C.P. 107, s. c. 4 Bing. 551, s. c. 1 M. & P. 454.

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## PATENT.

A specification will be bad, if it use terms calculated to encourage useless experiments to arrive at the desired object, although it give the proper means of arriving at it.

Thus, where a man in his specification used the following terms, "The invention consists in the using certain cloths, which may be made of ANY SUITABLE material; but I PREFER it to be made of linen warp, and woollen weft." The fact being, that he had unavailingly tried other materials, and had found NONE to answer but linen warp and woollen weft, it was held, that the specification was bad. *Crompton* v. *Ibbetson*, 6 Law J. K.B. 214.

If A, who has procured a patent for inventing three distinct substances which form a particular medicine, does not in the specification describe them by their known and accustomed names, but merely points out the method by which they are to be produced, it renders the specification invalid, as it only tends to make persons believe that an elaborate process is absolutely necessary, when in fact it was known to the patentee that the result of their labours might be purchased in any chemist's shop. *Savory* v. *Price*, 1 R. & M. [Abbott]

Where a patent was described to be for "a new and improved method of making of double canvas and sail-cloth, without any starch whatsoever," and the specification stated, that the invention consisted in an improved texture, or method of twisting the thread to be applied to the making of unstarched cloth. The Court determined, that the patent was void, as being taken out for more than the party discovered, it having been shewn that the exclusion of starch in such manufacture had been before adopted. *Campion* v. *Benyon*, 6 B. Mo. 71, s. c. 3 B. & B. 5.

Where a specification contained French terms, it was holden, that if there be drawings annexed thereto, and by a comparison of the words and the drawings, the one will explain the other, sufficiently to enable a skilful mechanic to perform the work, the specification is sufficient. *Bloxam* v. *Elsee*, 1 C. & P. 558. [Abbott]

A party obtained a patent for the "invention of certain improvements in the smelting and working of iron," and the patentee, in his specification, described the improvements to consist of various processes, by which iron contained in slags or cinders, produced from the several furnaces, was, by smelting, brought into the state of bar iron; and further, in the use and application of lime to iron, subsequently to the operation of the blast-furnace, whereby that quality in iron called "cold short," might be prevented. The patentee then declared, that in the smelting he used a mixture of lime and mine rubbish, and stated their proportions, and also the various processes, compounds and proportions, used in the different furnaces in the smelting and working; and further stated, that he had discovered that the addition of lime or limestone, or other substances, consisting chiefly of lime, and free, or nearly free, from any ingredient known to be hurtful to the quality of iron, would sufficiently prevent or remedy that quality in iron called "cold short," and would render such iron more tough when cold.

On the trial of an action for the infringement of this invention, it appeared, that the iron had before been extracted from slags; that it had been previously discovered, and even published, that the application of lime would prevent the quality called "cold short"; that such application had been used for that purpose in an extensive iron work, for a series of years previous to the date of the patent; and that the defendants had not worked according to the processes, compounds and proportions described in the specification, for that they frequently varied the proportions, and in one instance omitted one of the ingredients altogether, with an equally successful result: Held, by three Judges, (Gibbs C. J. *absente*,) that the patent was void, as the invention was not new, and that there had been no infringement of the patent by the defendants. *Hill* v. *Thomp-*

*son*, 8 Taunt. 375, s. c. 2 B. Mo. 424, s. c. 3 Merivale, 622.

Accidental error in the specification of a patent ordered to be corrected. The Master of the Rolls is the proper person to make such order. *In re Redmond*, 6 Law J. Chanc. 183.

The invention of a servant while in the employ of another, belongs to the servant and not the employer, in the absence of proof that the former was retained for the *express purpose of inventing*. *Bloxam* v. *Elsee*, 1 C. & P. 558. [Abbott]

*Semble*, It is piracy to use part of an improvement, for which a patent has been obtained, in another improvement. *Weiss* v. *Maw*, 4 Law J. Chanc. 224.

If A obtains a patent, and enters into an agreement with B, the effect of which is to make B a partner in the patent, B is entitled, not merely to share in the profits, but to interfere in the management of it; and if, upon a bill being filed, A insists that he alone is entitled to act in the management, and that such was the true intent of the agreement, an injunction will be granted against A. *Blackford* v. *Hawkins*, 1 Law J. Chanc. 141.

The Court will not restrain one of the several partners in a patent, from publishing a book containing an account of the invention. *Hawkins* v. *Blackford*, 1 Law J. Chanc. 142.

Injunction granted to restrain the infringement of a patent, even where its legal validity was questioned, where, from the nature of the instrument, the market for it might be supplied in a very short time. *Weiss* v. *Maw*, 1 Jac. 502.

Where an invention was objected to as not being new,—it was holden, that a drawing of one which the witness had before constructed, might be looked at by him, and that he might be asked if he had such a recollection of the machine made by him as to say it was a correct drawing of it. *Rex* v. *Hadden*, 2 C. & P. 184. [Bayley]

The plaintiff alleged in his declaration that he marked his powder-flasks and shot-belts "*Sykes Patent;*" and that the defendants made powder-flasks and shot-belts, and marked them with the same words, in imitation of the plaintiff's and knowingly sold them so marked *as and for* powder-flasks and shot-belts of the manufacture of the plaintiff, to the injury of the plaintiff.

The evidence was, that the defendants sold the articles as their own manufacture, but that the purchasers re-sold them as being of the manufacture of the plaintiff: The Court held, that the evidence supported the allegation in the declaration. *Sykes* v. *Sykes*, 3 Law J. K.B. 48, s. c. 3 B. & C. 641, s. c. 5 D. & R. 292.

A patent does not become void when it has passed to the assignees of bankrupts, who have more than five creditors; for the assignees are, as to this kind of property, the representatives of the bankrupts, and not of the creditors. *Bloxam* v. *Elsee*, 3 Law J. K.B. 93, s. c. 1 C. & P. 559, s. c. 1 R. & M. 167.

By an act for enlarging the term granted to a patentee for the enjoyment of his patent, it was enacted, that in case the power, privilege, or authority, granted by the letters patent, should at any time become vested in, or in trust for more than the number of five persons, or their representatives, at any one time, otherwise than by devise or succession, (reckoning executors and administrators as and for the single persons they represent as to interest as they are or shall be entitled to in of such their testators or testator,) then, and every of the said cases, all liberties, privileges, advantages vested in the patentees, their execu administrators or assigns, should cease, determ and become void. The patentees having be bankrupt, and creditors exceeding five in num having proved under the commission: It was that this clause applied only to an assignme act of the party, and not to an assignment by o tion of law; and, consequently, that the inter the assignees of the bankrupt in the patent ha ceased.

The patent was for a machine for making pap single sheets, without seam or joining, from o twelve feet and upwards wide, and from o forty-five feet and upwards in length: Held, this imported that paper varying in width bet those extremes, should be made by the same chine; and that the patentee, at the time of t out the patent, not having any machine capa producing paper of different widths, the paten void. *Bloxam* v. *Elsee*, 5 Law J. K.B. 104, s B. & C. 169.

## PAUPER.

If it appear that a plaintiff has no meritc cause of action, the Court will discharge a authorizing him to sue *in formâ pauperis*. A ju order, allowing a plaintiff to sue *in formâ pau* must be made a rule of court, before the Court entertain a motion to discharge it.—*Semble*, th action for penalties is not within the statute 1 7, c. 12. *Hawes* v. *Johnson*, 1 Y. & J. 10.

## PAWNBROKER.

A pawnbroker received a parcel of goods o day, and on that and several subsequent da advanced sums of money, each not exceeding as on different parts of the parcel, and rec pawnbroker's interest of three-pence in the per month on those sums: Held, that it was a tion for the jury whether this really were one action, and a mere contrivance for obtainin higher interest on the whole sum, in which c is void; or whether the advances were really tinct. *Cowie* v. *Harris*, 1 M. & M. 141. [Tenta

## PAYMENT.

(A) In general.
(B) Of Money, into and out of Cou
(*a*) *In Equity.*
(*b*) *At Law.*

### (A) In general.

[See Bill of Exchange, and Debtor a Creditor].

A person bought two houses, to which two in the parish church were attached. The c being under repair, the pews were about to

built at the expense of the owners of them. The vendor agreed to pay for the pews. After the pews were completed, the plaintiff attempted to occupy them; but he always found them full of persons, who resisted his entrance, saying that he had not paid for them. The vendor promised to pay, but he did not. After waiting upwards of a year, the vendee paid the churchwardens, and brought an action to recover the amount, as money paid for the use of the vendor: The Court held, that inasmuch as neither the churchwardens, nor any person having authority, had disturbed the vendee, it was a voluntary payment. *Walker* v. *Duncombe*, 2 Law J. K.B. 80.

A, residing in B, purchases different cargoes for C, in D, one of which A consigns in a vessel chartered by C to his own agent in D. The master of a ship which conveys one of the cargoes, contrary to the terms of the bill of lading, delivers the cargo to C, who had at that time accepted and paid bills drawn by A, to the amount of the first two cargoes, but not to the amount of the whole of the cargoes. In an action against the master by A, for not delivering according to the bill of lading, it is a question for the jury, whether, under the particular circumstances of the case, the accepted bills were agreed to be taken in payment of the particular cargoes. *Morgan* v. *Skirfield*, 3 Stark. 46. [Abbott]

Where a party gave a cheque to procure the delivery of goods which were distrained,—it was holden, that no property passed, if he had *not reasonable* ground for expecting that the cheque would be paid. *Hawse* v. *Crowe*, 1 R. & M. 414. [Abbott]

Where, in an action for goods sold and delivered, it appeared that the defendant gave the plaintiff bills of exchange in payment, which were dishonoured, and that the latter afterwards transferred them to J S, who gave his acceptance for them, and that the original bills were still in existence: Held, that the plaintiff was not bound to produce them, as, on their dishonour, he had a right to resort to his original demand, and declare against the defendant for the amount of the goods sold. *Hadwen* v. *Mendesabel*, 3 Law J. C.P. 198, s. c. 2 C. & P. 20.

A mere order by a creditor for the payment of his debt to a particular person, may be retracted; but he cannot withdraw the authority, where there has been a pledge by the person to whom the authority is given, that he will make the payment according to the order. *Hodgson* v. *Anderson*, 3 B. & C. 842, s. c. 5 D. & R. 735.

Where a debtor directed his bankers, who were indebted to him in a larger amount, to place to the credit of his creditor (a debtor to the bankers,) for goods sold, a sum of money so as to make it the same as a bill at one month, which the bankers consented to do, but who only considered it as a payment to be made at a future day: Held, that this did not amount to a payment; and on the bankers becoming bankrupts before the day on which the credit would expire, that the debtor was not discharged by such payment. *Pedder* v. *Watt*, 2 Chit. 619.

The plaintiff and defendant kept accounts with the same bankers in the country, although they resided at a distance from each other; and, the plaintiff having applied to the defendant for payment of rent, the latter, by letter of the 22nd October, stated that he had ordered the amount to be transferred to the plaintiff's credit. No transfer, however, was made on that day; but on the 10th of December following, the defendant transferred the sum due to the plaintiff in the bankers' books, and they stopped payment in the afternoon of the same day, but the plaintiff could not receive intelligence of the transfer until two days afterwards: Held, that such transfer was equivalent to payment. *Eyles* v. *Ellis*, 5 Law J. C.P. 110, s. c. 4 Bing. 13.

Where there is a general running account, and no intermediate rest, and the debtor remits money without any specific appropriation, it is *primâ facie* a payment in liquidation of the earliest balance due from the debtor; and under such rule, remittances made by C D to his London bankers generally, after the death of A B, held applicable, in the first place, to the liquidation of the partnership balance due at the death of A B. *Simson* v. *Cooke*, 2 Law J. C.P. 74, s. c. 1 Bing. 452, s. c. 8 B. Mo. 588.

It is a general rule of law, that if a person indebted to another on two accounts, pay him a sum of money, he has a right to say to which of those accounts it shall be placed: and if he does not expressly make any election, yet if it can be inferred from circumstances, to which account he intended to place it, the receiver cannot put it to the other account. *Shaw* v. *Picton*, 4 Law J. K.B. 29, s. c. 4 B. & C. 715, s. c. 7 D. & R. 201.

In general, when a man owes money on more accounts than one, he may, when he makes a payment, apply it to which of the accounts he pleases.

And if he do not so apply it at the time, the creditor who receives the money may apply it to which of the accounts he pleases: but, in such a case, he cannot apply it to a claim upon any transaction forbidden by law; or a claim which he may have upon a security which is so defective that it cannot be enforced either at law or in equity.

But he may apply it to a claim which might be enforced in equity, though not at law.

Accordingly, A, the acceptor of two bills for 25*l.* and 50*l.* both over due, paid 22*l.* 10*s.* to B, the holder, "on account." B said, "he wished to have the full amount of the 25*l.* bill." A replied, "he had no more money then, but would pay some more soon." B then indorsed on the 25*l.* bill, "Received 22*l.* 10*s.* in part of two bills": Held, that B might appropriate the payment to the 25*l.* bill, though void for want of a stamp. *Biggs* v. *Dwight*, 6 Law J. K.B. 45, s. c. 1 M. & R. 308.

It seems that the payment of money ought to be personally demanded, since writing a letter requesting payment, will not support the issue of a demand and refusal. *Edwards* v. *Yeates*, 1 R. & M. 360. [Abbott]

Where, to ground an attachment for non-payment of money, a demand of money is essential; the affidavit in support of the application must state when the demand is made—by a person authorized by letter of attorney; and that the authority was shewn at the time of the demand. *Jackson* v. *Clarke*, 13 Price, 208, s. c. M'Clel. 72.

The prosecutor called on A, who had been committed for a forgery, and said he had no wish to appear against him, but that the attorney concerned (an attorney of the Court C.P.) would proceed, if his costs were not paid, which the prosecutor had no

means of paying; he then proposed that A should advance the money, which he did, and it came into the hands of the prosecutor's attorney. Notwithstanding this, A was put on his trial, and the prosecutor appeared against him; A, however, being acquitted, applied to the Court of C.P. to compel the prosecutor's attorney to refund the money, putting in an affidavit of his innocence of the offence charged on him, and that he paid the money, because, from his knowledge of the parties, he believed his life in danger. But the Court refused to interfere. *Ex parte Brookes*, 1 Bing. 105.

The *lex loci contractus*, and the law applicable to cases of money charged as a rent payable out of land, where no provision as to the place of payment is made by the instrument, are inapplicable to a case where the instrument itself furnishes the means of interpretation. *Lansdowne* v. *Lansdowne*, 2 Bligh, 60.

## (B) OF MONEY, INTO AND OUT OF COURT.

### (a) *In Equity.*

[See VENDOR AND PURCHASER.]

A defendant will not be ordered to pay into court money which he admits he has received, unless there is an admission that it is still in his hands. *Anon.* 1 Law J. Chanc. 21.

A defendant, who admits in his answer the possession of property upon a trust, will be ordered to pay it into court, although he sets up a claim to it; if, upon the facts disclosed in the answer, the Court is satisfied that this claim is not well founded. *Del Pont* v. *De Tastet*, 2 Law J. Chanc. 140.

Payment of money into court, after a decree and report, ordered upon admissions in the answer, the defendant being at liberty to discharge himself of any part of the sums so admitted, by an affidavit of subsequent receipts and payments. *Anon.* 1 Law J. Chanc. 72.

The Court will order an executor, who admits himself to have been indebted to the testator at the time of his death, to pay the amount into court. *Rothwell* v. *Rothwell*, 2 S. & S. 217.

Whether, on granting a commission abroad, the underwriters are bound to bring the whole or any of the money insured into court, is a question dependent on the circumstances. *Marryatt* v. *Noble*, 1 M'Clel. & Y. 101.

In a suit to set aside post-obit securities, an injunction being granted, the principal and interest will be ordered into court, and will not be paid to the defendant. *Marsack* v. *Farlow*, 1 Jac. 572.

Where the plaintiff gave tenants notice not to pay the rent to the defendant's trustees, and the trustees had given the tenants also notice not to pay their rent to the plaintiff, it was ordered, on the motion of the plaintiff, and with the consent of all parties, to pay their rent into court, though the tenants themselves cannot make such a motion. *Belbee* v. *Belbee*, 6 Mad. 28.

Where a defendant on his marriage covenanted to pay a certain sum into the hands of trustees, and neglected so to do; in a suit for a specific performance, the Court directed the sum to be paid into court. *Rothwell* v. *Rothwell*, 2 S. & S. 217.

An order will not be made on motion, that money should be paid into court, where a sum is reported to be due, and exceptions are taken to the M report. *Creak* v. *Capell*, 6 Mad. 114.

In moving upon admissions in an answer payment of money into court, the plaintif shew that, upon the case stated in the answ has an interest in the sum in question, thou defendant, in his answer, expressly denies th plaintiff has any such interest. *Dunville* v. 2 Russ. 372.

Where, by mistake, sums paid into court the decree were included in the balances re due from the defendant, and the decree on directions ordered these balances to be pai court: Held, that the mistake could not be re without re-hearing the cause on the latter *Brookfield* v. *Bradley*, 2 S. & S. 64.

If an application to rescind an order for money into court, on a certain day, be made the same has been brought into court, it will fused with costs. *Dane* v. *John*, 13 Price, 11

An injunction to restrain proceedings a applies to money paid into court;—therefore, a defendant applied for leave to take money court which he had paid in, the Court refus motion, with costs. *Parke* v. *Shrewsbury*, 13 289, s. c. M'Clel. 103.

As a general rule, the Court requires, in al tions under acts of parliament for local im ments, &c., for payment of money out of that the parties applying shall, by affidavit, a verify their title, and state that, to their know and belief, no other person has any title to, or any interest in the estate. *In re Fleet-Mark provement Act, ex parte Shears*, 2 Y. & J. 493.

Where money has been brought into court obtaining an injunction, and afterwards that in tion is dissolved upon motion, the party ag whom the injunction issued, is not entitled to the money in court paid to him upon that mo *Furnival* v. *Bogle*, 6 Law J. Chanc. 91.

A fund paid out to persons entitled to it, su to the contingency of a female of advanced age ing children, on their recognizance to refund in of that event happening. *Long* v. *Hodges*, 1 Jac

The amount of certain bills of exchange paid into court by the acceptor on his obtain injunction against the holder, if the suit o plaintiff in equity is dismissed at the hearing money will be paid out of court to the defen *Wynne* v. *Jackson*, 5 Law J. Chanc. 55, s. Russ. 351.

Where the title to money paid into court is and does not depend on any complicated cir stances, a petition need not be presented. *H cote* v. *Edwards*, 1 Jac. 504.

The application to take money out of court w had been paid in by the party may be made by mo

A petition for that purpose is not necessa the Court of Exchequer.

Ordered under circumstances, on payment of of the motion: but without prejudice to the li the opposite party's solicitor on the residue of fund in court. *Oliver* v. *Dobson and Anderson*, Price, 156.

### (b) *At Law.*

Money may be paid into court after tender m *Anon.* 3 Law J. K.B. 175.

In a penal action the Court permitted half the amount sued for, to be paid into court. *Walker* v. *Keene*, 2 Ken. 292.

When money is paid into court on counts for goods sold and delivered, and for money had and received, and the latter only applies to the plaintiff's demand, such payment admits a cause of action on that account only. *Stafford* v. *Clark*, 3 Law J. C.P. 48, s. c. 2 Bing. 377.

Where the defendant has pleaded a tender, and paid money into court, which the plaintiff takes out, and the defendant takes down the record by proviso, and the plaintiff does not appear, the defendant is not entitled to a verdict, but the plaintiff must be nonsuited. *Anderson* v. *Shaw*, 4 Law J. C.P. 53, s. c. 3 Bing. 290.

Where the surname of one of three joint plaintiffs, in an action on a contract, was inserted on the record, but the defendant pleaded a tender, and paid money into court on the whole declaration, and failed at the trial in proving it, and a verdict of 1*s.* damages was found for the plaintiff, to be increased to 23*l.* 9*s.* 5*d.*, if the Court should be of opinion that the variance was not fatal: The Court, on motion for that purpose, refused to interfere. *Longridge* v. *Brewer*, 1 Law J. C.P. 42.

Where two breaches had been assigned on the same contract, and the defendant paid money into court upon one of them, it was determined that he thereby admitted his liability on both. *Dyer* v. *Ashton*, 1 Law J. K.B. 8, s. c. 2 D. & R. 19, s. c. 1 B. & C. 3.

Payment of money into court upon a general *indebitatus assumpsit*, is no admission of a contract beyond the amount of the sum paid in. *Seaton* v. *Benedict*, 6 Law J. C.P. 208, s. c. 5 Bing. 28, s. c. 2 M. & P. 67.

Where, in several actions on a policy of insurance, the defendant paid money into court on one, and obtained a rule to stay proceedings in the others, on the terms of admitting their subscription to the policy and the interest of the plaintiff—the plaintiff refusing to enter into the consolidation rule: It was holden, on the defendant obtaining a verdict in that action, that the plaintiffs were entitled to costs in the other actions, up to the time the money was paid into court. *Powell* v. *Parkinson*, 6 M. & S. 107.

The plaintiff is entitled to costs up to the time of paying money into court by the defendant, even after a double default to try the cause, and peremptory undertaking given.

A plaintiff, after proceedings had, may take out of court the money paid by the defendant, without an application to the Court for that purpose; and by his so doing, all proceedings are stayed. *Foulstone* v. *Blackmore*, 1 Y. & J. 213.

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## PEER.

The Court will not quash a writ in which a person has been arrested, because he swears that he is a peer, unless he sets forth some acts which he has done in exercising the rights and privileges of a peer. *Storey* v. *Birmingham*, 2 Law J. K.B. 34, s. c. 3 D. & R. 488.

An Irish peer cannot be arrested for a debt. *Coates* v. *Hawarden*, 6 Law J. K.B. 62, s. c. 7 B. & C. 388, s. c. 1 M. & R. 110.

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## PENALTY.

[See CONTRACT, and PRINCIPAL AND AGENT.]

Penalties imposed by a French law, must be enforced in a French court, and not in England. *Le Louis*, 2 Dods. 255.

If an existing statute imposes a penalty upon an act, which was before subject only to forfeiture, whether the recorded conviction of the act of forfeiture may be invoked for the purpose of enforcing the penalty, *quære*. *Rex* v. *Whitaker*, 1 Hag. 153.

Where an informer sues upon a penal statute, which gives the penalty with costs, half to the informer, and half to the poor of the parish in which the offence is committed, he cannot deduct from the moiety payable to the parish a contribution for costs incurred in maintaining the judgments in a court of error, which court had refused to allow the costs of affirmance. *Willans* v. *Taylor*, 5 Law J. K.B. 319, s. c. 7 B. & C. 111.

The Court will not compel a defendant to answer allegations which may subject him to penalties.

This protection extends not only to the question which directly may tend to criminate him, but to every link in the chain of proof.

Where the chairman of a joint-stock company, with a knowledge that the company had been dissolved, and that the managing committee had determined to buy up the shares, sent his shares into the market and sold them as good and available shares; the Court protected him from answering these allegations, upon the ground that there existed a reasonable probability that he might be indicted for the fraud. *Maccallum* v. *Turton*, 2 Y. & J. 183.

To a bill filed against the defendants stating a partnership between them and the testator, as notaries, and praying an account, &c., they answered, that the testator had not taken out his certificate, according to the statute 39 & 40 Geo. 3, c. 72, s. 7, and that, inasmuch as by the statute 1 Geo. 3, c. 79, s. 10, any notary acting for a person not qualified to act as a notary, was liable to be struck off the roll, they ought not to be compelled to answer as to the alleged partnership; this answer being excepted to, the exceptions were overruled by Leach, V. C. and Lord Eldon, C. *Nelme* v. *Newton*, 2 Y. & J. 186.

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## PENSION.

A pension during pleasure was granted by his Majesty, Geo. 3. His Majesty Geo. 4, upon his accession, granted, by a fresh warrant, a pension of equal amount to the same person: Held, that an assignment of the pension, made during the life of Geo. 3, did not give the assignee any right to the existing pension. *Clay* v. *St. John*, 2 Law J. Chanc. 151.

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## PERFORMANCE.

Ignorance is no excuse for the non-performance of that which a party is bound to do. *Maxwell* v. *Ward*, M'Clel. 464.

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## PERJURY.

(A) OFFENCE.
(B) INDICTMENT.
(C) EVIDENCE.

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### (A) OFFENCE.

An indictment for perjury may be sustained against the deponent of an affidavit, who is an illiterate person or marksman, if it appear that it was read over to him, and that he undertood its contents. And the same rule obtains, though the affidavit was rejected by the Court on the ground of an informality. *Rex* v. *Hailey*, 1 C. & P. 258, s. c. 1 R. & M. 94. [Littledale]

Whether an affidavit, sworn before a bankrupt's petition was actually filed, will support an indictment for perjury—*quære*. *Rex* v. *Dudman*, 2 G. & J. 389.

To support an indictment for perjury arising out of legal proceedings, the matter sworn to must be material to the question at issue. Therefore, where the subject of the perjury charged was the denial of an agreement for the purchase of lands, in an answer to a bill filed for a specific performance, it appearing that such agreement was not in writing: It was holden, that, the agreement being void by the Statute of Frauds, the offence did not amount to perjury. *Rex* v. *Dunston*, 1 R. & M. 109. [Abbott]

A cause was referred by a judge's order to C D, and by the order it was directed that the witnesses should be sworn before a judge, "or before a commissioner duly authorised." A witness was sworn before a commissioner for taking affidavits, and examined *viva voce* by the arbitrator: Held, that a witness so sworn was indictable for perjury. *Rex* v. *Hanks*, 3 C. & P. 419. [Gaselee]

### (B) INDICTMENT.

The words "wilfully and corruptly" are material words in an indictment for perjury; and their omission will not be cured by the words "falsely and maliciously;" or any others of supposed equal import: even though the formal statement, at the end of the count, contain the legal inference of the jury, that "so" the defendant did commit "wilful and corrupt perjury."

A count in an indictment for perjury, in averring the falsehood of the defendant's testimony, must not aver it in general terms, by referring to the particulars as given in a previous count: but the particulars of the falsehood must be clearly and certainly stated in each count. *Rex* v. *Richards*, 5 Law J. K.B. 155, s. c. 7 D. & R. 665.

An indictment against a witness for perjury must state that he wilfully or corruptly swore falsely—since alleging that "he then and there falsely and maliciously gave false testimony," &c. is insufficient. It must also aver, that he was sworn as a witness, and deposed to certain facts, as its omission c be aided by intendment. *Rex* v. *Stevens*, 5 C. 246.

In an indictment for perjury, it is not nece to set out the evidence given in the exact conti mode it occurred; provided there be sufficient n alleged to support the charge. *Rex* v. *Solon* R. & M. 252. [Abbott]

It seems that, in an indictment for perju averment that the person, who administered the had "sufficient and competent authority," is cient, without stating how, or in what charac had the authority.

Where perjury is assigned upon several p an affidavit, those parts may be set out in the i ment as if continuous, although they are in fa parated by the introduction of other matter. *Callanan*, 5 Law J. M.C. 39, s. c. 6 B. & C s. c. 9 D. & R. 97.

An indictment for perjury against an ins debtor, stating, that "whereas in truth and i the said schedule did not contain a full, tru perfect account" of all debts owing to him time of his petitioning for his discharge, w naming the particular debts omitted, is too ge *Rex* v. *Hepper*, 1 C. & P. 608, s. c. 1 R. & M [Abbott]

It seems that an indictment for perjury in a davit made before a commissioner in the Co Chancery, may be sustained, without averrin the affidavit had been used, or was intended t been used, in a judicial proceeding. *Rex* v. *De* 7 D. & R. 324, s. c. 4 B. & C. 850.

### (C) EVIDENCE.

To sustain an indictment for conspiring by oath, &c. the Ecclesiastical Court will, on p order its officer to attend with the papers in the c *Westmeath* v. *Westmeath*, 2 Add. 380.

Where the perjury arises out of the trial of a c it is sufficient for the prosecutor to prove all th dence given by the defendant, strictly applica the fact on which perjury is assigned. An testimony of a witness, who says he has stated best of his recollection, that which was mate the matter now in issue, is evidence for the *Rex* v. *Rowley*, 1 R. & M. 299. [Littledale]

A prisoner cannot be convicted of perjury affidavit, if it refers to a former affidavit, whi prosecutor is not prepared to prove. *Rex* v. R 1 C. & P. 259, s. c. 1 R. & M. 97. [Abbott]

Where an indictment for perjury averred th defendant was sworn on the Holy Gospel,— holden, that proof, that the defendant was and examined as a witness, was sufficient—it the ordinary mode of swearing. *Rex* v. *Rew* R. & M. 302. [Littledale]

An indictment for perjury, assigned on a tion to the Lord Chancellor, to supersede a co sion of bankrupt, professing to set forth on substance of the petition, stated, "that at the s meetings before the commission, the petition clared openly, and in the presence and heari A B, assignee, &c.;"—the petition itself "that, at the several meetings before the co sioners," the petitioner declared, &c.: Held, no variance, because the word commission de an authority or trust exercised by persons,

therefore was synonymous with the term commissioners. *Rex* v. *Dudman*, 4 B. & C. 850, s. c. 7 D. & R. 324.

An indictment for perjury alleged—first, that the evidence on which the perjury was assigned, was given "in the Court of the Palace, &c. at Westminster;" but on the production of the record of the proceedings, it appeared, that the Court was described as "the Court of the Palace, &c. *of* Westminster," instead of "*at* Westminster;" and, secondly, it averred, that the cause in the court below came on to be tried, "and was then and there duly tried by a jury of the county;" but the record of the trial stated, "that the jury came of the neighbourhood of Westminster": Held, as to the first point, that there was no variance, as the King's Palace *of* Westminster, and *at* Westminster, were in effect the same; and, secondly, that as the cause was, in fact, tried by a jury of the neighbourhood, no county being mentioned in the record, it was no objection. *Rex* v. *Israel*, 3 D. & R. 234.

On an indictment for perjury, in a cause at Nisi Prius, it is no variance that the Nisi Prius record states the trial to have been on a day different from that stated in the indictment.

If the indictment state the trial to have been before one of the Judges (who in fact sat for the Lord Chief Justice,) and the Nisi Prius record state the trial to have been before the Lord Chief Justice; *semble*, that this is no variance.

If the indictment, in setting out the substance of oral evidence charged to be false, put "Mr." for "Mister," and "Mrs." for "Mistress"; this is no variance, though it should appear that the witness said "Mister" and "Mistress," and not "Mr." and "Mrs." *Rex* v. *Coppard*, 3 C. & P. 59, s. c. 1 M. & M. 118. [Tenterden]

An indictment, setting out the defendant's affidavit, made use of the expression "for securing 250*l*." The affidavit stated, "for securing the repayment of 250*l*.": Held, to be no variance; the meaning not being altered.

An indictment, setting out the defendant's affidavit, stated a particular fact to which he had sworn; and it then proceeded to falsify the fact, and to assign perjury thereon. The affidavit stated not only the fact, but certain reasons for it: Held, to be no variance, as the reasons after given did not qualify the fact itself, or alter the meaning. *Rex* v. *Callanan*, 5 Law J. M.C. 39, s. c. 6 B. & C. 102, s. c. 9 D. & R. 97.

An indictment for perjury, in setting out the record of a conviction at the Middlesex Sessions, stated the adjournment to have been made by C and A, B, C, and D, and others, their fellows, &c. justices; an examined copy of the record of conviction when produced, stated the adjournment to have been made by C, and E, F, G, and others, &c.: It was holden, that the variance was fatal, in the absence of parol evidence that the adjournment was made by the persons named in the indictment. *Rex* v. *Bellamy*, 1 R. & M. 171. [Abbott]

If an indictment for perjury charge that the defendant falsely swore to certain facts, and the deposition appear to be joint, and that his wife first deposes to the facts, and then the defendant swears that he is sure that A B is one of the persons who assaulted, &c.: this is no variance, as it is sufficient for the indictment to state the substance of what the defendant swore. *Rex* v. *Grindall*, 2 C. & P. 563. [Abbott]

If A be indicted for perjury, in swearing that he did not enter into a verbal agreement with B and C, for them to become joint dealers and co-partners in the trade or business of druggists; and it appear that in fact B was a druggist, keeping a shop with which A had nothing to do; but that A and C, being sworn brokers, could not trade, and therefore made speculations in drugs in B's name with his consent, he agreeing to divide profits and loss with A and C, this will not support the indictment, as this is not the sort of partnership denied by B upon oath. *Rex* v. *Tucker*, 2 C. & P. 500. [Abbott]

## PILOT.

[See SHIP and SHIPPING.]

## PIRACY.

It is not piracy to trade in slaves. [*Sed vide* Statute 5 Geo. 4.]

There is no time of peace with professed pirates. *Le Louis*, 2 Dods. 244.

The proceeds of property found on board a pirate ship, and condemned as droits of the Admiralty, granted to the original owners of the property upon a memorial to the Crown. *Helen*, 1 Hag. 142.

## PLEADING.

1. *IN GENERAL.*
2. *AT LAW.*
   - (A) DECLARATION.
     - (*a*) *In general.*
     - (*b*) *Title.*
     - (*c*) *Parties.*
     - (*d*) *Joinder of Counts.*
   - (B) PLEAS.
   - (C) REPLICATION.
3. *IN EQUITY.*
   - (A) BILL.
   - (B) ANSWER.
   - (C) PLEA.
   - (D) IMPERTINENCE AND SCANDAL.
4. *IN THE ECCLESIASTICAL COURTS.*

### 1. *IN GENERAL.*

[See PRACTICE and DEMURRER.]

In pleading, the rule that the allegation should be as extensive as the proof, is not indispensable. *West* v. *Andrews*, 1 B. & C. 77, s. c. 2 D. & R. 184.

General allegations in pleadings referring to particular facts, will be limited in the construction put upon them by the nature of those particular facts. *Doloret* v. *Rothschild*, 2 Law J. Chanc. 125.

An equivocal expression shall, in the first instance, be taken in the sense unfavourable to the party using it.

But if the other party plead over, the same expression shall be taken in the sense which will support the previous pleading.

Accordingly, a man covenanted that he had done no act "whereby" the estate in question could be affected in title. Breach assigned that, in fact, he had previously executed a certain deed between certain parties, "whereby" the estate was affected in title. The defendant pleaded over. The pleadings went on to demurrer. The defendant then contended that the breach was assigned in equivocal terms, because the word "whereby" might apply either to the deed itself, or merely to the execution of it by him; and if it were the first, it was no breach in him: Conceded, as to the equivocality; but held to have been cured by the pleading over. *Hobson* v. *Middleton*, 5 Law J. K.B. 160, s. c. 6 B. & C. 295.

Where the form of the plaintiff's declaration infers that the action is commenced by one mode of proceeding, and his replication, in answer to a plea of the Statute of Limitations, sets out a proceeding of another mode, for the purpose of shewing that the action was commenced in time, it is unnecessary for the defendant to rejoin as a fact, that the action was commenced by a mode of proceeding different from that set out in the replication.

Thus—Declaration, apparently in an action by original—A B "was attached," &c.

Plea—The Statute of Limitations.

Replication—A bill of Middlesex sued out, returned, and continued in time.

Rejoinder—Defective, but held to be of no consequence, as the replication was bad; for it did not shew a proceeding sufficient to maintain the declaration. *Lawrence* v. *Lewis*, 6 Law J. K.B. 243.

The mere practice of the Court cannot be pleaded. It is matter of regulation by motion only.

The issuing and returning a *ca. sa.*, in order to fix bail, is a legal necessity upon the plaintiff according to the legal interpretation given to the recognizance. The bail may therefore plead, that no *ca. sa.* has been issued and returned, as that is matter of law. And whether the *ca. sa.* has been issued into the right county, is also a matter of law, appearing on the face of the record, and may therefore be a question raised by the pleadings.

But, whether a *ca. sa.* has remained four clear days in the office of the sheriff before the return; or whether, in any other respect, it has been issued, lodged, and returned, according to the practice of the Court, are questions of mere practical regulation by the Court upon motion, and cannot be raised by the pleadings. *Sandland* v. *Procter*, 6 Law J. K.B. 138, s. c. 7 B. & C. 800.

An immaterial averment may be rejected as surplusage, provided the sentence will remain perfect, distinct, and sensible, without it, but not otherwise.

Accordingly, a count stated that a writ was sued out against the plaintiff marked for bail 90*l.*; [that he was arrested under it,] and [being so arrested and in custody] that he was forced and obliged to procure bail to answer the writ: It was held, that the words in brackets could not be rejected, because, if they were, nothing appeared to shew that the plaintiff was forced and obliged to give bail. *Berry* v. *Adamson*, 5 Law J. K.B. 215, s. c. 6 B. & C. 528.

In Scotch pleading, a defender not having by his defences raised an objection which might have be material to his case, has waived that objection. if in a subsequent proceeding he raises the questi and, a reference being made upon the point by Court to the Lord Ordinary, the pursuer does appeal against the order by which the referenc made, the right to insist upon the objection is stored. *Dingwall* v. *Gardner*, 3 Bligh, 72.

## 2. *AT LAW.*

### (A) DECLARATION.

#### (*a*) *In general.*

It is not essential for a declaration in debt aga a defendant in the custody of the sheriff, to sh that the process issued at the suit of the plai against the defendant. *Parker* v. *Drew*, 1 Ken.

If a plaintiff declares *de novo* on the removal cause by *habeas corpus* from an inferior to a supe court, he is not bound to declare in the same f of action in the superior court as he did in the ferior court. *Bowerbank* v. *Walker*, 2 Chit. 517

If, in an action on the case, the declaration aga an Earl state him to have been "summoned," stead of "attached," it is untenable. *Hunter Earl of De Loraine*, 2 Chit. 638.

A count in a declaration in an action on the c stated, that the defendant represented and affir to the plaintiff, that he, the defendant, was leg entitled to sell and dispose of certain goods, and quested the plaintiff to sell the same by pu auction; that the plaintiff, confiding in such presentation and affirmation, sold the same, after deducting certain expenses, paid over the sidue to the defendant; whereas the defendant ceived and defrauded the plaintiff in this—to that the defendant was not at the time of the legally entitled to sell and dispose of the goods the plaintiff then averred that an action was brou against him by the true owner, and in which recovered the value of the goods sold, which plaintiff was obliged to pay him, together with costs of the action; and assigned for breach, the defendant not regarding his duty in that bel refused to pay those sums to the plaintiff: H sufficient after verdict, although it was objected there was no averment that the defendant represe to the plaintiff that he was legally entitled to or that the goods were put up to sale at the req of the defendant, or on his retainer, and that t was no retainer shewn at the time of the reque put up the goods to sale. *Adamson* v. *Jarvis*, 5 J. C.P. 68, s. c. 4 Bing. 66.

A count charging a clerk with negligence in su ing his employers to be defrauded of sums of mo without specifying any in particular, is bad. H *more* v. *Wilks*, 3 C. & P. 364. [Tenterden]

An allegation in a declaration, that defen dammed up and diverted the water of a cer watercourse, and prevented it from flowing in s cient quantities as it was accustomed to flow, is ported by proof of an irregularity in the suppl water, by reason of the defendant's act; althou may appear, that the water is only occasionally layed in its passage, and never wholly or in withdrawn from the claimant. *Shears* v. *We* Law J. C.P. 3, s. c. 7 B. Mo. 345.

In case against an attorney for negligently

chasing an insufficient title, the declaration stated, that he was retained as attorney; and held good, without alleging the consideration. If diligence would have been ineffectual, the defendant must prove it. And so, if a declaration state the defendant to be an attorney of a particular court, the plaintiff must prove it, though it is admitted in his plea. *Bourne* v. *Diggles*, 2 Chit. 311.

Where a party is described in the process generally, he may be declared against as an administrator; the object of the writ being only to bring the defendant before the Court. *Watson* v. *Pilling*, 6 B. Mo. 66, s. c. 3 B. & B. 4.

By the special memorandum of a declaration, it was stated that the plaintiff, administratrix, on the 20th of January, brought her bill into the office of the clerk of the declarations of K.B., according to the course and practice of the Court, and filed the same as of Michaelmas term. Plea, that at the time of exhibiting the bill, the plaintiff was not administratrix, upon which issue was joined. It appeared that the defendant was neither an attorney, nor a prisoner in the custody of the marshal. The bill was delivered on the 20th of January. The letters of administration were granted on the 10th of January: Held, that, upon the issue joined, the verdict was properly found for the plaintiff, the latter having been administratrix at the time when the bill was exhibited. *Wooldridge* v. *Bishop*, 6 Law J. K.B. 101, s. c. 7 B. & C. 406.

(*b*) *Title.*

A declaration was entitled on a particular day in Hilary Term, 3 Geo. 4, being a day after the 29th of January, when the 4 Geo. 4. began: Held, that the declaration was good, because the whole of the term might, in law, be said to be in the third year of the reign. *Law* v. *Pugh*, 1 Law J. K.B. 188, s. c. 2 D. & R. 868.

Where a declaration was entitled of a wrong year, but the notice to appear in the following term was correctly stated: Held sufficient. *Goodtitle d. Ranger* v. *Roe*, 2 Chit. 172.

Where a declaration, entitled generally of Michaelmas Term, averred the cause of action to have arisen on a day subsequent to the commencement of the term,—it was holden no ground of error. *Ruston* v. *Owston*, 1 M'Clel. & Y. 202, s. c. 2 Bing. 469.

(*c*) *Parties.*

In the commencement of a declaration, the plaintiff's name was stated to be "James Toll Hutchins;" upon special demurrer, on the ground, that in the subsequent part he was called "said James" only, held sufficient, because *non constat* that "Toll" is part of the surname. *Hutchins* v. *Gilbie*, 2 Chit. 335.

Although several persons have been jointly held to bail, in an action for a tort, yet the plaintiff may declare separately against one of them. *Wilson* v. *Edwards*, 3 Law J. K.B. 107, s. c. 3 B. & C. 734, s. c. 5 D. & R. 622.

(*d*) *Joinder of Counts.*

Where a declaration contained a count alleging, "that defendant had received for plaintiff a sum of money, to wit, 10s., to be paid by defendant to plaintiff upon request, yet defendant, not regarding his duty, had converted and disposed thereof to his own use:" Held, that it appeared to be laid in assumpsit, though colourably in trover, and could not be joined with counts in case. *Orton* v. *Butler*, 2 Chit. 343.

A count which is, in substance, a count in assumpsit, cannot be joined to a count in trover.

An express averment of a promise is not necessary in order to constitute assumpsit.

Therefore, a count which stated that the plaintiff, at the request of defendant, had delivered to him certain goods to be taken care of by the defendant for reward to him; and that, in consideration thereof, the defendant undertook and agreed to take due and proper care of the goods, and to re-deliver them on request—was held to be in assumpsit; and, because it was joined to a count in trover, and general damages were given, judgment was arrested. *Corbet* v. *Packington, bart.* 5 Law J. K.B. 142, s. c. 6 B. & C. 268.

In an action against husband and wife, the misjoinder of counts is available on general demurrer. *May* v. *House*, 2 Chit. 697.

(B) PLEAS.

A plea to an action by the plaintiff, as executor, that the promises in the declaration were made jointly with plaintiff, is a plea in bar, and not a plea in abatement. *Moffat* v. *Van Mullingen*, 2 Chit. 539.

Where a special plea states matter which amounts to a total denial of the plaintiff's right of action at any time, it is bad upon demurrer, as amounting to the general issue. *Stevenson* v. *Addison*, 5 Law J. K.B. 205.

In a *quare impedit*, the Court refused to allow the defendant to traverse in pleading all the allegations in the count, but ordered that the plea should be directed to a particular point to which the merits seemed to be confined, viz. the contesting the validity of a certain deed on which the plaintiff's title rested. *Gully* v. *the Bishop of Exeter*, 6 Law J. C.P. 240, s. c. 5 Bing. 42, s. c. 2 M. & P. 105.

An allegation, though of itself immaterial, if stated as the basis of a proposition upon which the plea depends, becomes important, and, being negatived by the finding of the jury, defeats the plea. *Rex* v. *Peto*, 1 Y. & J. 37.

Where a plea professes to answer the whole declaration, but does not do so—*semble*, that the course for the plaintiff to take is to join issue on the plea, and that the judge at Nisi Prius may direct the jury to assess damages in respect of the part not answered by the plea. *Merrick* v. *Ellis*, 6 Law J. K.B. 257.

Where a plea refers expressly to the exception of another plea, and also contains an averment of performance of covenants in the said deed, which deed is set forth in the plea referred to, but not mentioned in the exception to that plea, the two pleas may be taken together. *Macdougal* v. *Robertson*, 2 Y. & J. 11.

(C) REPLICATION.

To an action for maliciously suing out a commission of bankruptcy, the defendant pleaded the plaintiff's trading, act of bankruptcy, and his being indebted in the sum of 100*l.* whereof, &c. on replication *de injuriâ*, the Court held the replication good, inasmuch as those facts constituted together but one entire proposition, and put in issue only one

point, namely, the bankruptcy. *O'Brien* v. *Saxon*, 2 B. & C. 908, s. c. 4 D. & R. 579.

To debt on bond conditioned to replace stock, with all dividends "which shall accrue due upon the same, from the date of the bond" upon three months' notice, the defendant pleaded, that plaintiff did not give three months' notice to replace the stock, with the dividends which would have become due for the same from the date of the bond. Replication alleged, that more than three months before action, plaintiff gave notice, at the expiration of three months, to replace the stock, with all dividends which had accrued due on the same from the date of the bond, and then went on to assign a breach in the non-transfer of the stock: Held, that the notice set out in the replication was sufficient; and that the assignment of the breach was unnecessary and informal, but that the objection could be taken only by way of special demurrer for duplicity. *Hudson* v. *Smith*, 6 Law J. K.B. 146, s. c. 1 M. & R. 489.

In an action on a judgment recovered, the defendant pleaded that the plaintiff sued out a *ca. sa.* against him, under and by virtue of which said writ the sheriff took and arrested him, and had him in custody for the debt and damages; the plaintiff replied, protesting the suing out and delivering the writ to the sheriff, and traversing that under and by virtue, &c. the sheriff took the defendant: Held, to be a good and sufficient allegation in the replication. *Savile* v. *Jackson*, 11 Price, 343.

In an action on a bond, the plaintiff may, under the 8 & 9 Wil. 3. c. 11, s. 8, suggest breaches at the conclusion of his replication. *Humphrey* v. *Rigby*, 2 Chit. 298.

Where the original action is for damages, a replication in *scire facias*, against bail praying judgment of the debt and damages, is not demurrable. *Roe* v. *Roe*, 2 Chit. 322.

A replication to a plea of set-off and judgment, that the party against whom it was recovered was taken in execution upon it, is good. *Taylor* v. *Waters*, 2 Chit. 303.

A replication to a plea to an inquisition, traversing possession of the goods by the assignees (in the terms of the plea which stated the facts,) and alleging that the assignees were not possessed of the said goods, is demurrable; but the Attorney General was permitted to amend, by withdrawing the replication and paying the costs. *Rex* v. *Evans*, 9 Price, 266.

### 3. *IN EQUITY.*

#### (A) BILL.

A plaintiff in equity must state his title in his bill, and, unless it is admitted by the defendant, must prove it. *Norbury* v. *Meade*, 3 Bligh, 211.

Demurrer, on the ground that there was no description, in the bill, of the plaintiff's place of abode.

Where words of local description were, in grammatical description, applicable either to the plaintiff, (whose place of abode was not otherwise mentioned in the bill,) or to a third person; they were held to apply to the former. *Rowley* v. *Eccles*, 2 Law J. Chanc. 69, s. c. 1 M. & R. 511.

*Semble*: That a bill, praying that the defendant may deliver to the plaintiff documents constituting the legal title to stock, which the former had agreed to transfer to the latter, and that the plaintiff m have the full benefit of that stock, may be mai tained. *Doloret* v. *Rothschild*, 2 Law J. Chanc. 1 s. c. 1 S. & S. 590.

A plaintiff may in one bill pray account of t estates; thus, if he be the residuary legatee of who is residuary legatee of A? *Turner* v. *Dou day*, 6 Mad. 94.

A bill filed by the residuary legatees, who also appointees of a share of another testator, is multifarious, though it be for an account of both tates. *Turner* v. *Robinson*, 1 S. & S. 313.

A bill is multifarious, if it prays discovery or lief in respect of a transaction with which one the defendants had no concern, and which has connexion with those other transactions in which is concerned. *Percival* v. *Blower*, 1 Law J. Chanc.

A bill stating that two distinct actions for li have been commenced against the plaintiff in equi to which he has put in pleas of justification, praying a discovery, and also one or more comm sions to examine witnesses abroad in aid of his fence at law, is multifarious. *Shackell* v. *Macaul* 3 Law J. Chanc. 27, s. c. 1 S. & S. 79.

It is multifarious for a bill to pray an account testator's estate, and to set aside sales made by executor and trustee to himself and to another p son. *Salvidge* v. *Hyde*, 1 Jac. 151.

Infants entitled as the next of kin to shares of intestate's estate, and of whom one, as his heir-law, was entitled to his real estate, filed their against the administratrix, charging that she entered, as natural guardian of the infant heir, possession of the real estate, and praying that might account for both the real and the personal tate of the intestate: Held, that the bill was mul farious. *Dunn* v. *Dunn*, 6 Law J. Chanc. 175.

A testatrix, after charging all her estates wit sum of 1,000*l.* in favour of A, devises Blacka specifically, and gives the rest of her real estate trustees in trust for A: a bill for the executio the trusts of the will is filed by A; but, in the p secution of the suit, no order is asked or made w respect to the devised estates: and the decree further directions relates merely to costs, and the raising of the pecuniary charge out of all estates of the testatrix: afterwards A files a bil revivor and supplement against both the real the personal representatives of a deceased de dant, who had been in possession of Blacka charging that he and they had received the r and profits of a tenement as being part of Blacka though in truth it was part of the premises dev to A: Held, that the character of the suit was changed by the limited decree which the plai took, and that such a bill of revivor and supplem cannot be demurred to as being multifarious, in lation to the matters affected by the previous ceedings. *Traherne* v. *Pinkney*, 2 Law J. Chanc.

A party is entitled to the benefit of any p which can be suggested by the bill, though it be expressly insisted upon by the pleadings. *Kno* v. *Clayton*, 2 Law J. Chanc. 181.

#### (B) ANSWER.

An answer disclaiming is liable to exceptions insufficiency. *Glassington* v. *Thwaites*, 3 Law Chanc. 112.

An answer to a negative plea must be confined to facts specially charged as evidence of the plaintiff's bill. *Thring* v. *Edgar*, 4 Law J. Chanc. 75, s. c. 2 S. & S. 274.

It is not a sufficient answer for a defendant to say, "that he has heard and believes it may be true, but he does not of his own knowledge know, &c." *Agar* v. *Bective*, 1 Law J. Chanc. 132.

It is a sufficient answer, to say, "that it may be true, for any thing this defendant knows to the contrary, that," &c. (repeating the words of the bill); "but this defendant is an utter stranger to all and every such matters, and cannot form any belief concerning them." It is not sufficient that a particular allegation in the bill is included in a previous general denial. *Amhurst* v. *King*, 3 Law J. Chanc. 90, s. c. 2 S. & S. 183.

An answer to a bill requiring the defendant to set forth the consideration he had given for a bill of exchange, stated that he had received it in the course of his trade as a banker, and that he had given no specific sum, because the payer had drawn several sums at different times on account of the bill: Held, that the answer was good. *Webster* v. *Threlfall*, 2 S. & S. 190.

If matter is charged by bill, which repels the defence by plea, the answer must refute the matter alleged in the former. *James* v. *Sadgrove*, 1 S. & S. 6.

A demurrer to part of a bill of discovery, and an answer to other part of the bill, the demurrer is overruled, if the answer extend to any of the facts covered by it. And there is no distinction, in this respect, between demurrers to bills for relief, and demurrers to bills for discovery only. *Corbett* v. *Hawkins*, 1 Y. & J. 421.

### (C) PLEA.

A plea is bad, if collateral or immaterial matter be stated as the bar pleaded, and that which would have constituted a bar, is introduced only by way of subsequent averment. *Butten* v. *Butten*, 3 Law J. Chanc. 150.

Where the allegations in the bill are not absolute, but conditional, the facts, as alleged, though not contradicted by the plea, cannot be taken for granted by the Court in deciding on the pleas. *Corbett* v. *Corbett*, 1 Law J. Chanc. 26.

A plea of circumstances, from which a legal conveyance is to be presumed, is bad, even where the plea of a legal conveyance would have been good. *Welch* v. *Woodcock*, 4 Law J. Chanc. 204.

A double plea cannot be allowed in part, but may be ordered to stand as an answer—*Semble*, that a plea to so much of the accounts sought by the bill, as are the subject of certain deeds stated in the plea, is bad, as not expressing sufficiently how much of the deed is intended to be covered by the plea. *Cust* v. *Boode*, 3 Law J. Chanc. 17.

Where a bill alleges, that there are no outstanding terms, and also that the plaintiff has not in his possession the deeds which establish his title, a plea that there are no outstanding terms is bad, even though there should not be annexed to the bill the requisite affidavit, that the plaintiff has not the deeds in his possession. *Hooks* v. *Dormer*, 1 Law J. Chanc. 190, s. c. 1 S. & S. 227.

Bankruptcy may be pleaded to a bill, although the commission may have issued subsequent to its being filed. *Turner* v. *Robinson*, 1 S. & S. 3.

A plea of no partner may be good; yet, where unaccompanied by an answer and discovery as to the circumstances charged as evidence of the partnership, it was overruled. *Saunders* v. *King*, 6 Mad. 61.

A plea of an instrument is bad in form, if supported by an answer denying the fraud, where the allegations of fraud amount merely to a charge, that the instrument is, in contemplation of law, fraudulent, and do not state it to have been procured by fraud. *Windham* v. *Whiting*, 4 Law J. Chanc. 169.

A bill seeking an account of personal estate, a plea to so much of it as sought an account or discovery (further and other than was in the plea set forth) of that personal estate, held to be good in point of form. *Salkeld* v. *Science*, 3 Law J. Chanc. 19.

A plea to a bill by a person suing as Earl of S, states that he is not Earl of S, but that the defendant is Earl of S and K, (the earldom being a Scotch dignity), and avers that the plaintiff is the natural son of the late Earl of S and K, and M M, who were resident and domiciled in England at the time of his birth, and were not married until several years after; overruled, as there was no averment, either that the title of S and K, was the same as that of S, or that the plaintiff was born in England—*Quære*, whether the pleas should conclude in abatement or in bar? *Strathmore* v. *Strathmore*, 2 J. & W. 541.

To a bill filed for the production of the title deeds, and an account of the rents and profits of certain land, which the plaintiff claims under the will of J W; the defendant puts in a plea, stating that J W never was seised, or had any power of disposing of the premises, and setting forth a series of indentures, commencing from a date prior to that of J W's will, by which indentures, the persons, who are recited to have good power to convey, do convey the premises from time to time, so as to vest the fee ultimately in the defendant: Held, that the plea is double; that the plea of title in the defendant, even if it were single, would be bad, for want of averments of the title of the persons, who respectively purport by the indentures to convey: that the proper defence would have been by a plea, stating a title in the plaintiff, and averring that J W never was seised of the premises in question. *Lavice* v. *Croxton*, 3 Law J. Chanc. 201.

Where a bill, by creditors of a person entitled to a legacy, charges an assignment of the legacy to the defendant or his testator, under which the defendant claims some interest in it, and also charges that the defendant claims an interest in it by some other title, which he is called upon to set forth; and further, that the assignment, if any, was without consideration; a plea, negativing merely the assignment to the defendant or his testator, or in trust for either of them, is bad, as not displacing the whole equity set up by the bill. ——— v. *Kenny*, 1 Law J. Chanc. 18.

A plea to all the relief, and all the discovery, except certain interrogatories, which interrogatories were accompanied with an answer which did not go to any material point, overruled.

*Aliter*, where an answer is to matter which would have repelled the defence by plea. *James* v. *Sadgrove*, 1 S. & S. 4.

A plea to a part of a bill, followed by an answer to the residue of it, is overruled by the answer, if the matter pleaded could have been a bar to the whole bill. Leave given to take a plea and answer off the file, and to put in a new plea. *Watkins* v. *Stone*, 4 Law J. Chanc. 222, s. c. 2 S. & S. 560.

A bill which makes two cases,—alleging first, that a deed is wholly void; and secondly, that, if it is not wholly void, a particular covenant in it is void,—cannot be met by a single plea. A plea of a deed, which is impeached by the bill on the ground of fraud, ought not to contain averments denying the particular circumstances of fraud charged in the bill. *Nicholson* v. *Berfield*, 4 Law J. Chanc. 10.

A bill being filed by a person in the character of a creditor of a testatrix, the defendant, executor,—to the whole of the bill, except the allegation that the plaintiff is a creditor, and the discovery prayed upon that point,—pleads, that the testatrix was not at the time of her death indebted to the plaintiff; and supports his plea by an answer to the residue of the bill, in which he denies that the testatrix was in any manner indebted to the plaintiff: Held, that the plea is overruled by the answer.

A plea, which purports to be only to a part of the bill, is overruled by an answer to the allegations excepted from the plea, if the matter of the plea, supposing it to have been well pleaded in point of form, would have been a good defence to the whole of the bill. *Thring* v. *Edgar*, 4 Law J. Chanc. 75, s. c. 2 S. & S. 274.

A bill praying for an account and charging fraud, the defendant answers to the whole of it, except certain parts pleaded to; and then in bar to the relief, and to a few specified questions, he pleads a release, with averments negativing fraud: Held, that the plea was overruled by the answer, because the answer extended beyond the allegations of equitable matter, which would have avoided the plea, though it did not go to any of the questions specified in the plea. *Williams* v. *Smith*, 3 Law J. Chanc. 3.

A bill is filed, impeaching a conveyance, on the ground of fraud: to the whole of that bill the defendant pleads the conveyance, negativing the fraud by averments, and then in support of the plea answering the various allegations of fraud: Held, that such a plea is overruled by the answer. In such cases the plea ought to be to the whole of the relief, and to the whole of the discovery, except so much of it as must be given in support of the plea. *Lloyd* v. *Pipler*, 3 Law J. Chanc. 143.

To a bill for discovery and commissions in aid of an action at law, it is a good plea to shew that the plaintiff has not a valid cause of action. *Mendizabal* v. *Machado*, 5 Law J. Chanc. 20, s. c. 1 Sim. 68.

A plea of purchase for a valuable consideration, without notice, is good, if it denies notice generally. *Pennington* v. *Beechey*, 2 S. & S. 282.

To the amendments of a bill of revivor and supplement, which was filed in 1821, and amended in 1822, the defendant pleads that the original cause became abated in 1805, and that no proceedings have been since had thereon: such a plea held to be bad. *Ferrand* v. *Pelham*, 2 Law J. Chanc. 2.

A reversioner files a bill against a defendant, who claims under a recovery suffered by a prior in tail, and charges, that, if any recovery wa fered, the uses of it were so declared, that them the plaintiff had title, and that so it appear, if the defendant would produce the ments in his possession: Held, that a plea recovery suffered, and of the deed leading th of it, was good, though not supported by an swer denying the above-mentioned charges. *kett* v. *Cavendish*, 3 Law J. Chanc. 1.

To a bill stating a settlement, under which a particular estate in A, the plaintiff was ent certain hereditaments, and praying an acco rents, and a delivery of the title-deeds, the de pleads, that A alleged that she was seised in that she was in quiet possession—that she co to the defendant's devisor in consideration riage—and that devisor had, before his marri notice of the plaintiff's title: Held, that the bad, being destroyed by the implied notice the law infers from the facts stated on the that the plea ought to have contained an av that A was seised in fee of the premises.

*Semble*, That the objection of the Statute mitations cannot be taken by demurrer, but t statute must be pleaded.

*Quære*, Whether a defendant can avail him a demurrer to part of the bill, and a plea to part of it, which plea, though expressed to to part of the bill, would, if valid, be a bar whole bill. *Jackson* v. *Rowe*, 4 Law J. Chan s. c. 2 S, & S. 472.

To a bill, inquiring as to the execution of a a plea by the trustee, that the accounts are and a release, is untenable, unless it avers t matters inquired into appear on the face of count. *Clarke* v. *Ormonde*, 1 Jac. 116.

A bill being filed by two plaintiffs, a plea sh that one of them has not such an interest matters of the suit as entitles him to be a plai a good defence to the whole bill. *Maksp Haythorne*, 5 Law J. Chanc. 147.

A bill being filed against two parties, pray counts and relief against both; after one of fendants had put in an answer, an agreem made between the plaintiff and the two defe by their agent, who is also interested as a p the agreement, containing various provisio the transactions of mortgage and partners mines, which were the subject of the bill, other matters of agreement; and providing th proceedings in law and equity shall cease b the plaintiff and the two defendants." This ment, that all proceedings, &c., shall cess cannot be pleaded in bar to the whole suit defendant who has not answered.

Such a plea may operate to displace the eq relief sought by the bill, so far as it regar party who pleads; but as a bar to the whole cannot be pleaded.

Such a plea is, in effect, a plea of one part agreement in bar of the whole suit, which is missible.

The object of a plea to a bill in equity is, duce the subject matter of litigation to a point, and to avoid the expense which would curred by entering into all the subject-matter dispute, which is not affected by a plea of an

ment, making provisions as to the subjects of the suit in a way which the decree in the cause could not effect.

If an agreement be made subsequent to the filing of a bill between the parties to the suit and other parties, for the purpose of putting an end to the proceedings in the suit, and other purposes, it cannot be pleaded in bar to the bill by one of the parties. If it could be so pleaded, it must contain averments that the conditions of the agreement have been performed, or from circumstances could not be performed; and that the other parties, not joining in the plea, are ready to perform the agreement; and events by which the agreement is affected ought also to be noticed in the averments. But *semble*, that, in such a case, the Court, not having the power to compel the performance of the agreement on the plea, a bill must be filed for the purpose, including all the parties, and all the subjects of the agreement.

It lies upon the party seeking the performance to take the steps necessary to enforce it, and not upon the other party bound by the agreement, being plaintiff in the original suit, to intercept the effect of the agreement by filing a supplemental bill.

An executory agreement is a cause of action, and cannot be pleaded in bar to another cause of action.

Such an agreement is totally different from a release under seal, but, considered as in the nature of a release, it could only be applied to such part of the relief sought by the bill, as relates to the questions at issue between the plaintiff and the party who proposes to have the benefit of the agreement by way of plea. It could not be pleaded in bar to the whole relief; for the cause must, at all events, proceed as to the relief sought against the other parties.

Such a plea, containing no averments that all the parties to the agreement are ready to perform it, it is not only insufficient for want of proper averments, but could not be a good plea by any amendments; because it is not a proper subject of plea, but a mere right of action, and cannot be a bar to another suit instituted by the party against whom the right of action is claimed, especially where a long time has elapsed between the date of the agreement and the pleading of it. *Wood* v. *Rowe*, 2 Bligh, 595-6.

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### (D) IMPERTINENCE AND SCANDAL.

A bill of charges for goods sold, which setting out *item* by *item* in a schedule to an answer to a bill filed for a discovery of the consideration given for a bill of exchange, requiring the defendant to set forth a *full, true, and particular account* of the consideration, on every part of it, with the periods when, and places where, &c., is impertinent. *Morris* v. *Elliott*, 8 Price, 674.

A schedule, setting forth detailed accounts of various transactions, where the bill asks only for the general results of some of the accounts, and not their particular items, will be suppressed as impertinent.

Such a schedule will be suppressed *in toto*, even although some of the particulars contained in it are asked for by the bill, if these particulars are not clearly and conveniently separable from the impertinent matter.

The Court will not expunge, as impertinent, matter contained in the answer, which, though not necessary, and not called for by the bill, is in itself not altogether irrelevant, and might be useful to the defendant, in case his answer were read against him, at law. *Parker* v. *Farlie*, 1 Law J. Chanc. 19, s. c. 1 S. & S. 295.

A master ought not to report a few words in a passage to be impertinent, because these words may be superfluous.

Neither is it impertinent, after stating that certain applications have been made to the defendant, to set forth particular letters in which the applications were contained. *Del Ponte* v. *De Tastet*, 2 Law J. Chanc. 35.

Mere prolixity of expression does not constitute impertinence. *Anon.* 2 Law J. Chanc. 143.

Superfluous or prolix clauses or words in a sentence, are not to be deemed impertinent. *Anon.* 2 Law J. Chanc. 108.

To constitute impertinence, the matter alleged must not be material. *Bailey* v. *Williams*, 1 M'Clel. & Y. 334.

It is not impertinent to set forth verbatim in an answer, proceedings in another suit, which are material to the question between the parties in the suit in which the answer is filed. *Low* v. *Williams*, 4 Law J. Chanc. 199, s. c. 2 S. & S. 574.

### 4. *IN THE ECCLESIASTICAL COURTS.*

A rejoinder to a responsive allegation should only contradict or explain the facts alleged in the allegation to which it rejoins, and those *novitor presenta* to the proponent's knowledge, though the Court will in its discretion admit those facts material to the question at issue. *Dew* v. *Clark*, 2 Add. 102.

Slight circumstances may be pleaded in a testamentary cause, especially where the case set up by the other party is a case of fraud. *Lock* v. *Denner*, 1 Add. 353.

In pleading, allegations should be compressed into the smallest compass within which all relevant facts can be fairly and adequately stated, especially in cases which contain a great quantity of matter. *Locke* v. *Denner*, 1 Add. 362.

Circumstances impeaching the character or credit of a witness may be pleaded. *Locke* v. *Denner*, 1 Add. 361.

Explanatory articles in a responsive allegation will be admitted. *Roper* v. *Roper*, 3 Phill. 97.

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## POOR.

[See CHURCHWARDENS AND OVERSEERS, RATE, and SESSIONS.]

(A) RELIEF.
(B) SETTLEMENT.
(*a*) *By Birth.*
(*b*) *By Marriage.*
(*c*) *By Hiring and Service.*
1. *Contract*
2. *Hiring generally.*
3. *Conditional and exceptive Hiring.*
4. *Service.*
(*d*) *By Apprenticeship.*
1. *Contract.*

2. *Indenture.*
3. *Dissolution.*
4. *Service.*

(*e*) *By Tenement.*
1. *What is a sufficient Tenement.*
2. *Value.*
3. *Occupation.*
4. *Residence.*
5. *Payment of Rent.*
6. *Evidence.*

(*f*) *By Estate.*
(*g*) *By Payment of Taxes.*
(*h*) *By serving an Office.*

(C) CERTIFICATE.
(D) REMOVAL.
(E) EXAMINATION OF PAUPERS.

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## (A) RELIEF.

The parish in which an accident happens to a poor person, in the parish liable to afford assistance.

That liability is not altered by the removing of the poor person out of the parish.

In case of refusal to afford assistance in that parish, it may be given in another; and the parish originally liable shall continue so.

Or, in case of extreme necessity, (as, where the nearest house may be in another parish,) the assistance may be given in the other parish; and the parish in which the accident actually happened shall still be liable. *Tomlinson* v. *Bentall*, 5 Law J. M.C. 7, s. c. 5 B. & C. 758, s. c. 8 D. & R. 493.

It is incumbent on the overseers of the poor to use their utmost endeavours to obtain employment for their able-bodied poor.

*Semble*, That able-bodied poor, though unemployed, are not entitled to parochial relief in money, as impotent poor within the meaning of 43 Eliz.

*Semble*, That overseers of the poor can only legally give relief to able-bodied poor by setting them to work, and paying them for their labour. *Rex* v. *Collett*, 2 B. & C. 324, s. c. 3 D. & R. 582.

A parish to which a pauper is traced, as being the last parish to which he can be traced, and the first in which he is heard of, is not, on that account, fixed with him until his settlement be ascertained. That parish, in common with others, is liable only so long as he remains in the parish.

*Semble*, That relief given to a pauper is no evidence of his being settled in the relieving parish. *Rex* v. *Trowbridge*, 6 Law J. M.C. 7, s. c. 7 B. & C. 250, 1 M. & R. 7.

An order of justices for the payment of the maintenance of a pauper lunatic, which states that such justices, "after due examination had on oath, having adjudged the legal place of settlement, do direct, &c." sufficiently affirms the fact of an adjudication, to satisfy the statute 5 Geo. 4, c. 71, s. 3.

But where a pauper lunatic, whose settlement was unknown, has been sent to the county lunatic asylum, according to the provisions of the statute 48 Geo. 3, c. 96, s. 90, the justices who subsequently adjudge the legal place of settlement of such pauper, have no power to make a retrospective order upon the parish for the payment of maintenance during the time of his confinement in the asylum, antecedent to their adjudication: The charges so incurred must be borne by the county. *Rex* v. *Maudlin*, 6 Law J. M.C. 76, s. c. 8 B. & C. 78, s. c. 2 M. & R. 136.

## (B) SETTLEMENT.

### (*a*) *By Birth.*

An illegitimate child born in an extra-parochial place has not any settlement by birth, and, being a bastard, can derive none from its parent, for it is not entitled to follow the settlement of its mother longer than the purpose of nurture require it. *Rex* v. *St. Nicholas, Leicester*, 2 B. & C. 889, s. c. 4 D. & R. 462.

The fact of a person being at the age of four years in the workhouse of a parish, and kept there for several years afterwards, is not of itself sufficient to compel the Sessions to presume that the person was born there.

Nor would the mere fact of baptism in the parish of itself compel such a presumption.

A parish to which a pauper is traced, as being the last parish to which he can be traced, and the first in which he is heard of, is not, on that account, fixed with him until his settlement be ascertained. That parish, in common with others, is liable only so long as he remains in the parish. *Rex* v. *Trowbridge*, 5 Law J. M.C. 154, s. c. 7 B. & C. 252.

When an infant had enlisted into the marines and was discharged from that service, and returned to his family before he attained twenty-one years of age: Held, that he was not emancipated. *Rex* v. *Rotherfield Greys*, 1 B. & C. 345, s. c. 2 D. & R. 62[illegible]

During minority, a person cannot be emancipated unless he marry, and thus become the head of a family, or contract some relation which is altogether inconsistent with, and wholly excludes the parental control.

The enlisting in the army, and thus becoming subject to the Crown, is the contracting of such a relation; the authority of the parent being entirely superseded thereby.

But the engaging to serve on board a ship trading to foreign parts, for a time which would cover the minority, is not the contracting of such a relation.

A pauper under age, hired himself by contract to serve on board a ship trading to Newfoundland. While he was so serving, and before he attained twenty-one, his father acquired a new settlement; after he had attained twenty-one, the pauper returned to his father's house: Held, that the pauper was not emancipated when his father acquired the new settlement, and that his settlement shifted with that of his father. *Rex* v. *Lytchet Matravers*, 6 Law J. M.C. 11, s. c. 7 B. & C. 226, s. c. 1 M. & R. 2[illegible]

A pauper serving as a mariner, either in a king's ship or in a private vessel, at the time of his attaining the age of twenty-one, will not be deemed to continue a part of his father's family subsequent to that period; and, therefore, no new settlement acquired by his father afterwards will be communicated to him. *The King* v. *Lawford*, 6 Law J. M.C. 11[illegible] s. c. 8 B. & C. 271.

### (*b*) *By Marriage.*

A valid marriage, fraudulently brought about for the purposes of settlement, is, nevertheless, binding for all purposes of settlement. *Rex* v. *Birmingham*, [illegible] Law J. M.C. 67, s. c. 8 B. & C. 29, s. c. 2 M. & R. 2[illegible]

The wife and children of an Irishman, who has no settlement in England, and absconds leaving them chargeable, must be removed to the place of the wife's last legal settlement, and cannot be passed to Ireland under the 59 Geo. 3, c. 12, s. 33. *Rex* v. *Cottingham*, 6 Law J. M.C. 37, s. c. 7 B. & C. 615, s. c. 1 M. & R. 439.

(*c*) *By Hiring and Service.*

1. *Contract.*

An infant born in marriage and unemancipated, may gain a settlement by hiring and service with a parent. *Rex* v. *Chillesford*, 3 Law J. K.B. 148, s. c. 4 B. & C. 94, s. c. 6 D. & R. 161.

An unemancipated son may acquire a settlement by a *bonâ fide* contract of hiring and service for a year with his father, in a parish where the latter has no settlement, notwithstanding the 3 & 4 W. and M. c. 11. *Rex* v. *Winslow*, 6 D. & R. 168.

The pauper was hired by one of the superintendants of the Royal Military College at Sandhurst, at 16*s.* a week, and two suits of clothes per annum; to give a month's notice if he wished to leave, but to be dismissed for misconduct at any time.

The college is exempt from poor-rates, and pays no taxes for its servants. The pauper remained a year in the service, boarding and lodging in the college: Held, that he acquired a settlement in Sandhurst. *Rex* v. *Sandhurst*, 6 Law J. M.C. 15, s. c. 7 B. & C. 557, s. c. 1 M. & R. 95.

To confer a settlement by hiring and service, there must be an entire year's service, under a contract of hiring. Accordingly, the pauper, when about fourteen years of age, being desirous of being apprenticed to a shoemaker, his father agreed with one J T to give him a guinea to teach his son the trade of &c., the father finding the pauper lodging, &c. The pauper served the whole twelve months under that contract: there was no indenture, but the pauper was considered as an apprentice. The pauper's father, at the end of the year, came to an agreement with J T, that the pauper should work for J T for twelve months, making shoes at &c. the first half year, and at &c. the remaining half year. The pauper, after having worked the first half year under that agreement, left, and worked elsewhere: Held, that the pauper had gained no settlement, inasmuch as the first contract created only the relation of teacher and scholar; and the service under it, not being under a contract of hiring, could not be coupled with the subsequent service. *Rex* v. *St. Mary, Kidwelly*, 2 B. & C. 750, s. c. 4 D. & R. 309.

And the relation of master and servant must subsist between the parties. Therefore, where a pauper hired himself for three years, at 20*l.* per annum, as a looker, knowing that his master had not sufficient employment for him, and it was agreed that he should serve another master at his leisure as a looker: Held, although he served the former master three years, that the relation of master and servant did not exist between the parties, so as to entitle the pauper to a settlement under such a hiring. *Rex* v. *Lydd*, 2 B. & C. 754, s. c. 4 D. & R. 295.

Where apprenticeship is intended between the parties, but the contract is defective for the purpose of apprenticeship, it cannot be treated as a contract for hiring and service; nor will a service under it confer a settlement.

The question of intention is to be collected from all the circumstances; no particular form of words being necessary to create an apprenticeship.

A premium to the master is not a necessary ingredient; though the giving of a premium may be a strong circumstance to infer an intended apprenticeship.

A shoemaker proposed to the mother of a boy to take him to learn his business. The boy was to serve four years, was to board and lodge with his mother, and was to have half of what he earned. The mother consented, and the boy served four years upon those terms. No indentures were executed, *on account of the poverty of the mother*; and no premium was paid: Held, that this was not a contract of hiring and service, but a defective contract of apprenticeship, and that the pauper gained no settlement by service under it. *Rex* v. *St. Margaret's, King's Lynn*, 5 Law J. M.C. 18, s. c. 6 B. & C. 97, s. c. 9 D. & R. 160.

Pauper "was hired" by his uncle, a carpenter, "to learn his trade," and "was to do any other work as well as that of a carpenter." His uncle was to find him part of his food and clothing, but he was to lodge with his father. Pauper served his uncle on those terms five years. At the end of two years it was proposed to draw up indentures, to exempt pauper from the militia; but none ever were drawn: Held, that this was not a contract of hiring and service, but an imperfect contract of apprenticeship, and that service under it conferred no settlement. *Rex* v. *Coombe*, 6 Law J. M.C. 105, s. c. 8 B. & C. 82, s. c. 2 M. & R. 30.

A pauper was hired three weeks before Martinmas, to go into the service a week after Martinmas, at 4*l.* wages, and received 1*s.* earnest, without any time mentioned for duration of the service. The pauper entered the service under the above hiring; and on the same day his master told him it was not the custom in that parish to hire servants for more than fifty-one weeks; that he forgot to mention it when he hired him; and, therefore, if he had no objection, he would hire him again then for fifty-one weeks at the same wages, and give him another shilling for earnest. The pauper accepted the earnest, and served till the day after Martinmas, 1818. There was not, therefore, a year's service: The Sessions held, there was a dissolution of the original contract, and not a dispensation with the week's service. This is a question of fact; and the Court of King's Bench refused to disturb their decision. *Rex* v. *Bottesford*, 3 Law J. K.B. 152, s. c. 4 B. & C. 84, s. c. 6 D. & R. 99.

2. *Hiring generally.*

A B having hired a pauper to serve her for part of a year, before the expiration of the time for which he had been hired, applied to the pauper to continue with her, which he agreed to do, nothing being then said as to the time for which he was hired. Soon afterwards, A B said to the pauper, "I have hired you, but mentioned no time; remember, that you are hired for fifty-one weeks;" to which the pauper assented: Held, that this was such a yearly hiring and service as to confer a settlement on the pauper. *Rex* v. *Market Bosworth*, 2 B. & C. 157, s. c. 4 D. & R. 306.

A boy about ten years old took a place under a general hiring, and his master supplied him with meat and clothes, but gave no wages; the boy re-

mained two years on these terms: The Court held, that as there was no yearly hiring, the pauper had gained no settlement by the service. *Rex* v. *Christs Parish, in York*, 3 B. & C. 459, s. c. 5 D. & R. 314.

A year's service, under a hiring at so much a week in the winter, and so much a week in the summer, is not sufficient to confer a settlement. *Rex* v. *Rolvenden*, 6 Law J. M.C. 60, s. c. 1 M. & R. 689.

A hiring at so much a week in the winter, and so much a week in the summer, is not of itself a yearly hiring; nor can it confer a settlement, unless there be other circumstances from which the intention of a yearly hiring may be inferred. *Rex* v. *Warminster*, 5 Law J. K.B. 12, s. c. 6 B. & C. 77, s. c. 9 D. & R. 70.

Upon a special case, the Court of Quarter Sessions found, that a pauper hired himself as ostler to an innkeeper, that no earnest or wages were given, but he was to have what he could get as ostler, and he lodged and boarded at his master's house, and that either the master or servant might have determined the service when they pleased; it was held, that, upon this finding, this latter stipulation must be taken to have been part of the contract between the parties, and, consequently, that there was not any general or yearly hiring, and that no settlement was gained by serving under it. *Rex* v. *Great Bowden*, 6 Law J. M.C. 17, s. c. 7 B. & C. 249, s. c. 1 M. & R. 18.

### 3. *Conditional and Exceptive Hiring.*

Just before the end of the first year's service, the master being about to remove to another parish, B asked the pauper if he would go with him, to which the latter said he had no objection; but the master added, "I am afraid you will not be strong enough for the work there, but try." The pauper went, and served until within ten days of the year: Held, that it was a conditional hiring, and serving for forty days under it, gained a settlement in B. *Rex* v. *Newchurch*, 2 D. & R. 790.

By an indenture, A B did hire and retain C D, as a workman or servant, to be employed in a certain colliery, for the term of one whole year, at certain wages in the indenture mentioned; and A B did covenant, for every good and sufficient day's work, to pay C D a certain sum: in consideration thereof, C D agreed to perform and obey A B's orders and directions; and in default thereof, to forfeit the sum of 10s. 6d. for every act of disobedience: and the indenture contained a further proviso, that no covenant or clause therein contained should be construed to divest any magistrate from any jurisdiction which the law hath given to such justices over master and servant; but, on the contrary, that each of the parties should be at liberty, upon any breach of covenant, to require the assistance of any magistrate to compel the performance, or punish any breach of such covenants: and it was further covenanted, that in case A B should think it necessary, at or about Christmas, to repair or amend any machines belonging to the said colliery, or to do any other thing which the said A B should deem expedient, that then it should be lawful for him to stop the working at the colliery, for any time not exceeding, in the whole, seven days, without paying any wages, save and except C D should be employed by A B in any work: Held, under the ind that the actual service for an entire year e C D to a settlement, it being a conditional, n an exceptive hiring. *Rex* v. *Byker*, 2 B. & C s. c. 3 D. & R. 330.

A reservation, in a yearly hiring, for the to have "two or three days to see her frien an exceptive hiring, and confers no settlemen v. *Leamington Priors*, 8 D. & R. 239.

A, a pauper, agreed with C, a farmer, t him as a servant in husbandry, from Michael the following Michaelmas, at a certain sum pe for the winter half year, and another sum summer half year; with a proviso, that A have a month in harvest to himself; and if his master could not agree for the harvest mo the pauper, might harvest where he pleased. ever, C, before the commencement of the offered A 5*l.* for the month, which he ag accept, and accordingly served the whole Held, that this was an exceptive, and not a tional hiring; consequently, the pauper gained no settlement. *Rex* v. *Althorne*, 2 112, s. c. 3 D. & R. 375.

By an agreement between A B and C D, a it was agreed that C D should work in a for one year, on the following terms:— should work for the whole year, except du days at Christmas, when C D was not to nor to pay any penalty for not working; and further agreed, that during the working day year, he was to receive 2*s.* 6*d.* per day; and fault of doing any work, he was to forfeit penalty for his negligence; and further, th was not bound to work for the whole day, bu such quantity of work as was equal to a ful work; and as soon as that was done, he mi where he pleased. The pauper served one Held, that C D did not gain a settlement this agreement, it being an exceptive hiring v. *Gateshead*, 3 D. & R. 333, n.

A nephew contracted to serve his uncle there was work for him to do; and the latter took to employ him, and to pay him wages he had work; and when there was no work was to be no payment of wages, but he mi work from other people: Held, that this was ceptive hiring; that the pauper not having for his master for any whole year, he had ga settlement. *Rex* v. *Polesworth*, 2 B. & C. 71 4 D. & R. 260.

If, at the time of entering into a contrac year's service, a militia-man does not comm the fact of his being in the militia, the hirin year will not be considered such a hiring serve for the purpose of a settlement. *Rex* v. *worthy*, 5 Law J. M.C. 62, s. c. 6 B. & C. 2

### 4. *Service.*

The forty days residence necessary to o settlement by hiring and service, may be und ferent yearly hirings, but must be within the c of a year. *Rex* v. *Findon*, 3 Law J. K.B. 15 4 B. & C. 91, s. c. 6 D. & R. 116.

A pauper being settled in A, was hired by B, for a year; the whole of which service h formed in B. Before the expiration of the y again hired him for the succeeding year, under

hiring the pauper served about half a year in B, and then removed with his master to S, where he finished his service: Held, although he slept the last forty nights in S, that he had not, under the 3 & 4 W. and M. c. 11, gained a settlement by hiring and service in the parish of S. *Rex* v. *Apethorpe*, 2 B. & C. 892, s. c. 4 D. & R. 487.

Where a servant had been committed, at the instance of his master, for one month's imprisonment, under the 20 Geo. 2, c. 19, for misconduct: Held, to be such an abiding in his master's service, within the meaning of the 8 & 9 W. 3, c. 30, as to confer a settlement on him, by serving his master eleven months, exclusive of the time of his imprisonment. *Rex* v. *Hallow*, 2 B. & C. 739, s. c. 4 D. & R. 299.

(*d*) *By Apprenticeship.*

1. *Contract.*

Where, on the incorporation of parishes, a guardian of the poor was appointed, pursuant to the 22 Geo. 3, c. 83,—it was holden, that the churchwardens and overseers might bind paupers as apprentices without the guardian's signature to the indentures. *Rex* v. *Lutterworth*, 3 B. & C. 487, s. c. 5 D. & R. 343.

A pauper had been apprenticed by the parish, to a person resident at a place within the same county where the justices had exclusive jurisdiction: On a question of settlement, it was holden, that the indenture was invalid for want of notice to the overseers of the latter place, of the intention to bind such apprentice, as directed by the 56 Geo. 3, c. 139, and consequently the pauper gained no settlement under it—(Abbott C. J. *dissent.*) *Rex* v. *Newark-upon-Trent*, 3 B. & C. 59, s. c. 4 D. & R. 745.

Where, upon the binding of an apprentice out of a parish, a part of the premium or expense has been paid from the parochial funds, the indenture of apprenticeship, according to the provisions of the statute 56 Geo. 3, c. 139, s. 11, will be void, and no settlement will be acquired under it, unless it shall be approved of under the *seals*, as well as the hands, of two Justices of the Peace. *Rex* v. *Stoke Damerel*, 6 Law J. M.C. 28, s. c. 7 B. & C. 563, s. c. 1 M. & R. 458.

Fraud and collusion between the parents and master with respect to the binding of a parish apprentice, whose indentures have been duly allowed by two Justices, according to the provisions of the statute of Elizabeth, c. 43, are not sufficient to warrant the Quarter Sessions in defeating a settlement under those indentures. *Rex* v. *Great Sheepy*, 6 Law J. M.C. 75, s. c. 8 B. & C. 74. s. c. 2 M. & R. 286.

An apprentice may be bound for seven years to learn two trades of two masters; serving one master for part of the time, and the other for the remainder. *Rex* v. *Louth*, 6 Law J. M.C. 107, s. c. 8 B. & C. 247, s. c. 2 M. & R. 273.

2. *Indenture.*

By indenture of apprenticeship, a pauper was bound apprentice under the order and with the consent of two Justices, which order for the binding was regular, and referred to in the indenture, but did not specify the day of the date therefore: Held, that the indenture was void for not setting out the date of the magistrates' order of apprenticeship, as directed by the 56 Geo. 3, c. 139, and therefore, that no settlement was gained by service under this indenture. *Rex* v. *Bawberch*, 2 B. & C. 222, s. c. 3 D. & R. 340.

3. *Dissolution.*

A pauper was bound apprentice till 21, to one M D for nine years, under which he served M D six years, having still three years to run; the pauper asked M D leave to go into another service, to which M D consented, saying, he was not against it, if he could better himself. The pauper, without telling M D where he was going, went to one J, in the parish of P, and hired himself for a year at certain wages. When he returned, he communicated that fact to M D, who said, "Very well, I am not against it." After a few days he came to fetch his clothes, when M D said, he "hoped he liked his place." He said, he did. The pauper, having served J three months, was discharged; and on the question whether he gained a settlement in the parish of P, the Court was of opinion that the consent of M D was insufficient, and consequently he gained no settlement in P. *Rex* v. *Whitchurch*, 2 D. & R. 845.

It is a general rule of law that, that which is not beneficial to an infant is not binding; consequently he may bind himself an apprentice, but he cannot dissolve the indenture:—therefore, where he became a party to an indenture of apprenticeship, and, after serving part of his time, quarrelled with his master, and the indenture was cancelled, and he then bound himself to another master for the remainder of his time: The Court held, that he had gained no settlement thereby; the latter binding being void, inasmuch as the infant had no power to dissolve the first indenture. *Rex* v. *Wigston*, 3 B. & C. 484, s. c. 5 D. & R. 359.

An agreement by the master of an apprentice, "upon being paid" a sum of money, "to set the apprentice at liberty, and to give him up his indentures," is not such a discharge from the apprenticeship as will fix the settlement of the apprentice in the parish where he has slept the night previous to that agreement. *Rex* v. *Warden*, 6 Law J. M.C. 72, s. c. 2 M. & R. 24.

4. *Service.*

A service by an apprentice with a person other than his master, will not be a service under the indenture, unless all the parties are aware of the situation filled by each, and all concur in the service.

The placing a parish apprentice with a person other than the master, without the sanction of the magistrates, will be against the provisions of the 56 Geo. 3, c. 139, although the master may occasionally exercise acts of control over the apprentice while he is with that other person. *Rex* v. *Shipton*, 6 Law J. M.C. 92, s. c. 8 B. & C. 88. s. c. 2 M. & R. 217.

An apprentice, after serving his master for six years and nine months in the parish of S, under indentures which had not expired, went into the parish of D, under an agreement to serve W, another master in the parish of D, for a month at 2*s.* 6*d.* per week, the latter communicated that circumstance to the former master, who consented to the service, and the pauper went into the parish of D under that contract. At the expiration of that month the pauper and W came to another agreement for another month,

at 5s. 6d. per week, and the pauper remained with W until he went into the militia; at the end of a fortnight he returned to W, and entered into a third agreement, without specifying any length of time, and, while in that service, he slept from the 21st to the 24th of June inclusive in the parish of S: Held, that whether the first consent of the master was general or definite, the pauper having slept during the last three nights in the parish of S, that sleeping must be connected with the hiring; and consequently, that sleeping the last night in the parish in which the pauper was hired, determines the settlement to be in the parish of S. *Rex* v. *Ladlesleigh*, 4 D. & R. 332.

On an appeal to the sessions, it appeared that the pauper lived when a boy with one B three years, when he ran away; the respondents, in order to prove that the pauper resided as an apprentice, and, at the same time, to account for the non-production of the indentures, stated, that a fire happened about twenty years ago in the apartment in which the pauper then resided, and burned everything he possessed; that the father and mother of the pauper were dead; that the said B was dead, and that he had no relatives. As to the service with B by the pauper, it was stated by another apprentice to B, who served with the pauper, that he saw in his master's hand an indenture, which he understood to be the indenture of apprenticeship of the pauper; that the pauper and the witness boarded and lodged in the master's house, in the parish of St. M. It further appeared, that the pauper afterwards married, and that while living in St. M his wife was admitted into the workhouse of the said parish in a state of illness, and there died: Held, that the Sessions were justified in presuming that the pauper had lived with his master in the character of an apprentice, so as to acquire a settlement as an apprentice in that parish. *Rex* v. *St. Marylebone*, 4 D. & R. 475.

Where an apprentice occasionally slept in a parish different to that in which his master resided, by way of indulgence and not for the purpose of apprenticeship,—it was holden, that such occasional habitation conferred no settlement. *Rex* v. *Ilkeston*, 4 B. & C. 63, s. c. 6 D. & R. 64.

An apprentice working during the week in one parish, and sleeping on the Saturday and Sunday nights at his master's residence, in another, may gain a settlement under his indentures, by reason of inhabitancy in his master's parish. *Rex* v. *Warden*, 6 Law J. M.C. 72, s. c. 2 M. & R. 24.

### (*e*) *By Tenement.*

#### 1. *What is a sufficient Tenement.*

A settlement is gained by a householder, although he lets part off to an inmate, it being a sufficient dwelling-house within the 59 Geo. 3, c. 50. *Rex* v. *North Collingham*, 1 B. & C. 578, s. c. 2 D. & R. 743.

The actual occupation of a distinct and separate dwelling-house, is not necessary, in order to entitle a person renting the same to a settlement under the statute 59 Geo. 3, c. 50.

And, although a part of such dwelling-house, the internal communication whereof with the remainder is prevented, be underlet, at a rent which reduces the amount payable in respect of that part remaining in the occupation of the original tenant below the sum of 10*l.* per annum, such tenant will still be considered, within the meaning of the statute, to "hold the entire dwelling-house, and may thereby acquire a settlement. *Rex* v. *Great Bolton*, 6 Law J. M.C. 81, s. c. 8 B. & C. 71. s. c. 2 M. & R. 227.

Hiring a stall in an inclosed market-place, seems to be a tenement within 13 & 14 Car. 2, but does not confer a settlement unless the pauper occupies forty market days. *Rex* v. *Coversham*, 4 B. & C. 683, s. c. 7 D. & R. 160.

Within the meaning of the 59 Geo. 3, c. 50, a tenement may consist of house and land, taken at different times and of different persons, provided the whole rents amount to 10*l.*, and the land and house be in the same parish. *Rex* v. *North Collingham*, 1 B. & C. 578, s. c. 2 D. & R. 743.

Hiring a tenement for a less period than one year does not confer a settlement on the pauper, under 59 Geo. 3, c. 50. *Rex* v. *Batwick*, 4 D. & R. 3[illegible]

Where a master agreed by one entire contract with a pauper for 20*l.* per annum, a cottage and agistment and a profit of one cow, and the agistment of another cow, in consideration of his lodging and maintaining two of the master's labourers in the cottage: Held, that the latter cow was equally a tenement, within the 59 Geo. 3, c. 50. *Rex* v. *Cherry Willingham*, 1 B. & C. 626.

A pauper was hired by B, for a year, as his shepherd, on the terms, that he was to occupy a house and garden rent free, and have 7*s.* a week, and the feeding of 30 sheep with B's flock, for his wages. He lived with B two years, at the before-mentioned wages, during all which time the thirty sheep went with his master's sheep on the farm, the whole of which was situated in that parish. The feeding the thirty sheep was estimated to be of the value of 16*l.* a year, exclusive of the house and garden. Held, first, that, as it was not stipulated in the original bargain that the sheep should be pastured, a settlement was not gained; and secondly, that renting a tenement of 10*l.* annual value, the pauper should reside upon some part of that which constituted the tenement. *Rex* v. *Bardwell*, 2 B. & C. [illegible] s. c. 3 D. & R. 369.

A farmer hired a pauper as a labourer in husbandry under an agreement that he was to have yearly wages and his master either to find him or he to provide himself two cows. The pauper bought one cow of his master the other; both of these cows were fed on his master's pasture in his straw yard, the feeding was considered worth 5*l.* 5*s.* per annum: the question whether he gained a settlement: Held, that the pauper did not gain a settlement by renting a tenement of 10*l.* value; *aliter*, if the contract had been that the cows were to be pasture fed. *Sutton St. Edmunds*, 1 B. & C. 536, s. c. 2 D. & R. 800.

A hiring and service, under an agreement that the servant is to have the "going of sheep," which privilege proves to be of a higher value than [illegible] year, does not, unless there be some specific [illegible] to shew that the term "going" imports a [illegible] upon the growing produce of the master's land, that it is pasture feeding, confer a settlement [illegible] the statute Car. 2. *Rex* v. *Thornham*, 5 L. M.C. 70, s. c. 6 B. & C. 733.

Under an agreement a pauper had a house, garden, a rood of potatoe land, and the keep of

altogether of less value than 10*l.* After eleven years' service the cow failing to give milk, the master, not in pursuance of any agreement, kept him two heifers, which, with the land, were above 10*l.*, and he occupied the same about eleven months: Held, that a settlement was thereby gained. *Rex* v. *Benneworth*, 2 B. & C. 775, s. c. 4 D. & R. 355.

A person who holds the appointment of master of a charity school, though removable at pleasure, is, after residing seven years rent-free in a house, appointed by the charity for that purpose, estimated at the annual value of 10*l.*, notwithstanding part of it be under-let, entitled to a settlement, it being a tenement within the meaning of the 13 & 14 Car. 2, of the value of 10*l.* per annum. *Rex* v. *Lakenheath*, 2 D. & R. 816, s. c. 1 B. & C. 531.

### 2. *Value.*

The value of a tenement, as it regards a settlement, must be taken at the time when the party comes to settle upon it, and cannot vary with any subsequent improvement which it may acquire. *Rex* v. *Acton*, 6 M. & S. 54.

It is not necessary, to gain a settlement by renting a tenement, that the tenement be rated in the assessment at the yearly value of 10*l.*; it being sufficient if the rates be paid as for a tenement of the yearly value of 10*l.* *Rex* v. *St. Dunstan*, 4 B. & C. 686, s. c. 7 D. & R. 178.

The occupation of lands, and payment of rent for the same for upwards of a year, as a sub-tenant, under an agreement to pay the tenant so much a week in addition to the original yearly rent (so as to make the rent exceed the sum of 10*l.* per annum), is sufficient to entitle the person so occupying to a settlement, under 59 Geo. 3, c. 50. *Rex* v. *Wainfleet*, 6 Law J. M.C. 112, s. c. 8 B. & C. 227, s. c. 2 M. & R. 223.

### 3. *Occupation.*

The interest of a tenant from year to year, or of the executrix of such tenant, of an estate under 10*l.* a year, passes to her husband on their marriage by operation of law, and he acquires a settlement by forty days residence upon the estate. *Rex* v. *Ynyscynhaern*, 6 Law J. M.C. 9, s. c. 7 B. & C. 233, s. c. 1 M. & R. 16.

A B, a pauper, entered into the following agreement with C D, whereby C D agreed to sell to A B a certain messuage for the sum of 310*l.*, to be paid, viz. 160*l.* on the 30th of November, and the sum of 150*l.* on the 24th of June, with lawful interest. In consideration thereof C D agreed to make a good title to the same, and to convey the premises free from incumbrances. And it was further agreed, that on payment of the said 160*l.*, the said A B should be let into possession of the premises, but, in case of default thereof, this agreement shall be void. The sum of 160*l.* was paid on the day appointed, and possession given, but A B never paid the 150*l.* so agreed, &c., therefore no conveyance was ever executed, C D returning the said 160*l.*, and A B agreeing to give up the contract: Held, first, that the pauper had not such a possessory right, during the interval from the 30th of November to the 24th of June, as to gain a settlement by renting a tenement of the value of 10*l.*, under the 13 & 14 Car. 2, c. 12; and secondly, that the pauper had no equitable estate that would confer upon him a settlement under the 9 Geo. 1, c. 7, s. 5. *Rex* v. *Geddington*, 2 B. & C. 129, s. c. 3 D. & R. 403.

The occupation and payment of the rent of a tenement for a whole year, under an agreement "to pay 20 guineas a year, the rent to be paid weekly, and either party to be at liberty to give three months notice from any quarter-day, and at the expiration thereof to determine the tenancy," is such an occupation as will confer a settlement under 6 Geo. 4, c. 57. *Rex* v. *Herstmonceaux*, 6 Law J. M.C. 35, s. c. 7 B. & C. 551, s. c. 1 M. & R. 426.

A hired a house of the value of 9*l.* 10*s.* a year, and during the same period he contracted, under an agreement with the occupier of lands, for "two ponds, or the rushes and flags growing therein during the year": Held to be a continuing interest in the soil for that period, and therefore that it might be well connected with renting the house so as to obtain a settlement. *Rex* v. *All Saints, Cambridge*, 1 B. & C. 23, s. c. 2 D. & R. 47.

An occupation for less than a year of a tenement of more than 10*l.* value, under a hiring for a year, may be coupled with a similar occupation, under a subsequent yearly hiring of the same tenement, so as to satisfy stat. 59 Geo. 3, c. 50, s. 1, and gain a settlement, rent having been paid for the whole period. *Rex* v. *Stow*, 3 Law J. K.B. 154, s. c. 4 B. & C. 87.

The occupation of a tenement antecedent to an order of removal, may be connected with an occupation of the same tenement subsequent thereto, so as to confer a settlement under the statute 59 Geo. 3, c. 50.

Therefore, where a pauper, on the 6th of April 1823, hired a tenement by the year, of the annual value of 12*l.*, in the parish of D, which, with his family, he occupied until January 1824, when he became chargeable, and was removed, alone, to the parish of B, (his family still continuing to occupy the tenement in the former parish,) whence he returned the next day, and continued to occupy, under the original contract, until Michaelmas 1824, and paid the rent for upwards of a year,—it was held, that he gained a settlement under the statute 59 Geo. 3, c. 50, in the parish of D. *Rex* v. *Barham*, 6 Law J. M.C. 78, s. c. 8 B. & C. 99.

The holding and occupying of two tenements must be concurrent in point of time for one year, in order to comply with the statute 59 Geo. 3, c. 50.

A pauper held a house at the annual rent of 8*l.*, from Lady-day to Michaelmas 1821, and a different house from Michaelmas 1821 to Lady-day 1822, at the annual rent of 9*l.*, and during the whole of that period he was the tenant of a garden at an annual rent of two guineas; but he had agreed with another person that they should share the expense and the profits arising from the cultivation of the garden, and that person paid him half of the rent, but he paid the whole to the landlord: It was held, that he did not gain a settlement; because he did not during the whole year, as required by the 59 Geo. 3, c. 50, hold a house and occupy land which together were of the annual value of 10*l.* *Rex* v. *Tonbridge*, 5 Law J. M.C. 13, s. c. 6 B. & C. 88, s. c. 9 D. & R. 128.

### 4. *Residence.*

Under the 13 & 14 Car. 2, c. 12, it was held, that

in order to confer a settlement by renting a tenement, the party must have a residence which may be called his own home; consequently, that merely residing in the character of servant is not sufficient to satisfy the words of the statute, "coming to settle." *Rex* v. *Shipdam*, 3 D. & R. 384; and see *Rex* v. *Bardwell*, 2 B. & C. 161, s. c. 3 D. & R. 369.

But it seems that residence on the tenement, or some part of it, is *not* necessary to confer a settlement; and that the words "coming to settle," in the statute 13 & 14 Car. 2, c. 12, are satisfied by renting to the amount of 10*l.*, and residing in the parish; and, therefore, held, that a person coming into a parish as a servant, and during his servitude renting a tenement (without residing thereon) of 10*l.* value, gains a settlement under 13 & 14 Car. 2, c. 12. *Rex* v. *Kenardington*, 5 Law J. M.C. 11, s. c. 9 D. & R. 72, s. c. 6 B. & C. 70.

The forty days' residence on a tenement above the yearly value of 10*l.*, which, before 6 Geo. 4, c. 57, s. 2, in conjunction with the being rated to, and paying the parochial taxes, was sufficient to entitle to a settlement, must have been subsequent to the payment of the rates. *Rex* v. *Ringstead*, 6 Law J. M.C. 31, s. c. 7 B. & C. 607, s. c. 1 M. & R. 448.

Where a pauper hired a house and land three weeks after May-day 1820, to May-day 1821, at 15*l.* a year; and May-day 1821, hired it again, at the same rent, for a year; and resided in the house and occupied the land from the date of the first hiring upwards of a year, and paid the rent: Held, that this was renting a tenement within the intent and meaning of the 59 Geo. 3, c. 50, and conferred a settlement. *Rex* v. *Sturton-by-Stow*, 8 D. & R. 110.

Since the 59 Geo. 3, c. 50, a settlement may be gained by a residence of forty days in a parish, provided the party comply with the conditions mentioned in that act. And, therefore, where a pauper, since that statute, hired land for a year at the sum of 10*l.*, and paid that rent, and occupied the land for the whole year, but resided only forty days in the parish and not upon the land—it was held, that he gained a settlement. *Rex* v. *Wainfleet*, 6 Law J. M.C. 112, s. c. 8 B. & C. 227, s. c. 2 M. & R. 223.

### 5. *Payment of Rent.*

A pauper, by merely renting a tenement of the value of 10*l.* a year, does not gain a settlement unless he actually pays rent; and where, after 59 Geo. 3, c. 50, the pauper in the occupation of a tenement hired for 10*l.* per annum, though of less actual value, before payment of rent, received relief under an order of justices: Held, that he was to be deemed actually chargeable, and removable under 35 Geo. 3, c. 101, although he had resided in the tenement above forty days; and the order of removal being valid, could not be affected by the subsequent payment of the rent. *Rex* v. *the Parish of Ampthill*, 2 B. & C. 847, s. c. 4 D. & R. 447.

A party by whom a tenement is hired and occupied, and the rent paid, for a year, gains a settlement under 59 Geo. 3, c. 50, although a third person be surety to the landlord for payment of the rent. *Rex* v. *Kegworth*, 6 Law J. M.C. 83, s. c. 2 M. & R. 28.

The renting of a tenement, so as to entitle to a settlement, under 6 Geo. 4, c. 57, s. 2, need only be *bonâ fide* as between landlord and tenant.

It is not necessary that the whole amount of rent, required to be paid by that act, shall be paid by the party renting and occupying the tenement. *Rex* v. *Kibworth Harcourt*, 6 Law J. M.C. 60, s. c. 7 B. & C. 790, s. c. 1 M. & R. 691.

No settlement will be obtained by renting a tenement, under 6 Geo. 4, c. 57, unless the whole of the rent, whatever may be its amount, for an entire year, be paid. *Rex* v. *Ashby*, 6 Law J. M.C. 74, s. c. 8 B. & C. 27, s. c. 2 M. & R. 21; s. p. *Rex* v. *Ramsgate*, 5 Law J. M.C. 69, s. c. 6 B. & C. 712.

Payment of rent after the death of a pauper, will not be a compliance with the provisions, either of 59 Geo. 3, c. 50, or of 6 Geo 4. c. 57, so as to complete his settlement partially acquired in his lifetime. *Rex* v. *Carshalton*, 5 Law J. K.B. 14, s. c. 6 B. & C. 93, s. c. 9 D. & R. 132.

A house, of the annual value of 10*l.*, was hired by A, who died three days before the end of the year, but his corpse continued in the house after the end of the year, and after his death, his widow resided there and paid the year's rent: Held, that A's widow and children did not gain any settlement. *Rex* v. *Crayford*, 6 B. & C. 68, s. c. 9 D. & R. 30; s. c. as *Rex* v. *Bexley*, 5 Law J. M.C. 16.

### 6. *Evidence.*

A pauper assigned his lease to P, his wife's relation, on trust to cultivate the farm, and pay his (the pauper's) debts. When the lease expired, P, without his authority, hired a house in H, at 18*l.* rent, in which the pauper and family lived for two years. P was rated, and paid the rent and taxes: Held, that the pauper gained a settlement in H. The landlord of the house in H declared, during the pauper's occupation, that he had let the house to the pauper, but that Page had guaranteed the rent. The landlord died before the appeal was heard. *Quære*, if this declaration was admissible in evidence. *Rex* v. *Chediston*, 3 Law J. K.B. 208, s. c. 4 B. & C. 230, s. c. 6 D. & R. 269.

Where a pauper occupied a tenement under a written contract, which was inadmissible in evidence for want of a stamp: The Court held, that the Sessions were at liberty to look at it, for the purpose of seeing whether the pauper had hired a *bonâ fide* tenement for a year, within the meaning of the 59 Geo. 3. *Rex* v. *Bathwick*, 4 D. & R. 335.

### (*f*) *By Estate.*

The lord of the manor having permitted A to build a house on the waste, A lived in it for two years, and then sold the same to B, who sold the premises to C for 30*l.* without a conveyance, who resided there for a period of five years, and paid 1*s.* per annum rent to the lord, and then sold his interest, no adverse claim being made. But the Court determined, that although C paid a consideration of 30*l.* when he bought his interest therein, yet he did not acquire by purchase an interest or estate sufficient to confer a settlement within the stat. 9 Geo. 1, c. 7, s. 5. *Rex* v. *Hagworthingham*, 1 B. & C. 634.

The lord of a manor granted a lease of a cottage for thirty-one years to A, who resided in it above a year, and died, leaving a widow and three daughters. Administration was granted to the widow, but no distribution of the estate was made.

After his death, the widow, and, by her permission, one of the daughters and her husband, resided in it some years: Held, that the daughter, or her husband in her right, had not any equitable estate in the cottage, and that they gained no settlement by their residence in it. *Rex* v. *Berkswell*, 1 B. & C. 542, s. c. 3 D. & R. 9.

The question of strict legal title ought not to be entertained in cases of settlement. Therefore, an instrument not under seal, which professed to convey the fee, was held to be admissible evidence, with reference to the question of equitable estate; though the instrument could convey no legal interest. *Rex* v. *Ridgwell*, 5 Law J. M.C. 67, s. c. 6 B. & C. 665.

An equitable estate depending upon a condition, which is afterwards performed, cannot take effect by relation from the time of the original occupation; but only from the time of its completion by the performance of the condition.

Accordingly, where a pauper contracted to purchase an estate for 40*l.*, paid 30*l.* and was let into possession, and the balance was paid afterwards, and the purchase completed—it was held, that the time, for the purpose of settlement, must be calculated from the completion of the purchase, and not from the time of taking possession. *Rex* v. *Llantilio Crasseny*, 5 Law J. K.B. 5, s. c. 5 B. & C. 461, s. c. 8 D. & R. 320.

A pauper, by contracting for the purchase of two cottages at the price of 70*l.* and only paying a small portion of the purchase-money, has not such an equitable estate as to entitle him to a settlement in the parish in which the property is situated. *Rex* v. *Woolpit*, 4 D. & R. 456.

The sum paid by the purchaser of a copyhold estate to his attorney for the surrender, is no part of the consideration for the purchase, within the meaning of the stat. 9 Geo. 1, c. 7, s. 5. *Rex* v. *the Inhabitants of Cottingham*, 6 Law J. M.C. 31, s. c. 7 B. & C. 503, s. c. 1 M. & R. 469.

### (g) *By Payment of Taxes.*

Any person being charged with and paying towards the public taxes of a parish, in respect of a tenement above the yearly value of 10*l.* is entitled to a settlement. *Rex* v. *St. Pancras*, 2 B. & C. 122, s. c. 3 D. & R. 343.

### (h) *By serving an Office.*

A pauper, by executing the office of clerk and sexton in the part of the parish in which he resides, gains a settlement. *Rex* v. *Amlwch*, 6 D. & R. 626, s. c. 4 B. & C. 757.

The governor of a common workhouse, or house of industry, erected by eight parishes under 22 Geo. 3. c. 83, being appointed governor of the poor of one of these parishes for one year, served for three years, and lived in the workhouse: Held, that the appointment, not being by the eight parishes, was bad, and conferred no settlement as a public annual office, under 3 & 4 W. and M. *Rex* v. *the Inhabitants of Hambledon*, 4 B. & C. 459, s. c. 6 D. & R. 554.

At a court leet holden for the manor of A, the pauper was appointed street-driver of the borough of R, a district within the manor extending into several parishes, in one of which the pauper became chargeable: Held—as it appeared, first, not to be an annual office—secondly, that the pauper took no oath of office—and thirdly, that he had not served under the appointment for one whole year,—that under the 3 W. & M. c. 11, s. 36, he had not gained a settlement. *Rex* v. *Yalding*, 3 D. & R. 352.

## (C) CERTIFICATE.

The Court held a parish certificate, granted in 1761, valid, although it was only signed by one churchwarden and one overseer, inasmuch as they must presume that the instrument was signed according to the existing custom. *Rex* v. *Catesby*, 2 B. & C. 814, s. c. 4 D. & R. 434.

Where a parish certificate, thirty-five years old, was granted by two persons, who described themselves on the face of it to be "the major part of the churchwardens and overseers;" and there was evidence on one side, that both before and ever since the certificate was granted, but one overseer had acted in the parish; and on the other, that in two instances at least, two overseers had been appointed, though only one had acted: It was holden, that the Sessions might reasonably intend as a question of fact, that there had never been more than one overseer appointed, and consequently that the certificate was valid. *Rex* v. *Earl Shilton*, 6 D. & R. 104.

A certificate of settlement, in order to satisfy the provisions of the statute 8 & 9 W. 3, c. 30, need not be signed by the major part of the churchwardens of the certifying parish; but the signature of the major part of the aggregate body of the churchwardens and overseers will be sufficient.

In favour of the intendment of law, that an act is legal which has been acquiesced in for a long period of time, by the parties to whose interests it is adverse, the Court will presume,—where a certificate of settlement has been granted by persons professing to be parish officers, and has been admitted to be valid by the parish relieving the family to whom it was given during nearly seventy years,—that such persons were legally in office, and complied with all the requisites of the law.

Thus, where a certificate of settlement was granted to a pauper and his family, in the year 1758, by persons therein described to be churchwardens and overseers of the parish of B, and was signed by one churchwarden and two overseers; and it was proved that the churchwardens were usually sworn into office at the time of the year subsequent to the date of the certificate, though nominated before, but that the parish of B had acknowledged the validity of the certificate, by frequently relieving the pauper's family, residing under it in another parish, between 1758 and 1827; the Court decided, that the churchwarden might, under such circumstances, fairly be presumed to have been sworn at the time of his nomination, as well as at the usual time of swearing into office. *Rex* v. *the Inhabitants of Whitchurch*, 5 Law J. M.C. 39, s. c. 7 B. & C. 573, s. c. 1 M. & R. 472.

## (D) REMOVAL.

Where a widow who was entitled to dower which was unassigned, became chargeable to the parish in which the property was situated before she had resided forty days: Held, that as the dower had not

been assigned, she had not such an interest in the parish as to render her irremovable from what could be called *her own*. *Rex* v. *Northwould Bassett*, 2 B. & C. 724, s. c. 4 D. & R. 276.

The wife of a person who was legally settled in A, but was a transported convict, went to B, and resided there upon an estate in which she was jointly interested with her sisters, under their mother's marriage settlement: Held, that she was residing upon her own, and irremovable. The Sessions having quashed an order of removal both as to such woman and a child who accompanied her: Held, that they thereby virtually declared the child to be within the age of nurture, and irremovable from the mother, and that the Court might presume the fact to be so. *Rex* v. *Brompton*, 6 Law J. M.C. 55, s. c. 7 B. & C. [illegible], s. c. 1 M. & R. 451.

Where a child derives his settlement from his parent, it is immaterial whether the order of removal names the child or not. *Rex* v. *Catterall*, 6 M. & S. 55.

An order of removal defective in matter of form may be amended, by a justice, under 5 Geo. 2, c. [illegible], as, where it was addressed to the churchwardens and overseers of the parish of A, and it appeared there were no churchwardens, and that A was only a vill. *Rex* v. [illegible], 6 D. & R. [illegible], s. c. 4 B. & [illegible].

If an order of removal be not served within a reasonable time, it is a mere nullity: as, where an order of removal was made, and suspended on the ground of the age and infirmity of the pauper, who survived three years, but no notice of the order of removal was served on the parish to which she was ordered to be removed, until after her death. It was held, that the service was not within a reasonable time, and consequently, the order of removal was void. *Rex* v. [illegible], 3 B. & [illegible].

[illegible] between the date and [illegible] the appellants [illegible] at the next sessions, [illegible] the time when [illegible] being within the [illegible] the respondents [illegible] the appellants [illegible] North [illegible]

[illegible] pauper was quashed by [illegible] ground that the pau- [illegible] before the [illegible] settlement, and that [illegible] pauper had not been sum- [illegible]: Held that the [illegible] quashed; and the Court [illegible] of the appeal, and [illegible]. *Rex* v. *Tavistock*, 3 [illegible]

[illegible] of removal, the respon- [illegible] the depositions taken [illegible] The case must be entirely [illegible] *St. Peter*, 5 Law J. [illegible]

[illegible] of 3 Geo. 4, c. 83, is merely to [illegible] a removing parish, in proof of the fact of a [illegible] chargeable, but does not prevent the [illegible] from showing the fact of chargeability by [illegible], although the person removed has not been convicted under that act. *Rex* v. *the Justices of Stafford*, 5 Law J. M.C. 154.

A judgment of the Court of Quarter Sessions quashing an order for the removal of a pauper, with the consent of the respondent parish, is conclusive evidence to relieve the appellant parish on any subsequent dispute between these parishes as to the settlement of the same pauper at that time; and, if not *primâ facie* evidence that the settlement is in the unsuccessful parish, is, at least, sufficient to call upon that parish to shew a settlement somewhere. *Rex* v. *Coleshill*, 5 Law J. M.C. 130.

### (E) EXAMINATION OF PAUPERS.

[See BASTARD.]

An examination of a soldier as to his place of settlement, taken under the Mutiny Act, ought to shew, upon the oath of the deponent, that he is a soldier, and is quartered within the jurisdiction of the justices who take the examination. Or, if those facts do not appear upon the face of the examination, they must be shewn, by evidence *aliunde*, before the examination can be admitted in evidence.

Those facts, essential to the jurisdiction of the justices, were not allowed to be presumed in favour of the examination; though it had been taken forty-five years before the time when it was tendered in evidence. *Rex* v. *All Saints, Southampton*, 6 Law J. M.C. 55, s. c. 7 B. & C. 785, s. c. 1 M. & R. 663.

## PORTIONS.

Where a parent, who is tenant for life of a settled estate, with remainder to a trustee for a term of 500 years, upon trust to raise portions for younger children, has power to appoint the portions by deed or will, they cannot be raised in the parent's lifetime, and the whole sum cannot be raised until they have all attained twenty-one. *Wynter* v. *Bold*, 1 S. & S. 507.

## POST OBIT BONDS.

The vendor (a young man in distress) will be relieved against post obit bonds, if they be put up to sale without reserve. *Fox* v. *Wright*, 6 Mad. 111.

*Semble*—That the 4 & 5 Anne, c. 15, extends to post obit bonds.

A declaration in an action on a post obit bond is good, though it does not aver that the party upon whose death the money was to become payable is dead.

A post obit bond when forfeited, not being within the 8 & 9 W. 3, c. 11, renders it unnecessary to suggest breaches. *Murray* v. *Earl of Stair*, 2 B. & C. 82, s. c. 3 D. & R. 278.

## POST-HORSE DUTY.

Under the 59 Geo. 3, c. 51, a composition for saddle-horses does not protect the owner of such horses from his liability to pay the duty imposed by 1 Geo. 4, c. 88, s. 3, where the same horses are let to hire to be used in travelling. *Ramsden* v. *Hodgkinson*, 2 D. & R. 625. [See *The Regulations introduced by the* 4 Geo. 4. c. 62.]

If a person hire a horse, saying it is to be ridden into the country for his pleasure, or to go ten or twelve miles, or to ride for an hour or two, he is not said to be travelling, and the owner of the horse is not liable to the post-horse duty; but if the horse is hired to go to A, a place named, or for twelve days, a time certain, then he is travelling, and the post-horse duty must be paid by the owner of it. *Remsden* v. *Gibbs*, 1 Law J. K.B. 130, s. c. 2 D. & R. 625, 1 B. & C. 319.

Where a defendant, who was licensed to let post-horses, agreed with the proprietors of a country weekly newspaper to carry the papers on Friday in every week, from N S to L, where the same was delivered by him for a weekly stipend. The paper was carried by the defendant or his servants, sometimes on horseback, and at other times in a one-horse chaise, and the defendant was in the habit at such times of conveying parcels for hire from N S to L; sometimes he carried a passenger, and then he paid the post-horse duty. In an action of assumpsit brought by the farmer of the post-horse duties, for duties alleged to have been incurred by him in the execution of this contract: Held, that there was no letting to hire for the purpose of travelling, to bring the defendant within the meaning of the 25 Geo. 3, c. 51, or 44 Geo. 3, c. 98. sched. B. *Dowse* v. *Everard*, 8 Taunt. 653.

Horses let to hire, to assist in drawing a stage coach up a hill, are not subject to the post-horse duty under the statutes 25 Geo. 3, c. 51, 44 Geo. 3, c. 98, and 57 Geo. 3, c. 59. *Dowse* v. *Garrett*, 1 Law J. C.P. 7, s. c. 1 Bing. 107.

## POST OFFICE.

A packet-boat sent by the post-office may be arrested in a suit for mariners' wages. *Lord Hobart*, 2 Dods. 100.

The non-delivery of a letter two days after the post-master received it, does not render him liable to an action, though the letter contains a returned dishonoured bill of exchange, and the plaintiff could not give notice of dishonour in time by the post, it appearing that if he had sent a special messenger, he would have been in time. *Hordern* v. *Dalton*, 1 C. & P. 181. [Abbott]

## POWER.

(A) WHERE VOID.
(B) CONSTRUCTION AND EXECUTION.
(C) LEASING POWERS.
(D) REVOCATION.
(E) HOW DESTROYED.
(F) DEFECTIVE EXECUTION, WHERE AIDED.
(G) NON-EXECUTION.

### (A) WHERE VOID.

By a marriage settlement the wife's estate was limited to the husband for life; remainder to the wife for life; remainder to the first and other sons of the marriage in tail male; remainder to the first and other sons of the wife by any future husband in tail male; remainder to the daughters of the marriage, as tenants in common in tail general; remainder to the survivor of husband and wife in fee;—with a proviso, that, in case there should not be any children of the marriage, or, there being such, all of them should die without issue, and the husband should survive the wife, she, whether covert or sole, should have a power to charge the estates with a sum of money, to be paid after the decease of the husband and wife, and such failure of issue: the only child of the marriage died without issue in the lifetime of the wife: she executed her power, and died, leaving her husband surviving: Held, that the *power* was void, as being too remote in its original creation. *Bristow* v. *Boothby*, 4 Law J. Chanc. 87, s. c. 2 S. & S. 465.

Where an estate can only be devised by a will executed in the presence of three witnesses, a person cannot reserve power to make a valid devise of his estate by will before fewer witnesses. A person, by the medium of a will or deed, cannot reserve to himself powers contrary to law.

In Scotland, no man can make a *liege poustie* deed in this form; "Know all men by these presents, that I do hereby reserve a power to dispose of my estate at any time of my life, *et etiam in articulo mortis*." The *liege poustie* deed must be some actual deed of disposition existing at the death of the grantor. *Craufurd* v. *Coutts*, 2 Bligh, 689.

### (B) CONSTRUCTION AND EXECUTION.

A testator devises two freehold houses to his widow and two other trustees, to hold the same unto and to the use of them and their heirs, upon trust for his widow during her life; and after her decease, upon trust for his daughter-in-law, M P, her heirs and assigns, for ever, but not to be subject to the debts or control of her husband, but for her own use only, and subject to be disposed of by her in her lifetime, or by her last will and testament, as she may think proper. In a subsequent part of the will, the testator gives the two houses over to his son (her husband), in case his daughter-in-law should die in the lifetime of his widow: Held, that M P had not a power distinct from her estate: secondly, that she might convey, without fine, the contingent remainder in fee, limited to her separate use. *Minot* v. *Eaton*, 4 Law J. Chanc. 134.

Devise and bequest of real and personal estate in trust to pay the rents, dividends, and interest, from *time to time, as the same* should become due and be received, unto and for the only use and behoof of the testator's daughter, for and during the term of her natural life, and to pay the same *into her own hands*, independent of her present or future husband, and not in any manner subject to the debts, control, or engagements of such present or future husband, and her receipt to be a sufficient discharge to the trustees, as if she were sole and unmarried: Held, that the wife had a power of alienation of her life interest. *Glyn* v. *Baster*, 1 Y. & J. 329.

By marriage articles, executed during the wife's infancy, some of her real estates are limited, subject to a power of appointment given to the husband, to the children in tail, as tenants in common; the husband, by his will, devises and appoints all the estates belonging to him, or over which he had any power of appointing, to trustees, upon trusts which are not

according to his power, and the first of which is, to raise portions for the younger children: Held, it being apparent on the face of the will that the testator had in view the doctrine of election, that the younger children cannot claim the portions, and also take the estates limited to them by the articles. *Trollope* v. *Linton*, 2 Law J. Chanc. 3, s. c. 1 S. & S. 477.

A will directed a settlement to be made of real estate on A, and his first and other sons in tail, with powers of jointuring, leasing, sale, and exchange, and all other clauses, powers, and provisos usually inserted in settlements of the same kind: Held, that these last words did not authorize the insertion of a power to charge with portions. *Higginson* v. *Barneby*, 2 S. & S. 516.

Power in a marriage settlement to grant to a wife any annual sum of money or yearly *rent-charge, to be tax-free, and without any deduction, and to be issuing out of and chargeable upon lands in Ireland*, so that such rent-charge do not exceed in the whole the yearly sum of 3000*l. of lawful money of Great Britain:* Held, that a rent-charge appointed under and in the words of this power, is payable in Ireland, in the currency of England; but that the appointee is not entitled to have the sum transmitted to England free of the charge of conveyance and exchange, properly so called.

In the case of a simple charge of 3000*l.* on lands in I, the place of contract, the domicile of the parties the place appointed for payment, and other circumstances might require consideration; but in such a case as that above stated, the instrument itself must give the rule of decision.

The power to charge Irish lands with so much lawful money of Great Britain, is not such a power, that it is necessarily to be inferred that the money must be paid in England.

The appointment directing it to be paid in Lincoln's Inn Hall, the Court can only decide that the power is well executed, so far as it charges on the lands a sum of 3000*l.* lawful money of Great Britain.

By the appointment 3000*l.* of lawful money of Great Britain is given according to the power; and such a provision, from the expressions and the whole frame of the contract, seems to have been contemplated by the parties. *Lansdowne* v. *Lansdowne*, 2 Bligh, 78—94.

By a marriage settlement, containing the usual limitations, the husband, having a life-estate in reversion expectant upon the death of his father, was empowered when in possession, under the limitations of the settlement, to revoke, &c. as to so much and such part of the premises conveyed, "as shall be then in possession of any one or more tenants, by virtue of any one or more lease or leases, whereon a rent or rents not exceeding 300*l.* by the year in the whole shall be reserved, &c. so as there shall not at the time of such revocation be less than twenty years or three lives unexpired of such lease or leases." The clause of the settlement conferring the power concluded with a declaration, that it was the true intent and meaning of the parties that the husband should at any time during his life, after he should come into and be in the actual possession of the premises (settled), have absolute power and dominion over so much thereof as should be of the clear yearly value of 300*l.* sterling, and be at full liberty to dispose of the same in such manner and t uses and purposes as he should think proper. husband (donee of the power) after the death father, when he was in possession under the of the settlement, by a deed of revocation, p ing to be an execution of the power, and r that certain lands therein specified then prod clear yearly rent of 300*l.* or thereabout, revo uses of the settlement as to those lands, pointed the same in trust for him (the done heirs and assigns; the donee died, indebte amount exceeding the value of the lands so a ed, and having no other estate or effects. will, duly attested, and reciting his title and to dispose of the lands specified in the deed vocation and appointment, he devised to t his right and interest therein, upon trust to same, and out of the purchase-money to p debts, &c. The lands revoked, appointed vised, except a very small part, to the valu a year, were not (as recited in the deed of tion) under lease at the time of the appointm that deed, nor at the date of the will; but i instituted on behalf of creditors and legat carry the trusts of the will into execution, found and reported by the officer of the Co the lands so appointed and devised were of th of 300*l.* a year. By the decree in that suit, was established, and the revocation and appo held valid; and, upon appeal to the House o against the decree, it was held, that the pow rightly applied to the subject, and that the a ment was well executed. *Lidwill* v. *Hall* Bligh, 99.

*Semble*—That a power of sale given to thre tees, cannot be exercised on the death of t the survivor and a new trustee. *Hall* v. *D* Jac. 189.

Where trustees under a settlement have a of sale and exchange vested in them, the exercise it by a sale or an exchange with the for life of the settled estates. Where, up exercise of such a power, it was declared th estate should vest in the vendee; the purchase made in the name of a trustee, an appointm the trustee, in trust for the vendee, was held execution of the power. *Howard* v. *Duc* Turn. 81.

An estate being devised to a trustee, with to sell the same, and lay out the proceeds purchase of other lands, to be settled to th uses, and with power, for the purpose of suc to revoke the original uses,—the trustees r such uses, conveyed the land to a purchase received the purchase-money for it, and appli the purposes of the trust. By the same conve the tenant for life in possession (he being ten life without impeachment of waste) convey timber growing on such land, and received th chase-money for it, to his own use: Held, tenant for life, requiring an estate to be sold such a power of sale, having in such case a qu interest only in the timber, such powers w well executed, and the uses not revoked. *Ch* v. *Paxton*, 4 Law J. C.P. 41, s. c. 3 Bing. 20 10 B. Mo. 246.

Devise by testator of certain estates to pa trustees for a term, with power to raise mo

sale or mortgage, and also the residue of his estates to general trustees; and after reciting, that certain estates had descended to him, he empowered "his said trustees" to sell, &c. all or any portion of the said estates: Held, that a conveyance by lease and release of the estates by the latter trustees alone, was a good execution of the power for sale. *Smith* v. *Leigh*, 6 B. Mo. 214.

Where the trustees of lands in strict settlement have a power to sell, with the consent of the tenant for life, a sale by the trustees to the tenant for life will be good.

Under a will, directing the sale and division of real and personal property, the executor's power to do so will be implied. *Tylden* v. *Hyde*, 2 S. & S. 238.

Where a power of appointment was vested in a testator over freehold and copyhold estates, and he, being seised of other freehold estates, devised all his freehold and copyhold estates without reference to the power; it was determined, an execution of the power as to the copyhold estates, but not as to the freeholds. *Lewis* v. *Lewellyn*, 1 Turn. 104.

Where a testatrix, being seised of one undivided moiety of an estate in the county of S, and having a power of disposing of the other undivided moiety, and of which power she herself was the creatrix, devised all her freehold estate in the county of S to her nephew, I R, on condition that, out of the rents thereof, he should from time to time keep such estate in proper and tenantable repair: Held, that this devise was a sufficient execution of the power, and that both moieties passed under it to the nephew of the testatrix. *Doe d. Nowell* v. *Roake*, 3 Law J. C.P. 82, s. c. 2 Bing. 497. Overruled [in error], 4 Law J. K.B. 171, s. c. 5 B. & C. 720, s. c. 8 D. & R. 514.

A person having power to dispose of personal estate, and also of certain lands, gives, by a will referring to her power, the lands to A, and all she might die possessed of: Held, that A took only an estate for life in the lands. *Monk* v. *Mawdsley*, 5 Law J. Chanc. 149, s. c. 1 Sim. 286.

A testator makes a general devise of all his lands in nine parishes: in five of them he had only lands in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, and also lands over which his power extended: all the lands pass by his will, except the lands in the latter parish which were subject to his power. *Nepier* v. *Nepier*, 5 Law J. Chanc. 65, s. c. 1 Sim. 28.

A, being entitled to two freehold houses, and having a power of appointment over certain lands, and money to be laid out in lands, the same, in default of appointment, to go over, by her will devises "all and every her freehold messuages, lands, tenements, and hereditaments," to trustees for sale: Held, that the two freehold houses were sufficient to satisfy the words of the will, and that the power of appointment was not executed. *Hoste* v. *Blackman*, 6 Mad. 190.

A power to appoint to a purchaser is well exercised by appointing to trustees for a purchaser. *Howard* v. *Ducane*, 1 Law J. Chanc. 85, s. c. 1 Turn. 81.

*Semble*—That under a power to appoint to the heirs of the body of A after his decease, an appointment to an only child, before others born, is effectual.

Whether, under a power, a deed executed by the father and the eldest son, to make a tenant to the *præcipe* to suffer a recovery, would operate as an appointment—*Quære*. *Jesson* v. *Wright*, 2 Bligh, 2.

Power to appoint amongst testator's present or future grandchildren, or their respective issues, does not authorize the donee to exclude the children of a deceased grandchild, who were living at the donee's death. *Garthwaite* v. *Robinson*, 2 Sim. 43.

An appointment, limiting an estate to a son in fee, and in case he dies before twenty-one, and without issue, over to another, is not supported by the powers in a settlement whereby a wife is entitled, if there should be issue, to distribute the estates amongst them at her own discretion, and, in default of issue, to devise the same to whomsoever she shall appoint. *Doe d. Brownsmith* v. *Denny*, 1 Ken. 280.

A power to appoint is not an authority to convey; therefore, where lands were limited by deed to the use of such persons as others should appoint, and they made an instrument which amounted to a conveyance: It was holden to pass no right to the grantee. *Wynne* v. *Griffiths*, 4 Law J. C.P. 27, s. c. 3 Bing. 179, s. c. 10 B. Mo. 592, s. c. 5 B. & C. 923, s. c. 8 D. & R. 471.

A power to be executed by a will signed and published in the presence of, and attested by two credible witnesses, is not well executed by a will signed by the donee, and thus attested—"Witness A B, C D, and E F." *Stanhope* v. *Kerr*, 2 Law J. Chanc. 166, s. c. 2 S. & S. 37.

An instrument which is relied on to shew the execution of a power, must either expressly refer to the power, or be so clearly referable to it by extrinsic circumstances, as to have no effect whatever, except as an execution of the power. If, for instance, the instrument be a will, and its language can be satisfied by reference to any property or any interest whatsoever, not the subject of the power, it shall be held to apply to that property, or that interest, and not to the subject of the power. Even if it should appear that the testator really intended to pass the beneficial interest in the subject-matter, but intended to pass it by devise, and believed it would so pass; yet, as he would then be endeavouring to effect his intention by devise, and not to execute his power, nothing will pass by the devise; because the power itself remains unexecuted, even by intention. Thus, where a testatrix had one moiety of an estate in fee, and the other with a power of appointment created by herself, and held the whole for some years previous to her death, and then devised the whole by general description,—not referring to her power of appointment, and, in all probability, thinking she could pass the whole by devise: yet, it was held, that only one moiety passed; the power not being executed, and there being no apparent intention to execute it as a power. *Dean d. Nowell* v. *Roake*, 4 Law J. K.B. 271, s. c. 5 B. & C. 721, s. c. 8 D. & R. 514.

A having a power to appoint by will certain funds, in such manner as he should think fit, he, by his will, executed and attested as required by the power, gives and bequeaths to his relations sums of money, amounting in the whole to precisely the sum of which he had the power to dispose, but without

any reference or allusion in his will to the power, or any words indicative of his intention to execute it: Held, that the will was a good execution of the power. *Lassels* v. *Lassels*, 1 Y. & J. 445.

A married woman, being entitled to an annuity of 200*l.* out of the dividends of 10,500*l.* four per cent. stock, which, subject to the annuity, was divisible amongst the children of herself and her husband as he should appoint—the husband appointed 2500*l.* to his eldest son. The Court refused to order that sum to be transferred to the son, although the remainder would have been much more than sufficient to pay the annuity. *Breton* v. *Lord Clifden*, 1 S. & S. 363.

A testator bequeathed a leasehold to his wife for life, with a power of disposing of it at her decease to any one of his family: she survived her husband, and by her will bequeathed all her leasehold property, mansion, &c., and personal estate, upon certain trusts, (subject to her debts and legacies) for the benefit of J. G. who was a relation, but not one of the next of kin of the testator: Held, that the will of the wife was a good execution of her power to appoint the leasehold, and that she might appoint to one who was not one of the next of kin to her husband. *Grant* v. *Lynam*, 6 Law J. Chanc. 129.

A testator had devised estates to trustees for the use of his daughter for life, remainder to the use of her sons, and if he should die without issue, to the use of such persons as she should appoint. The son having no issue, he and his mother executed a conveyance in fee. The appointment was holden to be well executed, notwithstanding it was done in the lifetime of the son. *Daily* v. *Pullen*, 2 Law J. C.P. 144, s. c. 2 Bing. 146, s. c. 9 B. Mo. 300.

Where personalty, of which a party had the power of disposing, consisted of three per cent. stock: It was held, that the conversion thereof into long annuities, did not amount to an exercise of the power. *Hach* v. *Sequier*, 6 Law J. Chanc. 97.

A bankrupt having a power of appointment over money, to be executed only by will, made his will, disposing of the property, and then became bankrupt: and afterwards obtained his certificate, and died without revoking his will: Held, that the appointee by the will is a trustee for the creditors of the bankrupt, who became such after he had obtained his certificate. *Jenney* v. *Andrews*, 6 Mad. 264.

## (C) Leasing Powers.

A power in a will of leasing does not confer a right to sell or exchange. *Horne* v. *Barton*, 1 Jac.

A power of leasing for twenty-one years does not authorize the granting of a building lease for a longer period. *Pearse* v. *Baron*, 1 Jac. 158.

A tenant for life was empowered by act of parliament to grant leases for any term not exceeding ninety-nine years, so as every such lease should be made to take effect, either in possession, or immediately after the determination of the leases then subsisting thereof respectively, and so as in every such lease there be reserved, payable during the continuance of the term and estate thereby to be granted, the best and most beneficial yearly rent or rents; part of the estate being let upon leases, which, in due course, would expire on the 10th of October 1791. The tenant for life, in consequence of one bargain, executed at the same time two leas that part of the estate, one bearing date the May 1817, for the term of thirty years, to com on the 10th of October 1791, and the other b date the 4th of June 1817, for the term of three years, to commence the 10th of October Held, that the latter lease was void, as it was take effect immediately after the determina the subsisting lease.

The first of these two leases reserved a 270*l.*, the second reserved only 120*l.* By a in the second lease, the tenant was bound to either before the expiration of the term gran the first lease, or within the first year of th granted by the second. *Semble*, Although th reserved by two leases might be the most be between the lessor and lessee, yet they were between the tenant for life and the reversion therefore the second lease was invalid. *Sutton* v. *Harvey*, 2 D. & R. 589, s. c. 1 B 426.

By a deed executed in 1708, lands were in A for life, remainder to B for life, remai the issue of B in tail, remainder to the hei of A, remainder to the right heirs of A, with to A and B successively, "to grant leases fo of any part of the lands in settlement, renew ever, without fine to be taken for any su lease; such lease not to be of more lands t plantation acres, at the best rent, with cove be in such leases for building," &c.

In 1726 A grants to P (under whom the lant claims) three leases, the first two b houses and gardens, together with six pla acres to each; the third lease being of a garden, and three acres; and all three lease for three lives, with a covenant for renewal on cation within six months after the failure o life, on paying 4*l.*, and, in case of neglect, to the right of renewal.

In 1730, a new settlement is made, by wh lands are limited to A for life, remainder to son of B (deceased), for life, remainder to th of C, remainder to several brothers of C fo succession, and their issue in tail, in stric ment; remainder to the right heirs of C power to A to grant leases for three lives, able for ever, of any house and garden in t of B, with ten acres of land, &c., and a power to C, and his brothers in succession, any *plot* for a house and garden, with ten ac

In 1735 the third of the leases granted i was renewed by A according to the covenan the date of this renewal, fines of the land wer by C, being in possession upon the death of 1754, a recovery was suffered to such u and W, his son, should appoint; and in de appointment to C for life, remainder to W heirs.

By articles in 1754, and an Act of Parlia 1758, the lands were limited to C for life, re to W for life, remainder to the issue of W remainder to the right heirs of C. Th parliament, in pursuance of the articles, power in C and W, severally in succession, leases for three lives renewable for ever, *plot* for a house and garden in, &c., and any of land not exceeding ten acres.

In 1779, by deed and recovery, the lands were limited, in default of appointment, to W for life, remainder to L (the respondent in the appeal) in fee.

In 1786, W, the tenant for life named in the preceding settlement, renewed all the leases by deeds purporting to be executed in pursuance of the covenant for renewal, reciting the original leases of 1726; and that the leases had been frequently renewed; and containing covenants for renewal as in the original leases.

Further renewals to the same effect, and in the same form, were executed by W in 1790.

W died in 1791, when the fee vested in the respondent. It did not appear, by direct proof or otherwise, than by the recitals in the deeds of 1786, that any renewal had been made between 1735 and 1786: the rents reserved upon the leases were from time to time, and up to 1807, paid to and received by the owners of the lands for the time being, *including the respondent.*

In 1807, two of the *cestui que vies* being dead, application was made to the respondent for renewal, and upon refusal, a bill was filed in Chancery to compel a specific performance of the covenant to grant renewals. The bill was dismissed without costs, and on appeal the judgment was affirmed, on the ground (*semble*) that the leases were not warranted by the power. *Higgins* v. *Rosse*, 3 Bligh, 112.

Where a testator, by his will, gives a power to let such part of premises as had been usually granted or demised, and were then in lease for any term of years, determinable on lives, to any persons for the like terms, and in like manner, and under the like rents, services and conditions, as the same had been usually granted, and the residue of the same premises unto any person, for any terms of years not exceeding twenty-one years in possession, at the best rent that could be reasonably obtained for the same, so as that no such demise or lease should be made dispunishable of waste, nor without a condition of re-entry on non-payment of the rent or service thereby reserved, and so as each lessee should execute a counterpart of his lease: It was held, that a lease made under this power, of lands which were leased at the time of the creation of the power, and the second lease accurately followed the terms of the former lease of the same land, was well executed under this power, though the second lease did not contain a clause of re-entry. *Doe d. Bligh* v. *Colman*, 1 Bing. 28, s. c. 7 B. Mo. 271.

A power of leasing for years, required the insertion in the leases of a clause of re-entry, if the rent should remain unpaid for twenty-one days after it became due, and the leases were afterwards made with a power of re-entry, if the rent should remain unpaid for twenty-one days, and *no sufficient* distress could be obtained: Held, that such leases were good and valid, and might be supported as consistent with the power. *Tankerville* v. *Wingfield*, 5 B. Mo. 346, n.

B M, being seised, &c. in fee of lands, &c., devised the lands, &c. to his daughter, L B for life, with remainders over; with a power to her, in consideration of marriage, either before or after marriage, of revocation and appointment. B M died seised, without altering his will, leaving his daughter L B seised of the lands, &c. for life, with the power before mentioned.

L B intermarried with G V V.

Before the marriage, L B, being seised as aforesaid, by deed, in conformity with the power in the will of B M and in consideration of the marriage, revoked the uses and devises contained in the will, and appointed and limited the lands, &c. to F Earl of G and C M, and their heirs, in trust, to hold the same to the uses before limited, until after the marriage, and then to the use of G V V for life; remainder to L B (the grantor) for life; remainder to preserve &c.; and after the decease of the survivor of them to divers other uses, for the benefit of their issue; and in default of issue, to the use of the will of L B; and in the mean time, to the use of L B, her heirs and assigns.

In the deed was contained a leasing power to and for G V V and L B from time to time during their respective lives, when, and as they should respectively be in possession of the lands, &c. by indenture or indentures, under their respective hands and seals, attested by two or more credible witnesses, to demise such parts of the lands, &c. as now are leased for lives, or for years determinable on lives, in possession or reversion, for lives, or for any number of years determinable on lives, so as there be not any greater estate or interest subsisting at any one time than what will wear out or be determinable on the dropping of three lives, and *so as* on every such lease there be reserved and made payable, during the continuance of the estates and interests, thereby to be demised, leased, or granted respectively, *the ancient and accustomed duties and services, or more, or as great or beneficial rents, duties and services, or more, as now are, or at the time of demising* or *granting the premises so to be demised, leased, or granted respectively, were reserved or made payable* for the same premises respectively, or a just proportion, &c. (except heriots, &c.) all such rents, duties, and services respectively, to be incident to and to go along with the reversion and remainder of the same premises expectant on the determination of the respective demises, &c. and *so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved*, and so as, &c. &c.; and also by indenture under hand and seal, attested as aforesaid, to demise all or any of the lands, &c. for any term absolute, not exceeding twenty-one years, to take effect in possession, &c. so as upon every such lease there be reserved, during the continuance of such lease, so much or as great and beneficial yearly and other rent, and services proportionably, as now is paid, or the best and most improved yearly rent, &c., without taking any fine, premium or foregift, &c.; and so as in every such lease for any term of years absolute respectively, *there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof*: and also by indenture under hand and seal, attested as aforesaid, to demise the lands, &c. wherein any mine, &c.

On the 5th of September, 1803, G V V being seised of the lands for life, by an indenture of lease, in consideration of &c., let premises part of the lands, in settlement, which had been and were then under a lease for years determinable on lives, to C S

and H S, their executors and administrators, for ninety-nine years, if C S, H S and I S, or either of them, should so long live, yielding, &c. the yearly rent of 2*l.* at Michaelmas and Lady-day, and one couple of fat capons, on &c.

The indenture contained a covenant by the lessees for the payment of a proportion, &c. and a covenant for the payment of the yearly rent of 2*l.* and for the performance of the duties, &c., and also a proviso "that if it should happen at any time during the estate thereby granted that *the said yearly rent or sum of 2l. and every or any of the duties, services, reservations and payments thereby reserved, or any* part thereof, *should be behind, unpaid, or undone, in part or in all, by the space of fifteen days* next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid, *and no sufficient distress or distresses can or may be had and taken upon the said premises*, whereby the same and all arrearages thereof, if any be, may be fully raised, levied, and paid, &c.; or if any default should be made in the payment or performance of all or any of the reservations, covenants and agreements, thereinbefore contained, that then and from thenceforth, in all or any or either of the said cases, it should be lawful to and for the said G V V, his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises should belong, into the premises, &c. to re-enter, and the same to have, hold, retain, possess and enjoy, as in his and their former estate," &c.

After the death of the tenants for life, upon a trial in ejectment by the grantees of the devisee under the will of L M against the parties holding under this demise, it was found by special verdict, that the rents, duties, reservations, and payments reserved by the indenture, and secured by the render, covenants and power of re-entry therein contained at the time of making the indenture, were ancient and accustomed, and then were as great and beneficial, as any which at the time of making the deed, or at any time thereafter were or had been reserved in respect of the premises demised: and that the usual and accustomed form of leases of the estate, contained in the settlement for lives or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the indenture of demise in question.

Held, affirming a judgment of the King's Bench, and reversing a judgment of the Exchequer Chamber, that the evidence from the former leases was properly admitted and introduced into the special verdict: and that the lease in question, according to the practice of conveyancers, was by implication within the terms of the power, and valid. *Smith* v. *Jersey*, 3 Bligh, 290, s. c. as *Smith* v. *Doe d. Jersey*, 5 B. Mo. 332, s. c. 2 B. & B. 473.

G H, a tenant for life in a marriage settlement, is thereby empowered to make leases for lives of lands in Ireland, at the best rent, without fine. A power was also given with the consent of trustees to raise any sum of money. The trustees, in pursuance of the power, consent that G H should, by mortgaging all or any part of the lands, or in any other manner he should think fit, raise any sum of money not exceeding 5000*l.*

Under this power and consent, G H, in consideration of 300*l.* and a rent, grants to V W part of the lands in settlement, upon a lease for lives. T grant and a receipt expressing that the 300*l.* w raised under the power and consent as part of t 5000*l.*, were duly registered.

Before and at the date of this grant, V W was t solicitor of G H, who was involved in litigation a in distress.

The rent with the premium, calculated at 6 p cent., was considerably short of the annual valu the lands.

Upon a bill by the tenant in remainder under settlement to set aside the lease, and on appeal, was held, that the lease was a good execution the power to raise money, but void as obtained b solicitor from his client in circumstances of emb rassment and at an under-value. *Wood* v. *Hart* 3 Bligh, 470.

A lease granted under a power by a tenant life, exceeding the limits of the power, is not m valid by a renewal under a new settlement b tenant for life after a lapse of sixty years, and ve ing that the lease had been frequently renewed, although the rent reserved upon the original and newed leases had been received by the remain man in fee for sixteen years, after his interest ve in possession. *Higgins* v. *Rose*, 3 Bligh, 112.

Leases made by devisees in trust, but not in a conformity with the power granted them of leas are void in equity, and will not be confirmed by ceptance of rent. *Bowes* v. *East London W Works Company*, 1 Jac. 324.

A vicar and vestrymen having, under an a parliament, a power of leasing lands belongin the vicarage for any number of years at the rents—a lease for 999 years will not be set a on the principle applicable to leases by tru of charities. *Attorney General* v. *Wray*, 1 307.

Under a marriage settlement of the wife's perty, the husband had a power to grant lease twenty-one years. He granted one for ninety- years. The wife, after his death, sold the es and described the premises as being in the possess of that lessee. In an action of ejectment, bro by the purchaser to recover possession, the C held, that, the lease being void, and the descrip of the premises, as being in possession of the le not being any recognition of him as a tenant, t was not any occasion for him to make a deman possession before action brought. *Doe d. Big White*, 1 Law J. K.B. 170.

## (D) REVOCATION.

A deed of appointment is not the less opera because a prior deed of appointment, which it ports to revoke, cannot be found.

An appointment is not annulled by the pr dealing with the fund without reference to tha pointment. Construction of the 54th Geo. 3, c. *Hougham* v. *Sandys*, 6 Law J. Chanc. 671.

An authority, coupled with an interest in the pointee, cannot be countermanded, nor even w no interest is created, if an act is done by a t person in obedience to it. But where neithe these facts exists, the appointee may revoke a t authority at any time. *Gibson* v. *Minet*, 2 La C.P. 99, s. c. 2 Bing. 7, s. c. 9 B. Mo. 31.

(E) HOW DESTROYED.

A tenant for life of a trust-fund having a power of appointment of a part of the fund, can bind the fund or himself by a covenant so as to deprive himself of the power of appointment. *Noel* v. *Henley*, 1 M'Clel. & Y. 302.

Whether a power, under which all children have interest, can be destroyed by forfeiture—*Quære*. *Jesson* v. *Wright*, 2 Bligh, 2.

A power for the benefit of children—*semble*, cannot be forfeited or destroyed. *Jesson* v. *Wright*, 2 Bligh, 15.

A power of appointment given by will to the donee to appoint, after the death of a devisee, for life, "to the use of such child or children, and for such estate or estates, and in such shares and proportions, manner and form as the donee by deed or will shall limit and appoint, or give and devise the same," and, in default of appointment, to the children of the devisee, equally between them—is well executed by an exclusive appointment (by deed) to one of the objects of the power or fee; and that appointment is not avoided by a deed of settlement made almost immediately after by the appointee (in consequence of a previous agreement between him and the appointor,) conveying the property to trustees to the use of himself for life, with remainder to his children (not objects of the power,) in fee, with an ultimate remainder to himself in fee. *Tucker* v. *Sanger*, 1 M'Clel. 424, s. c. 13 Price, 608.

Lands had been settled, subject to a power of sale in trustees, with the consent of the tenant for life; and afterwards a recovery was suffered, in which the tenant in tail under the settlement was vouched, and by the recovery deed, it was agreed that the recovery should enure in confirmation of the estates created by the settlement, which were antecedent to the estate tail, and in confirmation of the powers annexed to those estates and subject thereto, to such uses as the tenant for life and tenant in tail should appoint. The tenant for life and tenant in tail afterwards exercised their power of appointment, and the trustees concurred with them in a conveyance of the lands, and they thereby created new powers of sale: Held, that the power of sale in the original settlement was not destroyed. *Roper* v. *Halifax*, 8 Taunt. 845.

(F) DEFECTIVE EXECUTION, WHERE AIDED.

Where money, which under a power in a will was directed to be raised by the sale of an estate, and to be invested by trustees, with the consent by deed of the party interested, was invested partly in 1783, without any such consent by deed, and partly in 1806, by the person interested himself, the trustee having become *non composa*, and an act of parliament, reciting these investments, appointed a new trustee: Held, that neither the act nor the lapse of time cured the defective execution of the power, as against a writ of *formedon*.

The issue was, whether the money had been invested with the consent of the *cestui que trust*, according to the directions of this will: Held, that it was correct to direct the jury to consider, whether it had been invested with the consent of the *cestui que trust* manifested by deed. *Cholmeley* v. *Paxton*, 6 Law J. C.P. 218, s. c. 5 Bing. 48, s. c. 2 M. & P. 127.

(G) NON-EXECUTION.

A power to appoint the proportions in which definite objects are to take, impliedly includes a gift to them in default of appointment. *Kennedy* v. *Kingston*, 2 J. & W. 431.

Testator gave a legacy to his daughter for life, with a power to appoint the principal, to take effect after her death; and if no appointment, then to A and B. The daughter died in the lifetime of the testator: Held, that A and B took immediately upon the testator's death—that their interest was postponed only for the sake of the daughter—and that it made no difference, that she might have defeated the gift by appointment if she had survived the testator, since A and B were to take if no appointment. *Chatteris* v. *Young*, 6 Mad. 30.

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## POWER OF ATTORNEY.

A partner gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit": Held, that this gave the son power to submit the accounts to arbitration. *Henley* v. *Soper*, 6 Law J. K.B. 210, s. c. 8 B. & C. 16, s. c. 2 M. & R. 153.

It is incumbent on all who deal with persons professing to act under powers of attorney, to see that the power be substantially followed; and at their own risk to notice all the qualifications and restrictions of the power.

Accordingly, a person going abroad executed a power of attorney to three persons, one of them being his wife, appointing them to act as well in respect of his trade as of his private affairs. By a subsequent power, executed while he was aboard, he authorized his wife to act on his behalf, giving her very extensive powers to sell and exchange lands, and "to accept such bills as should be drawn or charged on him by his agents or *correspondents, as occasion should require*." At this time he was connected in extensive mercantile business and joint speculation with persons residing in England. The joint creditors at that time becoming urgent, one of the firm applied to the wife, who was acting under the power of attorney, to accept several bills for some of the partnership debts, which she did. The bills were drawn by the partner who so applied, and in his own name; he was at that time a "correspondent" of the husband as well as a partner; but he was not a correspondent in respect of those bills, nor did it appear that he had any authority to draw them; nor that any "occasion required" their being accepted, except the fact that the creditors were urgent: Held, that the power of attorney did not authorize the wife to accept those bills; as they would render her husband liable *pro tanto* to the partnership debts; and, consequently, that the holder of one of the bills could not recover. *Atwood* v. *Munnings*, 6 Law J. K.B. 9, s. c. 7 B. & C. 278, s. c. 1 M. & R. 66.

A, having an interest in a fund, executes to the trustee of the fund a power of attorney to sue in respect of it, and afterwards takes the benefit of the insolvent act; his interest in the fund is thereby divested out of him, and the power of attorney is recalled. *Dawson* v. *Sexton*, 1 Law J. Chanc. 185.

A power of attorney to institute a suit in the name of the plaintiff, having been stated in the bill; proof thereof not required at the hearing, but the Master, before taking the accounts, prayed to inquire into that fact. *Edney* v. *Jewell*, 6 Mad. 165.

On an attachment for not paying money pursuant to an allocatur: It was holden, that service of the rule and allocatur, without producing the power of attorney authorizing the party serving it to receive the money, was sufficient. *Bass* v. *Maitland*, 8 B. Mo. 44.

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## PRACTICE.

### 1. *AT COMMON LAW.*

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(b) *By Bill.*
(c) *Bailable or Serviceable.*
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### 4. *IN THE COURTS OF ADMIRALTY.*
### 5. *IN THE HOUSE OF LORDS.*
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### 1. *AT COMMON LAW.*

#### (A) RULES OF.

Rules of practice which encourage an abuse, may be departed from. *Harrison* v. *Richardson*, 1 M'Clel. & Y. 246.

#### (B) PROCESS.

##### (a) *By Original.*

The Court refused a motion to supersede an original writ, on the ground of its being antedated

in respect to the day on which the actual sealing and delivery of it took place. *Roan* v. *Gally*, 2 Ken. 24. Chanc.

A *distringas* will not be granted to compel an appearance, on an affidavit merely disclosing the declarations of the defendant's wife. *France* v. *Stephens*, 8 Taunt. 693, s. c. 3 B. Mo. 23.

The defendant acknowledged a debt to be due to the plaintiff, who sued out an original writ:—Held, that he might compel an appearance by *distringas*, although the defendant had left this country for Ireland, but still continued to carry on trade here. *Hornby* v. *Bowling*, 4 Law. J. C.P. 147.

Where a *distringas* was issued and served upon the secretary of the Bank of England, accompanied by a notice, that it was for the purpose of preventing the transfer and payment of stock and dividends standing in the name of W W; but no bill had been filed against the bank or W W, the *distringas* was, under the circumstances of the case, set aside with costs. *Scott* v. *Bank of England*, 2 Y. & J. 327.

The Court allowed a writ of *distringas* to be sued out under the statute 7 & 8 Geo. 4, c. 71, s. 5, on an affidavit of the sheriff's officer, that he could not serve the defendant personally at his house; that he believed he kept out of the way to avoid being served; and that his son told him he had left home for that purpose. 6 Law J. C.P. 136, s. c. 1 M. & P. 557.

(*b*) *By Bill.*

Where a bill of Middlesex has been issued upon an affidavit of debt properly sworn, an office-copy of that affidavit will warrant the issuing of a latitat into any other county. *Baker* v. *Allan*, 6 Law J. K.B. 32, s. c. 7 B. & C. 526, s. c. 1 M. & R. 232.

A latitat may be made returnable on a general return-day, if the day of the week on which it falls is specified in such latitat. *Archer* v. *Walker*, 3 Law J. K.B. 134.

(*c*) *Bailable or Serviceable.*

Where there are several defendants, the process may be bailable against some, and serviceable against the others.

In the Common Pleas—*Semble*, that if either of the writs are bailable, all the defendants should be named in the *ac etiam* clause of the bailable writ, in order to fix the bail.

Where bailable process was sued out by the plaintiff on the 4th of May, returnable in one month of Easter, against W, in which process W only was named, and on which W was arrested, who put in and perfected bail in Easter term; and, on May the 11th, plaintiff sued out serviceable process, in which four other defendants were named; but W was excepted, returnable on the morrow of Ascension; subsequently a declaration as of Trinity term was delivered against W, together with the other four defendants—The Court held, that the declaration was regular. *Christie* v. *Walker*, 1 Bing. 48, s. c. 7 B. Mo. 362.

No continuance from serviceable to a bailable process. *Molloy* v. *Boza*, 1 Law J. C.P. 11.

The words "Ellenborough and Markham," or other names of the chief clerk for the time being, are not necessary to be affixed to the copy of serviceable process. *Anonymous*, 5 Law J. K.B. 77.

In serviceable process, the notice must be to appear upon the actual return-day, and not upon the *quarto die post*. *Price* v. *Davis*, 1 Y. & J. 9.

(*d*) *To whom directed.*

It seems that if a writ be directed to the sheriffs of Chester in the first instance, instead of the chamberlain, and they cause the party to be arrested under it, he cannot apply to have it set aside, as the sheriffs are the proper officers to execute the writ. *Osborne* v. *Hancock*, 5 Law J. C.P. 74.

If a writ be directed to the sheriff of London instead of to the sheriffs, the proceedings thereon will be set aside as irregular. *Ulugh* v. *Kingswood*, 2 Ken. 287.

The mayor, bailiffs, and burgesses of Berwick-upon-Tweed, being plaintiffs in the suit, the writ was directed to the coroner, who was sworn to be one of the burgesses. It being, however, mere serviceable process, the Court refused to set it aside; although it was objected that it should have been directed to elisors named by the Prothonotary. *The Mayor, Bailiffs, and Burgesses of Berwick-upon-Tweed* v. *Williams*, 3 Law J. C.P. 124, s. c. 10 B. Mo. 266.

(*e*) *Signature.*

Notwithstanding the old rules of court, 19 Jac. & 36 Car. 2, process of *subpœna ad respondendum* may be issued out of the office of pleas in the Exchequer, without being signed by an officer of the king's remembrancer. *Taylor* v. *Riley*, 9 Price, 383.

(*f*) *Service.*

The Court will not set aside a writ because the service is bad. *Leicester* v. *Walbrook*, 1 Law J. K.B. 60.

The rule that notices shall not be served after ten o'clock at night, does not extend to the service of process. *Priddie* v. *Cooper*, 1 Law J. C.P. 8, s. c. 1 Bing. 66: s. P. *Anon.* 2 Chit. 357.

*Quære*—Whether service of process and notice of declaration filed conditionally, served at the same time, is good service? *The Mayor and Burgesses of Derby* v. *Wheeldon*, 9 Price, 150.

A latitat directed to the sheriff of Kent cannot be served in the Cinque Ports. *Anon.* 6 Law J. K.B. 133.

Where a *quo minus* issues against several partners who are jointly liable, but which cannot be served upon one partner, who is abroad, if a *venire* issue against that partner, it may be served at the counting-house of the partnership; and, upon his non-appearance, a *distringas* may be executed there. *Petty* v. *Smith*, 2 Y. & J. 111.

The service of a latitat will not be set aside, on the ground that it was served in a wrong county, in the absence of an affidavit, that the service was not on the confines of the county into which it issued. *Storer* v. *Rayson*, 3 B. & C. 158, s. c. 4 D. & R. 739.

Where a person called several times at the house of another, in order to serve with process, but could not see him; and he afterwards put a letter into the post-office, containing a copy of the writ, and addressed to the party at his residence, but which he refused to receive: Held, that this was not good service. *Ridpath* v. *Williams*, 4 Law J. C.P. 138, s. c. 3 Bing. 443.

If a party refuses to receive a bill of Middlesex, putting it on his shoulders is good service;—and where the defendant was on the next day served with another copy and notice of declaration at the same time—it was holden not irregular, the first service being good, and there being an interval between that and notice of declaration. *Bell* v. *Vincent*, 7 D. & R. 233.

When the copy of a writ has been served upon the wrong person, an *alias* and *pluries* may be issued and served upon the proper one. ——— v. *Johnson*, 1 Law J. K.B. 247, s. c. 2. B. & C. 95, s. c. 3 D. & R. 254, as *Clarke* v. *Johnson*.

At the time of the service of non-bailable process, it is not necessary to shew the original unless it is demanded; but if a sight *of the original is demanded*, then the service will be irregular unless it is produced, even if the service be made by the plaintiff himself. *Thomas* v. *Pearce*, 2 Law J. K.B. 153, s. c. 2 B. & C. 761, s. c. 4 D. & R. 317.

The Court refused to set aside the service of process for irregularity, where the copy of it was against *John Stafford*, and notice at the foot to appear calling the defendant "*John Stratford*, you are served," &c. *Wilson* v. *Stafford*, 2 Chit. 355.

Where a defendant is in the King's Bench prison, and cannot be served personally with process, on account of the interference of one of the officers of that prison, the filacer is not bound to enter an appearance, unless an affidavit of such service is produced; as the remedy, if any, is against the officer of that prison for obstructing the service of the process. *Pigeon* v. *Bruce*, 8 Taunt. 410, s. c. 2 B. Mo. 462.

(g) *Irregularity.*

A writ issuing before the affidavit to hold to bail has been filed, is irregular. *Hawkins* v. *Baskerville*, 2 Ken. 374.

The issuing of a writ is matter of record in the court from which it issues. *Whitmore* v. *Rooke*, 1 1 Ken. 345, s. c. Sayer, 299.

Neither the date of the English notice being in figures, nor the writ signed by proper clerks, or king's title in a writ, is material. *Anon.* 2 Chit. 356.

It is not essential that an old copy of a writ should bear the proper names of clerks. *Anon.* 2 Chit. 239.

The Court refused to set a side a writ, because the blank for the name of the defendant in the *ac etiam* part had not been filled up. *Johnson's case*, 1 Law J. K.B. 86.

If the Court see an error in a writ, which is merely a slip of the clerk's in filling it up, they will rather amend it than grant a rule to quash it. *Anon.* 1 Law J. K.B. 114.

A writ may be altered and re-sealed any day before its return, and the same thing may be repeated several times until a whole term has elapsed from the *teste*. *Durdon* v. *Hammond*, 1 Law J. K.B. 34, s. c. 2 D. & R. 211, s. c. 1 B. & C. 111.

The Court would not quash a writ because it was made returnable in the third instead of the fourth year of the reign of Geo. 4. *Smith's case*, 1 Law J. K.B. 151.

It is no objection to a *testatum capias*, that it was tested before the original *capias* was returnable: and where the affidavit of debt was sworn, and *præcipe* filed with the filacer for the county into which the *capias* issued, and the defen arrested on a *testatum* issued into anothe Held, that it was not necessary to file th with the filacer for the latter county. *Bidgood*, 5 Law J. C.P. 65, s. c. 4 Bing. 6

A term must not intervene between the a bill of Middlesex, and the issuing of an between the return of an *alias*, and the is *pluries*. *Willett* v. *Archer*, 6 Law J. K.B 1 M. & R. 317.

The defendant was arrested on a *capi* able on a day certain, instead of a gene day, and gave a bail-bond to the sheriff: refused to allow the writ to be amended, the terms of the bail being discharged fendant's entering a common appearance v. *Dobell*, 6 Law J. C.P. 11, s. c. 1 M. &

Where a writ has a wrong return, it aided by a correct day being mention notice to appear. *Anon.* 2 Chit. 356.

Where expense has been incurred by deavouring to quash a writ for irregular appears that the irregularity was not in th in the service only,—the Court will dis rule with costs. *Huggett* v. *Parkin*, 1 B

As the statute makes the process on attorney's name and date are not indorsed void, it is no objection to a motion to that it might have been made earlier. *Alexander*, 2 Chit. 239.

A motion to set aside a *capias*, on acc attorney's name not being indorsed required by 2 Geo. 2, c. 23, s. 22, mus without delay. *Lowe* v. *Lowe*, 1 Law J.

Application to set aside process issued must be made within the first four days mere technical objections. *Steele* v. *Mo* & R. 450.

If an attorney undertakes to appear, it irregularity of a wrong name in the proc v. *Clarke*, 2 Chit. 240.

An irregularity in the notice to appear to a *capias*, and also in the service of it, by a request to stay proceedings. *Rawe* 1 Law J. C.P. 11, s. c. 1 Bing. 132, s. c. 7

If the return-day in a bill of Middl correct, the irregularity is cured by declaration out of the office. *Crowther* Law J. K.B. 107.

A rule to shew cause why the servic should not be set aside for irregularit served in a city locally within a count was directed to the sheriff of that count charged with costs, as it appeared the bad paid the debt and part of the costs; irregularity may be waived by the cond defendant. *Monday* v. *Sear*, 11 Price, 1

Irregularity in the service of a writ the defendant promising to pay the debt *Lloyd* v. *Hawkyard*, 6 Law J. K.B. 28 & R. 320.

Although process is irregular in conse variance between the return of the wri day in the notice to appear, yet it canno advantage of after plaintiff has filed co and declaration. *Hompay* v. *Kenning*, 2 C

Where a party held to bail obtains tim bail to the action, he cannot afterwards ob

writ for irregularity. *Moore* v. *Stockwell*, 6 B. & C. 76, s. c. 9 D. & R. 1.

(C) DECLARATION.

(a) *Filing and Delivery.*

On process returnable on the last return of the term, the plaintiff is not entitled to deliver a declaration *de bene esse*. *Key* v. *Brown*, 1 Law J. K.B. 192, s. c. 1 B. & C. 658.

If non-bailable process be returnable on the last general return of the term, the plaintiff cannot declare *de bene esse*. *Wilson* v. *George*, 5 B. & C. 455, s. c. 8 D. & R. 135.

The rule of Hilary, 60 Geo. 3, enabling the plaintiff to deliver or file his declaration two days exclusively before the end of the term, instead of four, leaves the time of the return as it was before, and does not therefore extend to the filing a declaration, where the writ is not returnable before the last return of the term. *Mock* v. *Southall*, M'Clel. 659.

Where the defendant had applied to the Court for the relief of Insolvent Debtors, for his discharge generally, and that Court remanded him—The Court of Exchequer refused a motion for a writ of *supersedeas* to discharge him as to the action, made on the ground that the plaintiff had not delivered a declaration to the defendant within two terms after the return of the process. *Garlick* v. *Ballinger*, 10 Price, 124.

(b) *Notice of.*

It is not necessary that the notice of a declaration should bear any date. *Anon.* 2 Chit. 238.

It is material that the notice of declaration should state the amount of the damages mentioned in the declaration.

The damages had been omitted in the notice of declaration, and interlocutory judgment had been signed. The defendant paid the debt, and the Court would not set aside the judgment, but ordered a *stet processus* to be entered. *Kilham* v. *Dunlap*, 1 Law J. K.B. 190.

The Court have no power to order that service of notice of declaration, by leaving the same at the *defendant's last place of residence* (he not, after diligent search, being to be found), and affixing a copy in the Prothonotary's office, shall be deemed good service. *Shaw* v. *Barratt*, 1 Law J. C.P. 66.

Fixing a notice of declaration in the Prothonotary's office, is not good service, although it is sworn that the defendant has no fixed place of abode, and that he could not be found. *Kemp* v. *Powell*, 8 B. Mo. 273.

Service of notice of declaration, at a house to which the defendant had referred the plaintiff's attorney to call, but which was not his place of residence, is not sufficient; and the Court set aside the declaration and subsequent proceedings, on the terms of the defendant's attorney undertaking to appear for him, and defend the action. *Hyde* v. *Wemiwell*, 5 Law J. C.P. 20.

Notice of declaration may be given on the return day, within any short interval, as *e. g.* a quarter of an hour after the writ is served. *Archer* v. *Walker*, 3 Law J. K.B. 134.

Where notice was served of declaration, indorsed to plead *in four* days, and the declaration was filed conditonally: Held, that it was no ground for treating it as a nullity, as it was the defendant's duty to search the office. *Watkins* v. *Woolley*, 8 Taunt. 644, s. c. 2 B. Mo. 719.

(c) *Striking out Counts.*

The Court will not strike out superfluous counts after they are engrossed. *Thomas* v. *Jackson*, 2 Bing. 453, s. c. 10 B. Mo. 425.

In an action by an attorney for his fees, the declaration contained, besides the usual money counts, the *indebitatus* and *quantum meruit* counts, for work and labour as an attorney, two similar counts for work and labour generally: Held, that some of the counts were superfluous, and reference ordered to the Master to strike out the latter counts. *Gabell* v. *Shaw*, 2 Chit. 299.

A declaration in assumpsit contained counts for work and labour as an attorney, and for work and labour generally, and all the money counts: The Court refused to strike any of them out as being unnecessary. *Brindley* v. *Dennett*, 3 Law J. C.P. 247, s. c. 2 Bing. 184, s. c. 9 B. Mo. 358.

Four counts for work and labour not allowed, though two of them were special. *Fraser* v. *Shaw*, 4 Law J. K.B. 58, s. c. 7 D. & R. 383.

The Court will not order counts in slander to be struck out as unnecessary or superfluous, where they were introduced in a *colloquium* with several persons, as in some counts it was necessary to set out the names of the persons to whom the words were spoken, and to omit them in others; and a plaintiff is not to be confined to one particular statement of the words spoken. *Nelson* v. *Griffith*, 3 Law J. C.P. 55, s. c. 2 Bing. 412, s. c. 9 B. Mo. 785.

On motion to strike out, as unnecessary, a count for interest, in an action on a bill of exchange, the declaration containing, besides counts on the bill, the common money counts—the Court refused the rule. *Thomas* v. *Hanscombe*, 1 Bing. 281, s. c. 8 B. Mo. 243.

(D) IMPARLANCE.

If a declaration be amended in vacation, but not delivered until after the essoign day of the ensuing term, the defendant is not entitled to an imparlance, as it cannot be considered as a new declaration. *Anon.* 5 Law J. C.P. 77.

A special imparlance is only granted where the refusal of it would create injustice. *Crooks* v. *Peat*, 2 Chit. 214.

(E) PLEAS.

(a) *Time for Pleading.*

A defendant, sued by bill, had a rule to plead "until two days before the essoign day of the term;" the essoign day of the term fell on a *Monday*, and defendant not having pleaded on the *Saturday*, the plaintiff signed judgment as for want of plea: Held, that the judgment was regularly signed. *Buckmaster* v. *Mackmahon*, 2 D. & R. 538.

Where time to plead has been given under a judge's order, such time is reckoned from the expiration of the rule to plead, and not from the period the order is dated. *Aspinal* v. *Smith*, 8 Taunt. 592, s. c. 2 B. Mo. 655.

A defendant in custody is, according to the statute 4 & 5 W. and M. c. 41, bound to plead within

eight days after the delivery of the declaration. *M'Kenzie* v. *Wallis*, 2 Law J. C.P. 35.

A defendant who obtains a rule to set aside the plaintiff's proceedings, and to stay further proceedings in the mean time, is not entitled, on that rule being discharged, to all the time which he had to spare, when he obtained the rule. On that rule being discharged, he must take the next step immediately upon him with all possible diligence, and without any reference to the former time which he had to spare. *St. Hawkins* v. *Ryan*, 4 Law J. K.B. 78, s. c. 4 B. & C. 879, s. c. 7 D. & R. 428.

If pending a demurrer which is overruled, the time allowed by the rules of court for pleading expires, the Court will grant further time to plead. *Duncan* v. *the Manchester Water-works Company*, 8 Price 638.

When further time is given to reply, the last day is not exclusive of the time given. *Theobald* v. *Ferguherson*, 1 Law J. K.B. 36.

(b) *Rule to plead.*

Where judgment was signed as for want of a plea, in consequence of the rule to plead several matters having been incorrectly entitled C v. W, instead of C v. W and Others, the Court set it aside without costs. *Christie* v. *Waller*, 1 Law J. C.P. 45, s. c. 1 Bing. 187.

Where a declaration has been amended in the same term as delivered, though after a rule to plead, it is unnecessary to give a fresh rule; but if it is amended in a subsequent term, such new rule must be given. *Berry* v. *Rodney*, 2 Chit. 332.

A summons for time to plead, upon which the plaintiff's attorney has indorsed a consent, virtually dispenses with the necessity of the plaintiff giving a rule to plead; because, although in strictness the order for time, and not the summons, dispenses with the necessity, yet the defendant cannot be allowed to take advantage of his own wrong, in not having drawn up the order. *Spencer* v. *Cook*, 6 Law J. K.B. 131.

(c) *Demand of Plea.*

It is necessary to make a demand of a plea in all cases before signing interlocutory judgment, except where the defendant is in custody of the sheriff in another suit, and the plaintiff has declared against him as being in that custody. *Remmington* v. *Johnson*, 2 Law J. K.B. 170, s. c. 2 B. & C. 803.

Where a declaration is filed in pursuance, of the 12 Geo. 1, c. 29, a demand of plea is unnecessary. *Free* v. *Mason*, 5 B. & C. 763.

(d) *Issuable Pleas.*

A defendant cannot put in a special demurrer when under terms to plead issuably. *Blick* v. *Dymoke*, 2 Law J. C.P. 29, s. c. 1 Bing. 379, s. c. 8 B. Mo. 427.

A judge, in vacation, may order a defendant to plead such a plea as he will abide by. *Foster* v. *Snow*, 2 Ken. 483, s. c. 2 Burr. 781.

If a defendant be under terms of pleading issuably, he cannot demur *specially* to the replication. *Sawtell* v. *Gillard*, 3 Law J. K.B. 108, s. c. 5 D. & R. 620.

The defendant, being under terms so to do, pleaded issuably. The plaintiff replied and gave notice of trial. The defendant returned the issue and demurred to the replication; and the plai judgment, which judgment was afterwar by an order of a Judge at chambers; supported the order, on the ground, that plead insubly is not meant to affect any stage of the cause. *Betts* v. *Appleget* C.P. 169, s. c. 4 Bing. 267.

(e) *Special Pleas.*

A defendant must shew full, reas ample cause to induce the Court to pe withdraw a general demurrer, and plea *Elworthy* v. *Cowell*, 6 B. Mo. 495.

In assumpsit, on an account stated, t fused to give the defendant leave to pl that the money therein mentioned was differences on stock-jobbing transacti fact might be given in evidence under issue. *Rennett* v. *King*, 6 Law J. C.P. M. & P. 145.

(f) *Sham Pleas.*

[See *Hopkinson* v. *Tabourdin*, 3 Ch

Where a palpable sham plea is pleade tiff may sign judgment as for want of a v. *Alexander*, 6 M. & S. 135.

The Court will not require a defenda his plea, nor call on the attorney to s authority he has put a sham plea on *Merington* v. *Becket*, 1 Law J. K.B. 24 & C. 81, s. c. 3 D. & R. 231.

Where a defendant has framed a plea, so as to compel the plaintiff's att sult counsel, the Court will permit ju signed as for want of a plea, and order or his attorney to pay the costs. *Sha thoud*, 2 Chit. 335.

Where a plea to a declaration for pation stated "that after the cause of a and before the exhibiting of the plaint defendant delivered to the plaintiff cer satisfaction of the promises in the decla the plaintiff accepted in satisfaction plea appearing to be wholly false, the it as a nullity, and allowed the plaintiff ment. *Rickley* v. *Proone*, 1 B. & C. 2 & R. 661.

The defendant pleaded in bar the quantity of wine to the plaintiffs in The Court refused to allow the latter ment as for want of a plea, although to be false, and pleaded for delay. *Sa well*, 6 Law J. C.P. 89, s. c. 4 Bing M. & P. 338.

Pleading a sham plea renders the s to costs. *Aubrey* v. *Aspinall*, 1 Jac. 4

To a declaration in assumpsit, conta on a bill for 857*l.* 10*s.*, with a count fo and the usual money counts, the defend as to the second and subsequent counts the sum of 857*l.* 10*s.*, non-assumpsit; as said sum of 857*l.* 10*s.*, that, after maki mises, and before the commencement of drew a bill on F L & Co. for that sum, it to the plaintiffs, to whom the defend liable on it; and, as to the promise in th mentioned, that before the said bill bec plaintiffs indorsed it to third persons,

defendant was still liable. On an affidavit that the plea was false, the Court ordered it to be struck out, unless the defendant would consent to withdraw it, and undertake to plead issuably within two days, and to take short notice of trial for the Sittings after the term. *Jones* v. *Studd*, 6 Law J. C.P. 153, s. c. 1 M. & P. 643, s. c. 4 Bing. 663.

Where defendant, after having pleaded a sham plea, demurred to plaintiff's replication for the purpose of gaining time, and the plaintiff obtained a a rule for a *concilium*, without previously giving a four-day rule to bring in the demurrer-book,—the Court refused to set aside the rule for the *concilium*. *Hanson* v. *Richardson*, 1 M'Clel. & Y. 246.

(*g*) *Signature.*

The signature of counsel to a plea must distinctly appear, as well at the foot thereof as in the rule to plead. *Grant* v. ——, 2 Chit. 319.

(*h*) *Filing and Delivery.*

The defendant has the whole of the morning of the fifth day of term to file his plea to a declaration delivered before the essoign day of the term. *Duncan* v. *Carlton*, 2 Law J. K.B. 173.

The defendant must deliver the plea of *plene administravit*, and if filed it is a nullity. *Kent* v. *Monk*, 2 Chit. 295.

(*i*) *Adding.*

A defendan t cannot add pleas in an action of covenant, after the plaintiff has obtained judgment on demurrer, after argument on some of the pleas which had been originally filed. *Munnings* v. *Lennox*, 5 Law J. C.P. 50.

(*k*) *Withdrawing.*

The Court will permit a plea, put in for delay, to be withdrawn upon an affidavit of merits. *Foster* v. *Snow*, 2 Ken. 483.

(*l*) *Striking out.*

A defendant must produce a certified copy of the record of conviction, and prove the identity of the party convicted, on a motion to strike out the plea of the general issue, and file a plea that the plaintiff was convicted of felony. *Croker* v. *Sivewright*, 2 Chit. 400.

(*m*) *Pleading several Pleas.*

Where the necessity of introducing particular special pleas is doubtful, the Court will not refer them to the Prothonotary to determine whether they ought not to be struck out as irrelevant. *Trickey* v. *Yeandell*, 1 Law J. C.P. 9, s. c. 1 Bing. 66, s. c. 7 B. Mo. 357.

The Court will not allow pleas which appear to be inconsistent, to be pleaded together, unless it be shewn that they are necessary at the time the rule to plead several matters is moved. *Shaw* v. *Russell*, 4 Law J. C.P. 194.

In an action on a lease, at the suit of the reversioner against the assignees of a bankrupt lessee, for non-payment of rent and injury to the reversion, the Court refused to allow the defendants to plead the general issue, and also that the premises did not come to them by assignment. *Whale* v. *Lenny*, 6 Law J. C.P. 196, s. c. 5 Bing. 12, s. c. 2 M. & P. 19.

*Quære*—whether on an information in the nature of a *quo warranto* for exercising an office not corporate, a party may plead several matters. *Rex* v. *Highmore*, 5 B. & A. 771.

Where, in an action on a policy of insurance for a life, the defendant applied to plead several matters;—one of which was, that the policy was not under seal: The Court would not allow it, on the ground that the party should not be put to strict proof of such an instrument. *Weld* v. *Foster*, 5 Law J. C.P. 13.

The Court will require, on a motion for leave to plead double, that the substance of the proposed pleas be stated. *Smith* v. *Backwell*, 6 Law J. C.P. 89, s. c. 4 Bing. 512, s. c. 1 M. & P. 338.

(*n*) *Puis darrein continuance.*

Motion to plead *puis darrein continuance*, matters of defence, which had arisen eight terms since the original plea was pleaded. No issue had been joined thereon, or step taken by the plaintiff since. The Court suffered defendant to plead them *nunc pro tunc*, as of the last continuance, on payment of the costs incurred since the intervening of the second continuance. *Anon.* 3 Law J. K.B. 225.

At Nisi Prius, a plea of *puis darrein continuance* may be put in on paper. *Myers* v. *Taylor*, 2 C. & P. 306, s. c. 1 R. & M. 404. [Abbott]

*Quære*—Whether, 1st, a plea of plaintiff's bankruptcy since last continuance is a dilatory plea, or a plea in bar; and, 2d, whether it should not set out proceedings in the bankruptcy specially, and that the plaintiff was a trader. *Hartley* v. *Dixon*, 2 Chit. 561.

A plea *puis darrein continuance* of a release, by one of the lessors of the plaintiff, is bad on general demurrer, and the Court would not give leave to amend. *Doe d. Byne* v. *Brewer*, 2 Chit. 323.

An affidavit to verify a plea *puis darrein continuance*, at the Assizes, sworn at the assize town on the commission-day of the Assizes, before a commissioner for taking affidavits, is not good: it should be sworn before one of the Judges of Assize; however, the Judge at N. P. will allow it to be re-sworn before him. *Bartlett* v. *Leighton*, 3 C. & P. 408. [Park]

In an action, which had been set down for trial in the term as undefended, and postponed on the condition of giving judgment of the term, a plea *puis darrein continuance* of the defendant's bankruptcy and certificate (the certificate having been obtained since the term) is admissible. *Whitmore* v. *Bantock*, 1 M. & M. 122. [Tenterden]

If one of two defendants plead bankruptcy *puis darrein continuance*, the plaintiff cannot, at Nisi Prius, confess this plea to be true, and go on with the case as to the other defendant. *Pascall* v. *Horsley*, 3 C. & P. 372. [Tenterden]

(*o*) *Judgment for want of a Plea.*

A mistake of the defendant's christian name in the beginning of his plea, does not entitle the plaintiff to treat it as a nullity, and sign judgment for want of a plea. *Anon.* 4 Law J. K.B. 76, s. c. 7 D. & R. 511.

Where prior to the defendant's perfecting his bail, the plaintiff delivered a declaration *de bene esse*, with a demand of plea, to which the defendant pleaded

in abatement, and the plaintiff signed judgment, the Court held the judgment to be regular. *Saunders* v. *Owen*, 2 D. & R. 252.

Where the plaintiff demanded a plea before appearance, or the time for appearing had expired, and signed judgment for want of a plea, the Court set it aside. *Martin* v. *Mahony*, 5 D. & R. 609.

Interlocutory judgment for want of a plea, may be signed of a term subsequent to the rule to plead given. *Anon.* 3 Law J. K.B. 174.

Where a defendant in a country cause appeared, on the 11th of November, to process returnable on the 3rd, and filed a plea in abatement on the 16th, on a rule to shew cause why judgment signed for want of a plea should not be set aside, the Court made the rule absolute, but refused costs. *Kirby* v. *Hunt*, 13 Price, 178.

After a judge's order directing the defendant to plead within a given time, if no plea is pleaded within that time, the plaintiff may sign judgment without giving a rule to plead. *Nias* v. *Spratley*, 3 Law J. K.B. 249, s. c. 4 B. & C. 386, s. c. 6 D. & R. 390.

### (F) CONSOLIDATING ACTIONS.

A consolidation rule having been entered into by several underwriters, to abide by the determination of the Court on a point reserved, as to whether notice of abandonment had been given in due time: The Court refused to grant permission for opening the rule, on an affidavit, stating that the owner had received letters from the captain abroad, informing him of the loss and sale of the ship before the arrival of the latter in L; as notice should have been given to the plaintiff to produce the letters at the time, or they should, at least, have been adverted to by affidavits when the motion was made to the Court on the point reserved. *Read* v. *Isaacs*, 6 B. Mo. 437.

If a party sue on a bill, and, after the action is commenced, another bill, accepted by the same defendant, of which he is the holder, is dishonoured, and he bring a second action on that—a judge at chambers would, on application being made, direct the two actions to be consolidated. *Oldershaw* v. *Tregwell; Same* v. *Same*, 3 C. & P. 58. [Tenterden]

### (G) MAKING UP AND ENTERING THE ISSUE.

Where the Vice Chancellor has directed an issue, the defendant may carry the record down to trial if the plaintiff endeavours to delay it. *Bassett* v. *Osborne*, 5 B. Mo. 473.

### (H) TRIAL.

#### (a) *At Bar.*

The Crown cannot move for a trial at bar before declaration. *Tyndal* v. *Pennington*, 1 Ken. 128.

The Court will grant a rule for a trial at bar in a civil suit, upon motion of the Attorney General, he stating that the Crown is interested in the subject matter of the suit, and will bear the expense in its future proceedings. *Rowe* v. *Brenton*, 5 Law J. K.B. 137.

#### (b) *Notice of.*

It does not appear that there is any prescribed time for a plaintiff to carry on a cause to trial, if he be not urged on. The defendant may urge him on if he pleases; but, if both parties remain quiet, a plaintiff may resume his proceedings after five suspension of them. *Newberry* v. *Howard*, J. K.B. 60.

If a cause be made a remanet at the assizes, notice of trial is necessary, if the plaintiff to try the cause at the following assizes. The where no notice of trial for the Spring assi been given, and the cause was made a rema the next Summer assizes: and the defendant then attended with his witnesses, and found th cause was not set down, afterwards applied fo to be paid by the plaintiff for not proceed trial: Held, that he was not entitled. *G Bilston*, 6 Law J. C.P. 33, s. c. 4 Bing. 414, M. & P. 87.

If, after notice of trial, an injunction for s proceedings at law has been obtained and dis the cause is to be considered as a remanet, an not necessary to give a fresh notice of trial. v. *Dowbiggin*, 1 Law J. K.B. 190.

After giving notice of trial, a party counterm it. There was an irregularity in the counter The opposite party applied to the Court for ment as in case of a nonsuit, alleging that been put to expense. The Court refused to gi judgment, observing that he might have bee those expenses, if he had informed the opposit of the irregularity, without coming to the *Stone* v. *Lamb*, 2 Law J. K.B. 78.

On an appeal entered at Easter, and respite the Midsummer sessions, the respondents w the 24th of June, served with a copy of th of respite, without any notice of trial; th cordingly appeared at the following sessions: that the service of the order of respite must sidered as a good notice of trial, and that the was therefore improperly dismissed. *Rex* v. *habitants of Lambeth*, 3 D. & R. 340.

#### (c) *Putting off.*

Although a plaintiff is under a peremptory taking to try at the next assizes, the abse eleven special jurymen is a sufficient reason plaintiff declining to proceed. *Master* v. *M* Bing. 70, s. c. 7 B. Mo. 367.

Where the plaintiff stated, as an excuse going to trial, that he had laid a case before c and could not get it answered soon enough notice of trial, the Court held it sufficient. v. ———, 1 Ken. 349.

Where an action is brought by the assigne bankrupt, the Court will not put off the tr the ground that a petition is pending concern validity of the commission. *Assignees of* — ———, 2 Chit. 411.

The plaintiff in a country cause is not bo proceed to trial at the next assizes after the which issue is joined. *Prentice* v. *Blott*, 3 C.P. 39, s. c. 2 Bing. 360, s. c. 9 B. Mo. 687

At Nisi Prius it is usual to put off a trial, application of a plaintiff shewing special c stances, till the next Sitting, if it be in term, a few days, if it be after term; but, if longer be required, it can only be obtained by withdr the record. *Curtis* v. *Barker*, 2 C. & P. 185.

Held, on application to put off a trial, th affidavit stating, that a material witness is and not likely to return until a certain day t

stated, implies that he is expected then. *Anon.* 2 Chit. 411.

The Court will postpone the trial of an information, on the ground that a material witness is absent. *Attorney General* v. *Lomas*, 13 Price, 258.

Notwithstanding a defendant has obtained leave to amend his pleadings, he is not compelled to go to trial at the ensuing Sittings, as the construction to be put on the words "usual terms," means on payment of costs. *Edmunds* v. *Walker*, 2 Chit. 292.

Trial of a revenue information further postponed on the motion of the defendant, although he had not complied with the terms of a former postponement, by paying the costs of the day.

Such applications are not *ex gratiâ*, where founded on the absence of a material witness. *Attorney General* v. *Gatcliffe*, 12 Price, 367.

(*d*) *Entering Causes for.*

In Hertfordshire and Sussex, the practice at the assizes is not to allow any cause to be entered for trial with the marshal, after the rising of the Nisi Prius Court on the first day of its sitting, although there be no *ne recipiatur* entered by the defendant. *Doe d. Sayer* v. *Rees*, 1 D. & R. N.P.C. 6. [Graham]

Judgment against the casual ejector having been set aside on the terms of entering into the consent rule, pleading, and taking short notice of trial for the adjournment day, the 11th April: The Judge at Nisi Prius granted an order for entering the cause on the adjournment day, though the defendant had not pleaded until the 9th of April. *Doe d. Crawshaw* v. *Shepherd*, 1 C. & P. 620. [Abbott]

(*e*) *Mode of conducting in Court.*

An entry by the defendant in the marshal's book, with a mark of *ne recipiatur*, is not sufficient to authorize the plaintiff to try the cause, he not having entered it. *Watson* v. *Gowar*, 8 D. & R. 456.

The course to be pursued, in any case where the special jury has not been summoned, is, for the cause to be taken after other special jury causes, fixed for that day, are disposed of; and not to wait until all the special jury causes in the list are tried. *Archer* v. *Bamford*, 1 C. & P. 64. [Abbott]

The counsel for the plaintiff has a right on the cause being called on, to have a witness called on his *subpœna* without swearing the jury. *Hopper* v. *Smith*, 1 M. & M. 115. [Tenterden]

The judge will not call on another cause, to allow an agreement to be sent to the Stamp Office, to be properly stamped, and the plaintiff must therefore be nonsuited. *Viscount Dudley and Ward* v. *Robins*, 3 C. & P. 26. [Tenterden]

An arrangement proposed by one of two defendants, in an action on a joint contract, that each party should pay a moiety of the damages, will not be acceded to by the judge at Nisi Prius, unless both defendants consent, either in person or by counsel. *Dickinson* v. *Goom*, 2 C. & P. 194. [Best]

The question, which party is entitled to begin on the trial of a cause, is to be determined by the judge at Nisi Prius, and his determination will not be reviewed by the judges in Banc. *Lopes* v. *Andrews*, 5 Law J. K.B. 46.

As the plea of *solvit ad diem* admits the execution of the bond, the defendant is entitled to commence. *Sandford* v. *Hunt*, 1 C. & P. 118. [Park]

Where issue was joined on a plea of justification, in assault and battery, it was holden, that the affirmative was with the defendant, and therefore the plaintiff's claim to damages did not give him a right to begin. *Bedell* v. *Russell*, 1 R. & M. 293. [Best]

It seems, in an action for goods sold, that, after the order and delivery of goods have been proved, the plaintiff may reserve the residue of his evidence until his reply to the defendant's case. *Stansfield* v. *Levy*, 3 Stark. 8. [Abbott]

The cross-examination is to be deemed notice of the intended defence, and therefore the plaintiff is bound to go into evidence to rebut it before he closes his case, and cannot enter into it in evidence in reply. *Wharton* v. *Lewis*, 1 C. & P. 529. [Abbott]

It seems the practice to allow the plaintiff who has closed his case, to adduce fresh evidence to get rid of objections which are beside the justice of the case; but not to obviate any difficulty on the merits, or anything which goes to the justice of the case. *Giles* v. *Powell*, 2 C. & P. 259. [Best]

Where a party acts as his own adviser, he cannot ask the Court to relieve him from the effects of errors occasioned by his ignorance. *Gillingham* v. *Waskett*, M'Clel. 568.

If in an action on a bill, it has been opened, that the bill in question, at the same time with another bill, was usuriously discounted by the plaintiff, and after a *primâ facie* case of usury made out, a witness who is called to disprove it, is asked as to something he has said respecting a trial relative to the other bill, this is not a matter so far collateral, that the other side may not call a witness to contradict him as to what he said.

If in an action on a bill the plaintiff's counsel make out a *primâ facie* case, and the defendant's counsel proves a case of usury, and, after the plaintiff has called a witness in reply to deny the usury, a witness be called to contradict the plaintiff's witness in reply, the defendant's counsel is entitled to observe on the plaintiff's evidence in reply, and on the contradiction; and the plaintiff's counsel then has a general reply. *Meagoe* v. *Simmons*, 3 C. & P. 75. [Tenterden]

To prove a conversation, a witness was called, who stated that he had taken the same down in writing; the counsel did not call for the paper, but the Judge did, and inspected it for his own satisfaction: It was holden, that its production, under these circumstances, did not entitle the plaintiff's counsel to address the jury again. *Dowling* v. *Finigan*, 1 C. & P. 587. [Best]

Where the counsel for the defendant opens facts to the jury, and calls no witness to prove them, it is in the discretion of the Judge to allow the plaintiff's counsel to reply. *Crerar* v. *Sodo*, 1 M. & M. 85. [Tenterden]

If the counsel for the defendant on the trial of an indictment for a misdemeanour opens new facts in his address to the jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is, notwithstanding, entitled to a general reply. *Rex* v. *Bignold*, 4 D. & R. 70.

If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the jury, observes upon the general state of the book, and refers to

other parts of it, such observations do not give the plaintiff's counsel right to reply. *Pullen* v. *White*, 3 C. & P. 434. [Best]

If a defendant prove payment to a plaintiff, by shewing the particulars of demand, delivered under a judge's order, in which the plaintiff has credited the defendant, this is the evidence of the defendant, and entitles the plaintiff to reply. *Rymer* v. *Cook*, 1 M. & M. 86 (in note). [Hullock]

If the defendant's counsel take an objection, and the plaintiff's counsel answer it, and, in replying on the objection, the defendant's counsel cite a case, the plaintiff's counsel will be allowed to observe on the case cited. *Fairlie* v. *Denton*, 3 C. & P. 103. [Tenterden]

Where, in order to save the time of the Court, it is arranged between the parties, that a great body of documentary evidence shall be entered as read, if, on examination by the parties it shall appear to be evidence, and afterwards the parties cannot agree upon the subject—The Court will permit the cause to be again set down for hearing, on the subject of that evidence; but will not permit the cause to be again opened, or any discussion to take place on the merits. *Wyld* v. *Ward*, 1 Y. & J. 536.

After the jury have had the case summed up to them, and have retired, the Court will not permit them to see a treatise on the law of the subject, even with consent of parties; as they should state their difficulty to the Judge, and receive his direction as to the law. *Burrows* v. *Unwin*, 3 C. & P. 310. [Tenterden]

## (I) MOTIONS, RULES, AND ORDERS.

The Court of King's Bench will, if they think proper, interfere, on motion, in those cases where, in former times, an *audita querela* could be sustained. *Puller* v. *Allen*, 1 Law J. K.B. 54.

The junior baron of the Court of Exchequer will, in future, sit to take motions of course on the anniversary of the martyrdom.

The three junior barons will sit, either with or without the Chief Baron, to transact the business of the plea side of the court, and to hear motions in equity, on Mondays and Thursdays during term. *Reg. Gen.* 9 Price, 15.

Although the defendant has struck out the rejoinder of *nul tiel record*, yet a rule to produce the record may be given; therefore, when a motion is opposed in the first instance, no costs of opposition can be allowed, though notice of motion was given. *Gerrard* v. *Gaskell*, 2 Chit. 401.

A motion to answer the matters of an affidavit, never granted on the last day of term. *Anon.* 1 Law J. K.B. 60.

An agreement not within the stat. 9 & 10 W. 3, c. 15, s. 1, will not be made a rule of court, although it contains a stipulation to that effect. *Steers* v. *Harrop*, 1 Law J. C.P. 42, s. c. 1 Bing. 133.

In serving a rule on the clerk of an attorney, it is sufficient to inquire at the office of his employer, if he is still a clerk in the office, and if he is, to leave the rule there. *Anon.* 1 Law J. K.B. 56.

When papers have been put through the hole of an attorney's door, an inquiry should afterwards be made whether they have come to the hands of the party, or the Court will not consider it a good service. *Anon.* 2 Law J. K.B. 76: s. p. *Anon.* 1 Law J. K.B. 88.

An affidavit of service, stating that a rule had been served, by giving it to a clerk in the office, is bad; it should have been "to a clerk in the office of Mr. A." *Anon.* 1 Law J. K.B. 188.

A rule having been obtained for a *concilium* on *Saturday*, and served on Saturday night, the term ending on the Wednesday following, is sufficient; as four days are not in all cases necessary at the end of the term. *Bradshaw* v. ———, 2 Chit. 372.

The Court will, on a special application, permit a rule at the end of the term to be drawn up for only three days. *Anon.* 2 Chit. 372.

A rule *nisi* to shew cause at chambers will not be granted at the close of the term, where the party might have applied sooner. *Anon.* 1 Chit. 266.

Where a rule was obtained on *Saturday*, for *Monday*, the Court enlarged it as of course. *Hain* v. *Aldrit*, 2 Chit. 372.

Upon an enlarged rule, the affidavits must be filed before shewing cause, although it be not so expressed in the rule of enlargement. *Barker* v. *Richardson*, 1 Y. & J. 302.

If a rule *nisi* for an information be fraudulently obtained, it will be discharged with costs. *Rex* v. *Page*, 2 Ken. 272.

If a rule be improvidently drawn up through the mistake of the officer, it will be discharged on terms. *Brookes* v. *Weston*, 8 Moore, 87.

The Court of Exchequer will not discharge a rule *nisi* for an order of the Court, in the absence of proof that notice has been given to the opposite party, of the intended application. *Raby* v. *Olverenshaw*, 11 Price, 512.

It is not a valid objection on shewing cause, that a rule to compute was moved on the day of signing interlocutory judgment for not bringing in the record. *Russen* v. *Hayward*, 5 B. & C. 752.

A rule to shew cause cannot be made absolute until the following day after which cause was to have been shewn, although the rule may have been enlarged. *Solomon* v. *Cohen*, 9 Price, 388.

After the Court have once delivered their opinion upon a rule, they will not allow it again to be discussed, upon the suggestion that new matter can be brought forward, if it appear that the new matter was within the control of the party at the time of the original discussion. *Dillamore* v. *Capon*, 2 Law J. C.P. 35, s. c. 1 Bing. 398, s. c. 8 B. Mo. 462.

In a joint action by three plaintiffs for a libel,—held, that the defendant might call on the plaintiffs' attorney to disclose their residence and occupation. *Worton* v. *Smith*, 6 B. Mo. 110.

The Court will not set aside a writ because the service is bad. *Leicester* v. *Walbrooke*, 1 Law J. K.B. 60.

A judge's order may be altered by the Court. *Anon.* 1 Ken. 376.

The Court will not set aside the order of a judge made at chambers, on facts which could have been, but were not, produced before him at the time the order was made. *Gwatkin* v. *Gosling*, 1 Law J. K.B. 190.

Therefore the Court refused a rule *nisi* to set aside an order made by a judge at chambers, on the ground that the whole of the evidence was not laid before the judge; observing that the suitors must

employ attornies who will attend to the business at chambers, and bring the whole of the evidence before the judges. *Ward's case*, 2 Law J. K.B. 92.

On a summons to stay proceedings in an action on a judgment, the judge having decided that interest was not payable, and the plaintiff having accepted the sum tendered—The Court refused to discharge the judge's order, and to allow him to proceed in order to try the question. *Butler* v. *Stoveld*, 1 Bing. 368, s. c. 8 B. Mo. 412.

After an amendment had been made under a judge's order, the Court discharged the order, upon the ground, that the amendment was too material to be permitted in a writ of right. *Tooth* v. *Boddington*, 1 Law J. C.P. 66, s. c. 1 Bing. 208, s. c. 8 B. Mo. 42.

*Delay* in drawing up and serving a judge's order waives it. *Charge* v. *Farhall*, 4 B. & C. 865, s. c. 7 D. & R. 422.

## (K) PARTICULARS OF DEMAND.

The marshal, in an action against him for an escape, has a right to demand a particular of the cause of action. *Webster* v. *Jones*, 7 D. & R. 774.

Where the plaintiff delivered a particular of demand under a judge's order, which stated the action to be for goods and a bill for 40*l.*, omitting another bill for 20*l.*: It was holden no objection, because you need not give a particular of a bill if it appears in declaration. *Cooper* v. *Amos*, 2 C. & P. 267. [Abbott]

The omission to deliver a particular of demand under a judge's order, does not entitle the plaintiff to sign judgment of *non pros*. *Somers* v. *King*, 7 D. & R. 125.

Where the defendant obtained a summons for better particulars four days before the time of pleading expired, and the plaintiff's attorney did not attend until the third summons, when the order was refused; and, the time for pleading being expired, he signed judgment for want of a plea: Held to be premature, because the delay was created by plaintiff. *Glover* v. *Watmore*, 5 B. & C. 769, s. c. 8 D. & R. 607.

In an action by assignees of a bankrupt, the declaration stated the cause of action to be, money had and received to the use of the bankrupt; the particulars of demand described it as had and received to the use of the plaintiffs. This is not such a variance as to prevent the plaintiffs from recovering, it not appearing that the defendant could be misled by it. *Tucker* v. *Barrow*, 1 M. & M. 137. [Tenterden]

Where, in an action of trover, the plaintiff declared for timber generally, the Court would not require him to furnish the defendant with the particular quantity or quality of the articles he sought to recover. *Storer* v. *Hunter*, 3 Law J. C.P. 207.

## (L) OYER.

The Court refused to order a defendant to give the plaintiff oyer of a lease, or permit him to take a copy of it, on an affidavit of the plaintiff's attorney, who stated that there was no counterpart in the possession of the plaintiff, and that the attorney who had prepared the lease and counterpart, had absconded. He should have shewn that there was no counterpart in existence. *Earl Portmore* v. *Goring*, 5 Law J. C.P. 132, s. c. 4 Bing. 152.

## (M) PROCEEDINGS.

### (a) *Where set aside.*

However irregular proceedings may be, yet if they are not complained of in a reasonable time, the Court will not permit any party to take advantage of them. *Gregg* v. *Gordon*, 1 Law J. K.B. 36.

Where a defendant is guilty of *laches*, the Court will not set aside the proceedings, though they be void, and not merely irregular. —— v. *Davis*, 4 Law J. K.B. 55.

A defendant having discontinued proceedings until he received notice of executing a writ of inquiry, and then made an objection to the declaration delivered *de bene esse*: The Court held, that the objection came too late. *Minster* v. *Coles*, 2 Chit. 237.

Notwithstanding three terms have expired, yet the Court will set aside the proceedings for irregularity where no latitat was issued. *Anon.* 2 Chit. 237.

A rule which impeaches only one particular act, in a cause for irregularity, admits that the act immediately preceding was regular. And therefore a defendant, who seeks to set aside a *declaration*, because no writ has been served, is answered by its being shewn that he had been (perhaps improperly) served with a rule for time to declare, but which ought not to have been taken out, unless the defendant had been served with a writ, and had appeared. *Foxall* v. *Atkinson*, 4 Law J. K.B. 294.

An irregularity in a notice at the bottom of a copy of a writ, is not a sufficient ground for setting aside the writ, but only the copy; and the term "irregularity" in a rule to set aside the proceedings for irregularity is not essentially requisite. *Harvey* v. *Bennett*, 2 Chit. 238.

Unreasonable charges in an attorney's bill, are no ground for setting aside proceedings, being a proper subject of reference to the Master. *Peace* v. *Roberts*, 1 M'Clel. & Y. 105.

Where the christian name of the defendant is omitted in the latitat, the Court will (if the process be bailable) set aside the proceedings on motion; but if it be serviceable only, they will not interfere on motion, but leave the defendant to plead in abatement. *Rolph* v. *Peckham*, 6 B. & C. 164.

The Court will not set aside the proceedings for irregularity, because the declaration is against a less number of defendants than were inserted in the mesne process, unless the defendant shew that the cause of action is distinct. *Tupney* v. *Warwick*, 6 Law J. K.B. 123.

Where a rule to plead and notice of trial had been served, the Court would not set aside the declaration and subsequent proceedings for irregularity, although one of the counts in the declaration delivered was on unstamped paper; and held also, that an objection, that the money counts were partly printed and partly written, was untenable. *Brande* v. *Rich*, 8 Taunt. 591, s. c. 2 B. Mo. 654.

An objection cannot be taken to an irregularity in issuing an execution for damages and costs, in original actions, on the ground of omitting costs in error. *Anon.* 2 Chit. 240.

Where a defendant pleads *nil debet* to an action of debt on a judgment: Held, not a nullity, though improper. *Anon.* 2 Chit. 239.

In a replevin suit, a rule to reply, instead of a

rule to plead in bar, is a nullity, and judgment may be signed. Taking out a summons on which no order is afterwards made, does not waive any irregularity. *Ward* v. *Hindkss*, 1 Law J. K.B. 28.

If the plaintiff receive the debt without the knowledge of his attorney, and promise the defendant to pay his own costs, and the attorney afterwards goes on, the Court will set aside the proceedings. *Gillam* v. *Dundan*, 1 Law J. K.B. 151.

A defendant, who obtains a rule to set aside the plaintiff's proceedings, and to stay further proceedings in the meantime, is not entitled, on that rule being discharged, to all the time which he had to spare when he obtained the rule. On that rule being discharged, he must take the next step incumbent upon him, with all possible diligence, and without any reference to the former time which he had to spare.

But if he take the necessary step on the same day upon which his rule is discharged, he will have observed reasonable diligence. *Hughes* v. *Walden*, 5 Law J. K.B. 75.

(b) *Where staged.*

[See Trover.]

If a defendant be sued as an attorney, when he is not one, proceedings will be stayed. *Nabb* v. ——, 2 Chit. 396.

Where, upon the defendant's undertaking to pay debt and costs on or before a certain day, a judge's order to stay proceedings was obtained, but conditionally, on the usual terms: It was holden, that, on the defendant's refusing to comply with his undertaking, the Court could not compel him to do so, but the plaintiff must either bring an action on the undertaking, or proceed in the original cause. *Hayman* v. *Buck*, 3 B. Mo. 102.

When a demand is above 40s., an action may be brought in a superior court, notwithstanding it be reduced by a set-off to 17s. *Gotobed* v. *Birt*, 2 Chit. 394.

An affidavit stating that plaintiff's debt is under 40s., is no ground for staying proceedings. *Cullifford* v. *Dyche*, 2 Chit. 395.

The Court will stay proceedings in an action in Middlesex, if cause of action be under 40s. *Anon.* 2 Chit. 395.

In an action for a debt recoverable in a Court of Requests, where the plaintiff might after verdict be deprived of costs, this Court will stay the proceedings on payment of the debt without costs. *Cornforth* v. *Lowcock*, 6 Law J. K.B. 34, s. c. 1 M. & R. 321.

Although a plaintiff proceeds by action for a false return, and also by *distringas* against the last sheriff at the same time, the Court will not stay proceedings. *Anon.* 2 Chit. 392.

Execution having been taken out for costs on a verdict of one shilling damages, notwithstanding the omission of the surname of one of the plaintiffs, the Court, after a motion to increase the damages had been refused, and an offer to amend on payment of costs had been rejected by the plaintiff, stayed proceedings in a second action for the original sum sought to be recovered. *Longridge* v. *Brewer*, 1 Bing. 307, s. c. 7 B. Mo. 522.

A plaintiff declared in assumpsit against trustees of a turnpike-road generally, went to trial, withdrew his record, and, after suffering himself to pressed, sued the same trustees a second name, for the same cause of action: refused to stay the proceedings in the sec the costs of the first action were paid. *Poole*, 3 D. & R. 53.

The Court will not stay the proceedin ground of the pendency of another actio same cause, against the defendant joi another person, except in a case of opp vexation. If such a case is made out, the terfere in a summary manner, or allow th plead in abatement, notwithstanding the have expired—*Semble*. *Sowter* v. *Dunste* J. K.B. 114, s. c. 1 M. & R. 508.

Where separate actions were brough several persons for the same debt, who were jointly liable, the defendant in having paid the debt and costs in that ac Court stayed proceedings in the others wit *Carne* v. *Legh*, 6 B. & C. 124.

A plaintiff had declared and proceeded an action for work and labour, against a t road, without naming any *individual defe* the trial the record was withdrawn, and ju *non pros.* was afterwards signed. Before were paid, the plaintiff brought anoth against the present defendant for the sam action: Held, that there was no ground the proceedings, since there is no rule b plaintiff is compelled to pay the costs of a f before he can proceed with the second. *Poole*, 3 D. & R. 53.

Where an action of trespass was brough by an uncertificated bankrupt, for false imp after nonsuit in K.B. for the same cau ground, that he was not prepared with e prove the validity of the former commi Court stayed the proceedings until the co former action were discharged. *Crawley* 8 Taunt. 407, s. c. 2 B. Mo. 460.

Where the plaintiff discovers that the is insolvent, he cannot stop the proceed the rule of court respecting superseding p against insolvents, unless the defendant tody, without the danger of having a ju *non pros.* signed. *Taylor* v. *Harrison*, 1 La 29.

The Court will not direct a *stet processus* unless the affidavit states that the defe insolvent before the action was brought. Law J. K.B. 56.

When the Court is satisfied that the de insolvent, and will not consent to the ent *processus*, they will discharge the rule for as in case of a nonsuit, with costs. *Star* Law J. K.B. 79.

The Court will grant a rule on the l term, staying the proceedings in a cause has been a notice of the motion, but they cause to be shewn against it at chambers. Law J. K.B. 41.

(N) References to the Master or Proth

Where a rescue had been returned by th and the Court, on hearing affidavits, had r set a small fine, thinking the return warran referred all matters in difference between th

to the Master: Held, that the reference did not authorize the Master to decide whether the return was legal. *Rex* v. *Griffiths*, 1 Ken. 138, s. c. Sayer, 253.

Certain facts being referred to the Prothonotary, who reported the parties in contempt, inasmuch as they had not answered the interrogatories sufficiently: Held, that the Prothonotary's report was not conclusive, and consequently exceptions might be taken upon any material point.

And an affidavit from the party, that he was too poor to take office copies of the interrogatories, was deemed unavailable. *In re Isaacson*, 1 Bing. 272: s. p. *Herd* v. *Calvert*, 1 Ken. 375.

## 2. *IN EQUITY.*

### (A) BILLS.

#### (a) *In general.*

A bill will not be entertained for an account, and payment of monies due, for expenses incurred in fitting out and supporting certain troops called the Irish Legion, in the service of the republic of Columbia. *MacNamara* v. *D'Evereux*, 3 Law J. Chanc. 156.

Where a libel had been published, and the person libelled elected to seek his remedy by action for damages; and to the declaration in such action, the defendant pleaded as a justification the truth of the facts constituting the libel, and filed against the plaintiff in the action a bill, stating, that the transactions in question took place in a distant colony, and that the witnesses to the facts were not in England; and praying a commission to examine those witnesses, and a discovery from the defendant, and an injunction to stay proceedings in the action until the return of the commission: Held, upon a demurrer to the bill in the court below, and upon appeal, that the plaintiff in equity was entitled to the commission and the injunction. But, as to the discovery, the plaintiff having in his bill charged and interrogated upon facts, impeaching the character of the defendant in equity, and facts which might subject him to criminal proceedings, whether such defendant is bound to answer any interrogatory which indirectly tends to establish the charge, or any interrogatory affecting him with moral turpitude, or degradation of character—*quære.*

Such a bill is not sustainable, where it appears that the evidence is not material to prove the case at law. The bill ought, therefore, to shew what are the pleas at law. But if it refers to them so as to make them part of the bill, it is sufficient.

To support such a bill, it is not necessary to allege that the witnesses were residing in England at the time of the publication of the libel, or have since left it. *Macauley* v. *Shackell*, 1 Bligh, N.S. 96; and see *Shackell* v. *Macauley*, 3 Law J. Chanc. 30.

It seems that a bill may be filed notwithstanding various statutes point out a summary mode of proceeding. *Wall* v. *Attorney General*, 1 M'Clel. & Y. 643.

A defendant in a suit by the assignees of a bankrupt, cannot object to the bill as not having been filed with the consent of the creditors, unless the objection is made by the answer. *Bevan* v. *Lewis*, *Stokes* v. *Whittaker*, 1 Sim. 376.

Where specific relief is prayed, the ground for which fails, the plaintiff, under the prayer for general relief, can have such relief only as is consistent with the facts clearly and fully stated in the bill. *King* v. *Rossett*, 2 Y. & J. 33.

An objection to a bill on the ground of multifariousness cannot be made at the hearing. *Wynne* v. *Callander*, 1 Russ. 293.

By an act of parliament for the improvement of the city of Dublin, reciting that the cleansing of the streets, before an act passed in 1784, had been managed by the corporation of Dublin, and the expense defrayed by them out of the tolls and customs of the city; and that since 1784, the corporation had paid to certain intended commissioners the sum of 2000*l.* yearly out of the revenue arising out of and from the tolls and customs of the city.

The corporation, according to the act, paid the 2000*l.* annually until 1818, after which, the payment being in arrear, the commissioners by their secretary under the authority of the act; in Easter Term, 1819, brought an action against the treasurer of the corporation to recover 2000*l.*, being one year's instalment. After appearance, the corporation represented that the tolls and customs were insufficient to pay any part of the 2000*l.*, and proposed that the action should be stayed without prejudice to other proceedings. To this proposal the commissioners acceded, and the action was discontinued.

In 1821 the commissioners brought another action to recover arrears, among which, by the fourth count in the declaration, 6000*l.* were claimed as due on account of the arrears, for three years' payment for cleansing the streets, to which the defendants pleaded, that during the three years in the count mentioned, no revenue had arisen to the corporation out of the tolls and customs, whereout the corporation could have paid to the commissioners, &c. In consequence of this plea, the commissioners, in the name of their secretary, filed a bill in Chancery against the defendant in the action, stating the facts above mentioned, and charging that the tolls were not deficient, and setting forth the particulars of various tolls and customs claimed and received by the corporation; that, before and since 1784, the corporation had let the tolls, or some part of them, upon leases at large rents; and that since the year 1784, the corporation had received in tolls every year beyond the sum paid to the commissioners a surplus annually of 2000*l.* at the least. Upon these statements, with interrogatories founded upon them, the bill prayed in aid of the action—a discovery and account of the revenue arising from tolls and customs, and of the leases granted and rents received and paid upon the same.

To this bill the defendant demurred: 1st, as to so much as sought a discovery and account of the surplus of revenue received by the corporation in every year since 1784, beyond the sum paid to the commissioners; the cause assigned was, that such surplus was not liable to the payment of the arrears of future years. The second demurrer was to so much of the bill as sought a discovery of the leases of tolls and customs granted by the corporation since 1784, and not subsisting since 1818; the ground of this demurrer was, that the arrears had been paid up to 1818, and that the surplus of tolls before 1818, could not be applicable to the payment of arrears accruing after 1818.

The defendant also put in a long answer, in which he admitted that the corporation and their lessees, both before and since the year 1784, had demanded and received tolls on various articles, and that payments had been and were made upon ships entering the harbour, and ferries; but contended that such payments were not liable under the act to the payment of the 2000*l.*; and he set forth accounts in schedules of tolls and customs, and payments made for ships and ferries since 1818, insisting, that since that time there had been no surplus monies received upon tolls and customs, after defraying the expense of collection.

Held, (affirming the judgment of the Court below,) that the demurrers should be overruled.

The reasons for the judgment on the appeal were: first, because the demurrers were overruled by the answer; and, secondly, because, even admitting that the surplus of former years was not applicable to the payment of arrears of future years, the discovery of the revenues actually received in such years might be material to furnish presumptive evidence upon the trial of the action. *Archer* v. *Little*, 1 Bligh, N.S. 272.

Where a bill stated the loss of a counterpart of a lease as one ground of relief, and prayed an account of what was due for rent; and, as another ground of relief, alleged that rent become due in a testator's lifetime had not been fully satisfied: Held, that a demurrer to all of the bill (except the allegations as to the last ground of relief,) because the plaintiff had not annexed to the bill an affidavit of the loss or destruction of the counterpart, was a good defence. Leave to amend the bill refused. *Onslow* v. *Meymott*, 6 Law J. Chanc. 150.

(*b*) *To perpetuate Testimony.*

*Semble*—That a bill to perpetuate testimony cannot be filed by an issue in tail. *Belfast* v. *Chichester*, 2 J. & W. 439.

In all cases, delay of suit, where parties are cognisant of their rights and under no legal disability, must affect a tardy claim, as importing a conscious acquiescence in what they have supposed to be an adverse right. *Whalley* v. *Whalley*, 3 Bligh, 31.

(*c*) *Of Discovery.*

An agent, made defendant to a bill for a discovery as to a title, may demur to it, and he is not compellable to produce the deeds. ——— v. *Staples*, 2 Ken. 135.

Where relief is prayed, and discovery as ancillary only to that relief, if the ground for the relief fails, the discovery cannot be obtained. *King* v. *Rossett*, 2 Y. & J. 33.

A plaintiff has no right to a discovery of circumstances, as evidence in support of his title, which is denied by plea, unless in his bill he expressly charges those circumstances as evidence of his title. *Britten* v. *Britten*, 3 Law J. Chanc. 150.

(*d*) *Of Revivor.*

If one of two co-plaintiffs dies before the defendant answers, the latter may compel the remaining co-plaintiff to revive the suit with respect to the representatives of the deceased plaintiff. *Adamson* v. *Hall*, 1 Law J. Chanc. 91, s. c. 1 S. & S. 249; s. c. before the Lord Chancellor, affirming the V Chancellor's decision, 1 Turn. 258.

If a mortgagee and a judgment creditor file a b for the payment of their respective debts, agai the trustees and representatives of a deceased te tor, upon which a decree is made for the general ministration of the testator's real and personal est and afterwards the judgment creditor dies; the p sonal representative of the judgment creditor is titled to file a bill of revivor, making the mortga a party defendant, and to prosecute the decre plaintiff. *Burney* v. *Morgan*, 1 Law J. Chanc. 2 s. c. 1 S. & S. 358.

Where a suit has been instituted by a devisor, revived by a party claiming under a first will, proper course for a devisee claiming under a sec is to revive the suit, abated by the death of the visor, *de novo*. *Ryland* v. *Latouche*, 2 Bligh, 5

Where a suit becomes abated by the death of of several plaintiffs, the representative of the ceased plaintiff cannot revive it except by a bi revivor, to which the other plaintiffs in the orig suit are parties. In such a case the representa of the deceased plaintiff cannot make the o plaintiffs in the original bill, defendants to the of revivor, unless they have refused to be co-pl tiffs in it. *Anon.* 2 Law J. Chanc. 170.

Where a bill of revivor has been filed, bef order to revive obtained, the Court will order a vival within ten days, or dismiss both bills. B v. *Bolton*, 2 S. & S. 371.

Where the plaintiff files a bill of revivor, but not obtain an order of revivor, the defendant obtain an order dismissing the bill, unless the is revived within a limited time. *Anon.* 4 La Chanc. 141.

A suit having become abated, and a bill of rev having been filed requiring no answer, and no o of revivor being obtained, a defendant, who has peared to the bill of revivor, may obtain an or that, unless the suit be revived within a given t the original bill, and the bill of revivor, shall s dismissed with costs as against him. *Germ Cook*, 4 Law J. Chanc. 101.

A bill of revivor, even when filed by a party fendant, ought not to be brought to a hearing. P v. ——, 6 Law J. Chanc. 182.

On a bill of revivor the defendant cannot p an answer containing new facts, though it app that, if it had been filed originally, it might produced a different decree.

If a bill, produced as a bill of revivor, be not s the defendant should demur; because, by answe the same, he admits the bill to be a good one: a a party file one who is not entitled, the defen must adopt the same course. *Nanney* v. *Tetty* Price, 117.

(*e*) *Supplemental.*

Before a party is entitled to file a supplem bill in the nature of a bill of review, it is necess that the new matter should be discovered subsequ to the decree, or at least subsequent to the t when it could have been introduced into the ca and the matter should not only be new, but mater and such as, if unanswered in point of fact, wo clearly entitle the plaintiff to a decree, or wo raise a question of such nicety and difficulty, as to

a proper subject of judgment in a cause. *Ord* v. *Noel*, 6 Mad. 127.

If the plaintiff in a suit omits to put facts in issue by his original bill, or by amendment, leave to file a supplemental or amended bill, after the suit is at issue, ought not to be granted by the Court on the ground of inadvertence. A petition to obtain such leave ought to make out a case of new evidence lately discovered, material to the plaintiff's equity, and which, with reasonable diligence, could not have been discovered; but, in such case, the suit ought to be disposed of without prejudice to the matter omitted to be put in issue, which the plaintiff may prosecute in any future suit. *M'Neill* v. *Cahill*, 2 Bligh, 229.

Parties cannot proceed to a decree, and then apply to the Court for leave to file a supplemental bill, in the nature of a bill of revivor, for the purpose of introducing new evidence. *Bingham* v. *Dawson*, 1 Jac. 243.

Where a plaintiff, by the present practice of the Court, may obtain that relief by petition, for which a supplemental bill was formerly necessary, and prefers the latter course, the supplemental bill is not demurrable, but the proceeding will be taken into consideration on the question of costs. *Davies* v. *Williams*, 1 S. & S. 5.

A, being entitled, as one of four co-heiresses, to certain hereditaments, conveys her share to a trustee, upon trust to sell, and then grants an annuity to B, charged upon the proceeds of the sale; the annuity being in arrear, B files a bill against the persons interested in A's share, to have his security made effectual: He may afterwards file a supplemental bill, stating a lien of A, in respect of her share, upon the three shares of those who were co-heiresses with her, bringing before the Court the persons interested in those shares, and praying relief accordingly. *Campbell* v. *Curzon*, 3 Law J. Chanc. 203.

Where a decree is defective only because incidental parties are not before the Court; as in the case of an assignment in trust for payment of debts, reserving the surplus, if the assignee obtains a decree, and afterwards it appears that he had assigned his interest before the decree, his assignees may, by supplemental bill, have the benefit of that decree. (*Sanbde*, *Binks* v. *Binks*, note, p. 593.) *Rylands* v. *Latouche*, 2 Bligh, 567.

If the question of next of kin be raised on the record, a person, though not a party to the suit, may be heard, if the Master has found that he has a counter-claim against the party suing in that capacity; but if the claim be not raised on the record, and none of the next of kin are in that character parties to the cause, it must be brought before the Court by a supplemental bill. *Waite* v. *Temple*, 1 S. & S. 319.

### (*f*) *Amended.*

Upon an application for the plaintiff to amend his bill, without prejudice to an injunction previously obtained on the merits, the particular amendments must be specified. *Bell* v. *Brockbank*, 2 Y. & J. 181.

Leave given to convert a bill for discovery into a bill for relief.

Where, after answer, a bill for discovery and for a commission is allowed to be converted into a bill for relief, the defendant is entitled to have leave to put in such an answer to the amended bill, as he might have filed, if there had been no answer to the bill of discovery. *Louseda* v. *Templer*, 2 Russ. 561.

If a bill is amended, by adding parties, after witnesses have been examined, their depositions cannot be read against the new parties. *Pratt* v. *Barker*, 1 S. & S. 1.

Where co-plaintiffs are made defendants by motion to amend for the purpose of letting in their evidence, it must be on terms of giving security for payment of all costs, and not merely up to the time of their conversion from plaintiffs to defendants.

Such an application must (to succeed) be made without delay.

Where there had been great delay, it was considered not only a ground for refusing it, but refusing it with costs. *Simmons* v. *Addison*, 12 Price, 169.

A bill need not be amended for the purpose of introducing facts disclosed in the answer, on which the plaintiff means to rely, as parts of his case, entitling him to the relief which he has prayed. *Attwood* v. ——, 1 Russ. 353.

After a defendant has answered the original bill, he cannot demur to the amended bill, on the ground that the plaintiff's title is not such as to give him a right to any answer. *Wreford* v. *Letham*, 5 Law J. Chanc. 173.

An objection on the face of an original bill cannot be made available on the amended bill. *Ovey* v. *Leighton*, 2 S. & S. 234.

### (*g*) *Cross Bills.*

A cross bill may be filed in the Court of Chancery, if an original bill has been filed in the Court of Exchequer. *Parker* v. *Leigh*, 6 Mad. 115.

Any proceeding taken in a cross cause, does not prevent the original plaintiff from calling for an answer to the original bill.

The original cause being a country cause, and the cross cause a town cause, if the defendant to the cross-bill takes out two orders for time, so that his third order will expire before the third order of the defendant in the original cause, the Court will allow the defendant to the cross bill further time, so that he may not be compelled to answer the cross bill, till he has obtained an answer to his original bill from the plaintiff in the cross cause. —— v. *Harris*, 1 Law J. Chanc. 111, s. c. 1 Turn. 165.

### (*h*) *Taken* pro confesso.

Where a bill, to which there is only one defendant, is to be taken *pro confesso*, it may be done upon motion, the defendant, if in custody, being brought into court. *Lewis* v. *Marsh*, 3 Law J. Chanc. 133, s. c. 2 S. & S. 220.

### (*i*) *Filing.*

Laches in filing a bill can only be taken advantage of by plea. *Ros* v. *Willoughby*, 10 Price, 2.

### (*k*) *Dismissing.*

If the plaintiff do not attend by counsel when the cause has been set down for hearing, the bill will be dismissed.

On motion, the Court will not dismiss a bill after it has been set down for hearing. *Lyonce* v. *Wye*, 9 Price, 166.

A creditor, who files a bill on behalf of himself

and other conditions of a certain class, may, before a decree, dismiss his bill at his own pleasure. After a decree he cannot dismiss it. *Hansford* v. *Storie*, 2 Law J. Chanc. 110, s. c. 2 S. & S. 196.

Where there are two plaintiffs, and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion. *Caddick* v. *Masson*, 1 Sim. 302.

A bill cannot be dismissed for want of prosecution, after a subpœna to rejoin has been served. *Long* v. ——, 1 Law J. Chanc. 155.

Semble—That an order cannot be obtained to dismiss a bill for want of prosecution, after replication, but that the defendant must procure the cause to be set down.

If, on shewing special cause against an order to dismiss a bill for want of prosecution, it be stated that some of the defendants are in contempt, and that the plaintiffs were proceeding to attach them, an affidavit in support of that particular must be produced. *Atkinson* v. *Hutton*, 13 Price, 6.

Where a bill is inadvertently dismissed as against one of the defendants, and it afterwards appears that he is still a necessary party, the order of dismissal will be varied, or discharged, so as to place him again on the record. —— v. *Marland*, 1 Law J. Chanc. 212.

After an order to dismiss a bill for want of prosecution, the bill will not be restored, except upon a special case made by affidavit, and assigning satisfactory reasons for the plaintiff's delay. *Watkins* v. *Stanyan*, 1 Law J. Chanc. 231.

An order nisi to dismiss, will not be discharged on the ground of a material amendment; the regular course being to reply, and then get an order for leave to withdraw and amend: but the facts on which the application for that order is grounded, must be verified by affidavit. *Croft* v. *Appleton*, 11 Price, 338.

Where an order to dismiss has been discharged, a second one cannot be obtained on the same day. *Sir* v. *Mawood*, 2 S. & S. 325.

(B) Process.

Notice of motion in a cause cannot be given before service of the subpœna; nor is the defect cured by the defendant appearing in order to insist on the objection of irregularity. *Lampard* v. *Padfield*, 2 Law J. Chanc. 30.

An infant not named must be described in the subpœna as the youngest female or other child of its parents. *Sley* v. *Broughton*, 2 S. & S. 188.

After a subpœna has been sealed, no alteration can be effected.

Therefore, where a writ had been altered, the Court held, that the rule, that parties who move to set aside proceedings for irregularity must apply in the first instance, does not preclude the party, against whom the undue advantage had been attempted, from moving the Court. *Parker* v. *Ewart*, 9 Price, 441.

Where an order had been obtained, that service of a subpœna on the attorney of the defendant, who resided abroad, and had brought an action at law against the plaintiffs, should be good service; but such order was obtained, and the subpœna issued and served two days before the filing of the bill, the Court refused to discharge the order for irregularity, holding that the irregularity, if [illegible] by a subsequent appearance of [illegible] *Exchange Assurance Company* v [illegible]

Where a messenger has be[illegible] of *cepi corpus*, and the defen[illegible] Bench prison upon mesne pr[illegible] must next be obtained. *Nea*[illegible] 389.

If the messenger ordered to [illegible] die, the serjeant-at-arms wi[illegible] *Macnab* v. *Mensal*, 2 Sim. 16.

Where process is prayed g[illegible] fendant, who is stated in the [illegible] jurisdiction, and who does not [illegible] process will be allowed to be [illegible] evidence has been gone into. [illegible] Law J. Chanc. 141.

The Court of Chancery wil[illegible] cess of the court to be made u[illegible] to whom a party is indebted f[illegible] paid on his discharge from an[illegible] to compel a repayment. *Jen*[illegible] 233.

(C) Appear[illegible]

An appearance cannot be re[illegible] out the defendant's authority. [illegible] Law J. Chanc. 53.

If an appearance is entered [illegible] out authority, and afterwards a[illegible] rized to appear for him, adopt[illegible] appearance cannot be carried [illegible] of time, than to the date of t[illegible] the authority of the solicitor by [illegible] *Gray* v. *Chaplin*, 3 Law J. Ch[illegible] S. 267.

Appearance of a defendant [illegible] which he must answer or su[illegible] must be calculated from his a[illegible] not from that time at which [illegible] have been served, if he remai[illegible] service. *Webster* v. *Threlfall*, [illegible] 74, 109, s. c. 1 S. & S. 135.

If a person, named as a de[illegible] but who has not put in any [illegible] counsel at the hearing, the [illegible] *Capel* v. *Butler*, 4 Law J. Ch[illegible] 457.

If the defendant does not [illegible] plea when it is called on, the [illegible] it without hearing it opened, [illegible] the plaintiff produce an affid[illegible] the rising of the Court. *Bl*[illegible] Law J. Chanc. 33.

(D) Answe[illegible]

[See *Bartlett* v. *Gillard*, 6 La[illegible] 3 Russ. 14[illegible]

(a) *Time and Mann*[illegible]

An answer must be filed o[illegible] the seal day, to prevent an att[illegible] tion, or a motion to extend th[illegible] to stay the trial. *Whitehouse* v [illegible] Chanc. 34, s. c. 1 S. & S. 102.

And a mistake as to office h[illegible] exception to this general rule. [illegible] Law J. Chanc. 83, s. c. 1 S. &[illegible]

An answer sworn at too late

ing to be filed at the six clerks' office, but filed on the following morning, will not be ordered to be considered as filed on the day on which it was sworn. *Ibbetson* v. *Booth*, 1 Law J. Chanc. 34, s. c. 1 S. & S. 102.

If, after a decree made, and proceedings under it in the Master's office, it be discovered that the answer of one of the defendants, though sworn by him and engrossed, has not been filed; the Court will not order such an answer to be filed *nunc pro tunc*. *Osmond* v. *Tindal*, 3 Law J. Chanc. 127.

Where a solicitor had prevailed on a party to file a bill against others and himself, and he acting as the plaintiff's solicitor in the suit, did not put in his answer, the Court ordered him to file his answer within a certain time. *Jenoway* v. *Middleton*, 9 Price, 666.

If the Attorney General do not put in his answer to a bill filed against him, within a reasonable time, the Court will order that, unless the answer be put in by a short day, the bill be set down to be taken *pro confesso*. *Peto* v. *the Attorney General*, 1 Y. & J. 509.

After a plea overruled, it is not of course to obtain an order for time to answer. *Trim* v. *Baker*, 1 Law J. Chanc. 218, s. c. 1 S. & S. 469, s. c. 1 Turn. 253.

Order for time to answer, obtained as of course by petition at the Rolls after plea overruled, discharged as irregular. *Ferrand* v. *Pelham*, 2 Law J. Chanc. 2, s. c. 1 Turn. & R. 404.

In a suit for tithes, the defendant, who had filed a cross bill against the plaintiff for a discovery, applies for time to answer the original bill, until after an answer shall have been put in to the cross bill: refused, because the course is to amend the answer. *Dolben* v. *Whittington*, 11 Price, 28.

Husband and wife being defendants, the latter, after obtaining an order to answer separately, is entitled to all the orders for time to answer, and is not bound by a previous order obtained by her husband for that purpose on behalf of himself and her. *Jackson* v. *Haworth*, 1 S. & S. 161.

The defendant, being in contempt for want of an answer, afterwards put one in, and an order for his discharge was obtained upon payment or tender of the costs of contempt; the costs were tendered but not accepted; afterwards the answer was excepted to and referred; and after warrants to proceed before the Master, the defendant submitted to answer the exceptions. The plaintiff did not proceed immediately upon the former process of contempt, but waited for an answer to the exceptions: Held, that an order for time to answer the exceptions obtained by the defendant was regular. *Cox* v. *Champneys*, 6 Mad. 262.

Where defendants, having stood out all process of contempt, for want of an answer, at the return of the commission of rebellion, entered an appearance with a clerk in court, paid the costs of contempt, and obtained the usual order for time to answer; on an application for an attachment against the defendants for not putting in their answers, the Court held, that, according to the established practice of the court, the defendants were entitled, on paying the costs of contempt—to appear and take the usual orders for time, in the same manner as if they had not been in contempt, but expressed its disapprobation of the practice. *Hull* v. *Mackay*, 2 Y. & J. 472.

After service of an order to answer amendments and exceptions together, it is irregular to file a further answer, even though that further answer was sworn before the order was served. *Stockdale* v. *Ladbroke*, 3 Law J. Chanc. 134.

A defendant who is in contempt for want of an answer, may, on filing the same, be discharged either by the usual order, or by the waiver of the plaintiff. *Hoskins* v. *Lloyd*, 1 S. & S. 393.

(*b*) *Signature.*

A defendant who is the guardian of an infant, need not sign the answer more than once if he be a co-defendant in a joint answer. *Anon.* 2 J. & W. 553.

All the skins of parchment, containing an answer, must be signed; if not, they are irregular. *Carter* v. *Bosanquet*, M'Clel. 456, s. c. 13 Price, 604.

An answer on two sheets of parchment interlined, and one sheet only signed, will be ordered to be taken off the file. *Bailey* v. *Forbes*, 1 M'Clel. & Y. 462.

Where an answer is contained in more than one skin of parchment, every skin must be signed by the defendant. And therefore, where in a country cause an answer was comprised in two skins, and the last only was signed, the Court directed than an officer should take the answer into the country, and procure the signature of the defendant to the other skin, unless the defendant should previously come to town and sign it. *Jacobs* v. *Badger*, 1 Y. & J. 166.

(*c*) *How taken.*

An order will not be made, even under very special circumstances, for taking an answer without oath, unless upon consent of the plaintiff. *Anon.* 1 Law J. Chanc. 4.

An answer is not irregular, because it has been taken before the defendant's solicitor as one of the commissioners. *Bird* v. *Brancher*, 3 Law J. Chanc. 84, s. c. 2 S. & S. 186.

Answer ordered to be taken off the file, on the ground (*inter alia*) that it had been affirmed by one of the defendants, who was a quaker, under a commission issued to take the answer upon the defendant's corporal oath. *Parke* v. *Christy*, 1 Y. & J. 533.

(*d*) *Supplemental.*

Leave given, after replication, to file a supplemental answer to a bill for dower, in order to state a fine and non-claim which had been omitted, through ignorance, in the original answer. *Jackson* v. *Parish*, 1 Sim. 505.

Where a defendant by his answer alleged certain moduses to be payable in lieu of tithes, but did not state any time at which the moduses were payable, the Court permitted the defendant to file a supplemental answer for that purpose, on the terms of paying the costs, and did not require an affidavit from the defendant explaining the omission — holding, that the moduses as pleaded were void moduses. *Scott* v. *Carter*, 1 Y. & J. 452.

Where infant defendants were out of the kingdom, and a commission was sent abroad for the appointment of a guardian to put in their answer, and a supplemental bill was filed, to which

[illegible]

[illegible]

[illegible]

leave to withdraw the replication, and file exceptions to the answer *nunc pro tunc*. *Evans* v. *Veysey*, M'Clel. 341.

(F) DEMURRER.

[See DEMURRER.]

(G) PLEA.

By analogy to the rule at law, matters arising between the bill and plea may be pleaded in equity. *Turner* v. *Robinson*, 1 S. & S. 3.

If a writ of attachment with proclamations, issued against the defendant, has not been returned, the defendant may put in a plea and answer. *Sanders* v. *Murney*, 1 S. & S. 225.

Filing a plea after the return of a simple attachment, is not irregular. *Hamilton* v. *Hibbert*, 2 S. & S. 225.

A party in contempt, who has obtained an order for a commission to take his "plea, answer or demurrer," may put in a plea.

*Quære*, If the commission had been merely to take his answer, whether he could have put in a plea. *Barber* v. *Crawshaw*, 6 Mad. 284.

When a plea is filed to a bill, the defendant should not only set down the plea, but give a rule for arguing it. *Parker* v. *Alcock*, 1 Y. & J. 195.

(H) MOTIONS.

Motions cannot be made, even in term, except upon seal days, unless leave to make them on any other day be obtained by special leave of the court. *Anon.* 4 Law J. Chanc. 204.

A motion cannot be made to adjourn a petition in bankruptcy; a petition in the bankruptcy is sufficient for that purpose. *In re Hardy*, 6 Mad. 252.

A motion to enlarge the time for foreclosing, is not a motion of course, although the interest and costs be paid up. But if there be no opposition, the Court will give further time in its discretion. *Quarles* v. *Knight*, 8 Price, 630.

(I) PETITIONS.

A person who has lent deeds, and which deeds have been brought into the Master's office under the usual directions in the decree, may, although he be not a party to the cause, present a petition to have the same delivered to him. *Marriott* v. *White*, 1 S. & S. 17.

If the Court takes possession of the property of an individual, by mistake, he may apply by petition, *pro interesse suo*, and the Court will immediately grant him relief. *Anon.* 1 Law J. Chanc. 11.

The Court will not on motion enforce an arrangement by consent, since it must be brought before the Court by petition. *Gribble* v. *Carpenter*, 11 Price, 509.

The matter of a report directed, not by the decree, but by subsequent order, can be brought on only by petition. *Clarke* v. *Elliott*, 3 Law J. Chanc. 200.

Where a bill is filed merely to obtain a transfer of stock, standing in the name of a trustee, who is out of the jurisdiction of the Court, the order must be made at the hearing of the cause, and cannot be obtained by petition. *Burr* v. *Mason*, 2 S. & S. 11.

A sum of stock, claimed as a legacy, by A, was ordered by the decree to be carried over to the account of A, "subject to the further order of the Court," with a direction that it should not be sold or transferred without notice to B: Held, that the Court might, upon petition and without rehearing the former decree, order the money to be paid to B, if his title appeared to be the better of the two. *Barksdale* v. *Abbott*, 3 Russ. 186.

Where a petition is presented in a cause, for a reference to inquire whether an infant is a trustee under the statute of Anne, and the infant is not a party to the cause, it is not enough that the petition be entitled in the cause, it must be entitled also in the matter of the infant. *Headley* v. *Redhead*, 1 Law J. Chanc. 159.

A signature to a petition, "authenticated by me A B, solicitor to the petitioner in the matter of the petition," is not an attestation of the signature within the meaning of the general order. *In re Dumbell*, 5 Law J. Chanc. 83.

A petition having received the Lord Chancellor's *fiat*, the affidavits were filed: an informality being discovered, the petition was then amended, and received the Lord Chancellor's *fiat* anew, and was ordered by his Lordship to be received into the petition paper: Held, that the petition could not be heard, because the affidavits were filed before the amended petition was regularly in court. *Ex parte Bygrove*, 2 Law J. Chanc. 147.

After a petition has been struck out, the Court cannot order it to appear on the paper till it is again set down. *Ex parte Piper*, 2 Law J. Chanc. 168.

(J) ORDERS.

Where a purchaser has obtained an order *nisi*, and has omitted to confirm it, the vendor may confirm it. *Anon.* 5 Law J. Chanc. 147, s. c. as *Chillingworth* v. *Chillingworth*, 1 Sim. 291.

A defendant is not entitled to apply for an interlocutory order for his own relief and security, if he is not a party seeking the aid of the Court, unless his motion may be imposed as a condition on an order applied for by the plaintiff. *Wynne* v. *Griffith*, 1 Law J. Chanc. 110, s. c. 1 S. & S. 147.

*Quære*, Whether the Court will at one and the same time, order the Chancellor of the Duchy of Lancaster to return the writ, and the sheriff to return the mandate which has been issued to him. *Anon.* 1 Law J. Chanc. 117.

The Lord Chancellor, by empowering the Vice Chancellor to sit for him, does not thereby authorize him to alter or discharge orders made by the former.

If the Lord Chancellor authorize the Vice Chancellor only to discharge an order, he cannot alter it.

*Quære*, Whether the Vice Chancellor has power to discharge or alter an order made by the Lord Chancellor, although it be only to hear a motion by consent. *Saunders* v. *King*, 2 J. & W. 429. [See 53 Geo. 3, c. 24, s. 2.]

The Vice Chancellor cannot discharge orders of course made by the Master of the Rolls. *Whitehouse* v. *Hickman*, 1 S. & S. 104, s. c. *Anon.* 1 Law J. Chanc. 72.

Orders already made will be set aside, where similar motions for the same orders have been refused, but the costs not paid. *Killing* v. *Killing*, 6 Mad. 68.

It is not of necessity that an order shall be dis-

charged, because obtained irregularly. *Anon.* 4 Law J. Chanc. 101.

Held not irregular, after a decree was drawn up, passed, and entered, to make an order upon a petition presented by an executrix, allowing her to retain sums paid through mistake. *Livesey* v. *Livesey*, 6 Law J. Chanc. 13.

The principle of waiver applies to an irregular, but not to an erroneous order. *Levi* v. *Ward*, 1 S. & S. 343.

An order on two solicitors, as partners, is not duly served by serving it on one of them, and leaving a copy at the place where the partnership business is carried on. *Young* v. *Goodson*, 2 Russ. 255.

An order upon the occupiers of certain warehouses to permit an inspection for the purpose of ascertaining their value in respect of tithes, cannot be executed by force, but operates only as a process of contempt, and to take the bill, if necessary, *pro confesso*. *East India Company* v. *Kynaston*, 3 Bligh, 170.

## (K) EXAMINATIONS.

[See WITNESS.]

A defendant cannot obtain an order to examine, as a witness, a plaintiff who does not consent. *Foreday* v. *Whightwick*, 6 Law J. Chanc. 60.

A plaintiff cannot obtain leave to examine a co-plaintiff as a witness, on giving security for costs. *Benson* v. *Chester*, 1 Jac. 577.

After committal for filing insufficient answers, the defendant, instead of putting in a written examination to the interrogatories, is to be examined personally upon them by the Master.

On the examination of a defendant, who is attending before the Master in consequence of insufficient answers, he may avail himself of the attendance of counsel.

A *vivâ voce* examination at law, and a personal examination in equity, are not synonymous.

The defendant is not to be discharged out of custody upon the Master's report of the sufficiency of his examination, till the plaintiff has seen the examination.

The object of the Court in directing the defendant to be examined upon interrogatories is, that, upon that examination, he shall not be liberated out of custody till he has given a sufficient answer, not only to the questions contained in the bill, to which he has not before answered, but to every question which the Master thinks may fairly arise out of the matter, which may be contained in the answers to those questions, without putting the plaintiff to the trouble of amending his bill.

But it seems, the proper mode of discussing the insufficiency of the defendant's examination is, upon the old exceptions, with respect to any of the original interrogatories in the bill remaining unanswered; and upon new expeptions, with respect to any new questions which the Master may have introduced in settling the interrogatories. The insufficiency of the examination, however, was in this case permitted to be shewn as cause against the defendant's discharge. But an examination may be quite sufficient, though it is untrue and inconsistent with what has been sworn by the defendant in his answers. Though the true principle is, that the plaintiff must be satisfied with what the conscience of the defendant allows him to swear. *Farquharson* v. *Balfour*, 1 Turn. 184, 201.

When a sequestrator has been examined in the Master's office, the examination need not be signed by counsel. *Keene* v. *Price*, 1 S. & S. 98.

A plaintiff cannot, by an order of course, refer the examination of a defendant for insufficiency, after he has proceeded upon it. —— v. *Ure*, 4 Law J. Chanc. 206.

On a re-examination, on the ground of irregularity, no new witness can be examined. *Perry* v. *Sylvester*, 1 Jac. 83.

The rule that a witness cannot be examined after publication passed, is not imperative under every variety of circumstance; but it will not be departed from, unless the Court is satisfied, by the best evidence, that it was impossible for the party to have had the benefit of the testimony before publication passed. *Auderton* v. *Wilbraham*, 3 Law J. Chanc. 130.

Where publication has passed, and the cause is in the paper for hearing, the plaintiff, upon motion, paying the costs of the application, will be allowed to examine witnesses to the execution of a will. *Coley* v. *Coley*, 2 Y. & J. 44.

## (L) INTERROGATORIES.

[See WITNESS.]

The Court ordered an examination on interrogatories, to ascertain whether a party had purchased property with knowledge of a decree. —— v. *Lady Falmouth*, 2 Ken. 22, Chanc.

Permission was reluctantly granted to the plaintiff at the hearing, to exhibit an interrogatory as to the loss of a deed by mistake omitted to be proved. *Cox* v. *Allingham*, 1 Jac. 337.

The Court will, on motion, when a cause has been set down for re-hearing, permit interrogatories to be exhibited, to prove exhibits not before the Court on the original hearing, upon an affidavit stating that they have come to the plaintiff's knowledge since, and that when the cause was heard he did not know of their existence. *Williamson* v. *Hutton*, 9 Price, 194.

At the hearing, liberty given to a plaintiff, suing as administrator, to exhibit interrogatories to prove the death of the person, whose administrator he claimed to be; and the cause permitted to stand over for that purpose. *Meons* v. *De Bernales*, 1 Russ. 301.

Where a defendant, being examined in the Master's office on a general interrogatory as to his receipts and payments, answers by referring to a former answer, which, in fact, contains no information on the subject, the Master will be ordered to receive interrogatories as to his receipt of particular sums. If the Master refuses to receive such interrogatories when tendered to him, the application is made regularly by motion as well as by petition. *Porter* v. *Woodbridge*, 4 Law J. Chanc. 68.

In a country cause, an order to file cross interrogatories, for the cross examination of the witnesses of the adverse party, is an order of course. *Anon.* 6 Law J. Chanc. 21.

Impertinent interrogatories can only be taken advantage of by demurrer.

Interrogatories, however impertinent, if answered, cannot be suppressed, as the answer waives all objections. *Jefferies* v. *Whittuck*, 9 Price, 486.

A demurrer to interrogatories, some parts of which are free from objection, must particularize the objectionable parts. *Jackson* v. *Benson*, 1 Y. & J. 32.

If an answer to interrogatories be not only too general, but insufficient, exceptions will most undoubtedly be allowed.

Held, that an interrogatory asking, whether there were not a *bonâ fide* consideration, and if not, what was the consideration, is answered by a denial, that there had been a *bonâ fide* consideration, since any other than a *bonâ fide* consideration is unknown to the law.

The practice relative to costs on exceptions taken to interrogatories is, that, on overruling exceptions, forty shillings are allowed, and, on allowing them, sixty shillings.

If out of thirty-five exceptions taken to an interrogatory, five be only allowed, and, on argument, one of the five be overruled, the defendant is not entitled to costs. *Daniel* v. *Bishop*, 13 Price, 15.

Where a party, who has put in insufficient answers, is to be examined upon interrogatories, such interrogatories must be settled by the Master, and must go directly to the points, to which the exceptions are sustained. *Farquharson* v. *Balfour*, 1 Turn. 184.

### (M) DEPOSITIONS.

*Quære*—Whether depositions taken in a cross cause, after publication passed in the original cause, can be read at the hearing of the original cause. *Horlock* v. *Priestley*, 1 Law J. Chanc. 73.

The Court will not reject depositions on the certificate of the commissioners, before whom they were taken, on the ground that the witness under examination had not only consulted minutes of her own, but a document drawn out for her by plaintiff's attorney, and had given her testimony upon them. *Anon.* 2 Ken. 27. Chanc.

Depositions taken to perpetuate the testimony of witnesses cannot be obtained from the Court, for the purpose of perfecting the title to an estate. *Teale* v. *Teale*, 1 S. & S. 385.

Where depositions were returned on paper, the Court allowed them to be engrossed on parchment, and the engrossment to be filed. *Willis* v. *Garbutt*, 2 Y. & J. 326.

Depositions taken by commission, suppressed, it appearing that the evidence had been taken by the clerk to the commissioners, and that the effect of some of the depositions had been communicated to the agent on the other side. *Lennox* v. *Munnings*, 2 Y. & J. 483.

### (N) EXHIBITS.

Exhibits impeaching the validity of a deceased person's signature to a codicil are admissible. *Machin* v. *Grindon*, 2 Add. 91.

Where exhibits are left under an order with the clerk in court, and it becomes necessary to have them produced in court, or at the assizes, the Court will not order them to be given up to any person unless by the consent of all parties, and upon payment of the clerk in court's fees. *Harris* v. *Bodenham*, 1 S. & S. 283.

### (O) PUBLICATION.

It is of course to enlarge publication before the cause is set down. *Long* v. *Barne*, 1 Law J. Chanc. 119.

Where no witnesses have been examined, it is a motion of course to enlarge publication. *French* v. *Lewsey*, 6 Mad. 50.

It is the course of the Court not to refuse enlargement of the time of publication when a proper application is made, though the party applying may have been extremely dilatory. *Anon.* 1 Law J. Chanc. 119.

The Court enlarged the publication under special circumstances, although the rule to pass publication had expired four months. *Stevens* v. *Salwey*, M'Clel. 596.

Publication enlarged under the circumstances. *Cutler* v. *Cremer*, 6 Mad. 253.

Publication after answer to original bill, will be enlarged, until the answers in a cross cause come in, upon the production of an affidavit verifying the facts stated in the cross bill. *Edwards* v. *Morgan*, 11 Price, 399.

In one suit, two distinct matters cannot be joined; as, where one requires that the depositions should not be published, till the hearing of the cause, and the other requires an immediate publication of the same depositions. *Dew* v. *Clarke*, 1 Law J. Chanc. 37, s. c. 1 S. & S. 108.

If the delay in proceedings on bill and cross bill be occasioned by the fault of all the parties thereto, the Court will on terms, and on payment of costs, grant a second order to enlarge publication in the original cause, so as to enable the party applying for time to consider the matter furnished by the answer to the cross bill newly filed. *Lowe* v. *Firkins*, and *Firkins* v. *Lowe*, 13 Price, 21.

Practice as to publishing depositions of witnesses examined after decree. *Handley* v. *Billinge*, 1 Sim. 511.

### (P) CAUSES.

#### (*a*) *Setting down.*

A cause ought not to be set down in the paper of further directions when only a separate report has been made, and there is no general report. *Cochrane* v. *Chambers*, 2 Law J. Chanc. 47.

A cause set down, without consent, in the vacation after the term in which publication has passed, is regular. *Partridge* v. *Cann*, 1 S. & S. 466.

A cause may be set down for trial *pro formâ*, so as to enable a witness attending from a public office in the country to prove a document, without staying a longer period. *Swift* v. *Grace*, 9 Price, 146.

Where a defendant obtains an order for shewing cause against a decree which has been obtained by default, it is his duty, and not that of the plaintiff, to have the cause set down. *Cooke* v. *Gould*, 4 Law J. Chanc. 153.

#### (*b*) *Adjournment of.*

It is an established practice that no cause be adjourned, without production of an affidavit of due notice of the application to adjourn having been given to the other party. *Anon.* 2 Law J. Chanc. 55.

A cause cannot be adjourned, if a new subpœna to hear judgment is necessary. *Memorandum*, 2 Law J. Chanc. 80.

The Court will postpone the trial of a cause, in order that a cross cause may be tried at the same time. *Roberts* v. *West*, 11 Price, 514.

(c) *Restoring to the Paper.*

Where a bill had been dismissed for want of prosecution, on an affidavit that the defendant's solicitor had instructed his clerk in court to file a replication, which he had omitted to do; the Court on the usual terms permitted the cause to be restored. *Attorney General* v. *Fellows*, 6 Mad. 111.

In equity, where a party shews upon affidavit that he was surprised by a cause being in the paper on a particular day, and being disposed of in his absence, the Court upon motion will restore it to the paper to be heard, and a petition is not necessary for that purpose. *Rowley* v. *Carter*, 1 Y. & J. 511.

(Q) SUBPŒNA TO HEAR JUDGMENT.

After a subpœna to hear judgment served, and the suit revived in consequence of the plaintiff's death, it is not necessary that there should be a new subpœna. *Bray* v. *Woodran*, 6 Mad. 72.

A subpœna to hear judgment is not dispensed with by a solicitor's undertaking to appear. *Bishop* v. *Bishop*, 9 Price, 481.

An application, that the service of a subpœna to hear judgment on the defendant's clerk in court might be deemed sufficient, was granted, on an affidavit stating that the defendant could not be found, and that his solicitor had refused to receive the same. *Farquharson* v. *Theobald*, 13 Price, 130.

(R) DECREES.

On the non-attendance of the defendants to an information by the Attorney General against a corporate body, the Court pronounced a decree *nisi*, on affidavits, first, of an indorsement on the *distringas*, by the defendants' solicitor undertaking to appear at the hearing of the cause; and second, stating service of a letter missive on the solicitors of the Bishop of Winchester, who signified that they did not think it necessary to appear for the Bishop. *The Attorney General* v. *the Poor of Alverstoke*, 9 Price, 482.

Where a defendant has produced uncontradicted *primâ facie* evidence of a fact which constitutes his defence, but that evidence is not in itself conclusive, he will not be entitled to a decree, but a reference will be ordered as to the fact in question. *Stephens* v. *Meecham*, 6 Law J. Chanc. 28.

After a decree in one of two suits, commenced in the name of an infant, it is not usual to refer it to the Master to inquire which is most beneficial. *Taylor* v. *Oldham*, 1 Jac. 527.

Where a bill is taken *pro confesso*, and a decree made upon it, whether the defendant has or has not appeared, the Court will pronounce an absolute decree in the first instance, and will not give the defendant a day to shew cause. *Landon* v. *Ready*, 1 Law J. Chanc. 15, s. c. 1 S. & S. 44.

*Semble*—If the bill states, that persons, who in respect of their interests would be necessary parties to the suit, are not within the jurisdiction of the Court, a decree may be made in the cause, though process is not prayed against them, nor any proof given that they are out of the jurisdiction. *Holdich* v. *Thomlinson*, 3 Law J. Chanc. 133, s. c. 2 S. & S. 219.

Where three plaintiffs hold a joint office, and the defendant has a good case against one of the plaintiffs, though not against the others, a decree cannot be made by the Court in that suit for the plaintiffs. *Hunter* v. *Richardson*, 6 Mad. 89.

A decree for payment of the debt of one creditor, under a deed of trust which provides for the payment of other creditors, is erroneous. So, if the bill, stating A to have been the survivor of the trustees named in the deed, makes the heir of A a party to the suit, as such supposed survivor, and that allegation proves to be false, the decree made upon such state of the pleadings is erroneous.

A bill to carry such a decree into execution, notwithstanding long acquiescence, cannot be sustained. The original decree may be examined, impeached, and varied, in a suit to carry that decree into execution; it is not conclusive until reversed by original bill, or bill of review, for error apparent on the face of the decree; and the Court may refuse to carry it into execution.

Interest ought not to be computed from the date of the decree for payment, but from the day when payment is by the decree directed to be made.

An erroneous decree, directing payment of interest, cannot give the right to interest, but interest may be due under circumstances.

No proper decree can be made for the purpose of raising any sum of money under a deed, without having before the Court all the persons interested in the property.

A party who comes into a court of equity, to have the benefit of a former decree, must shew that that decree was right; if it appears to be erroneous, the Court cannot carry it into execution.

A decree taken *pro confesso*, is the decree of the plaintiff who takes it, and it is his duty to see that it is right.

A decree taken *pro confesso*, against one of the defendants in a suit, may be impeached for error by a party claiming under that defendant; and the party claiming under the plaintiff in the suit, can have no benefit of that decree, if erroneous.

A decree taken *pro confesso* is conclusive against the defendant only, as to facts within his knowledge, not as to facts which the plaintiff has the same opportunity of knowing as the defendant, *e. g.* as to the survivorship of a trustee, which was alleged in the bill, but proves to be contrary to fact. *Hamilton* v. *Houghton*, 2 Bligh, 160.

A decree, which provides for the debt of one creditor under a deed of trust, upon a bill and answers raising questions as to the rights of subsequent incumbrancers, which are unnoticed by the decree, is defective on account of that decree; and *semble*, invalid as against those parties. But if they do not appeal, how far that defect is to be considered in the judgment in the appeal—*quære*.

In the case of an appeal against a decree, giving the benefit of a former decree which is erroneous, it is not necessary to appeal against the former decree. *Hamilton* v. *Houghton*, 2 Bligh, 185.

The devisee having taken the benefit of an insol-

vent act, and made the assignee a party to the suit, who, by his answer, disclaimed all knowledge of the assignment, and refused to undertake the trust for the creditors, he cannot be compelled to act, and the suit remains imperfect until another assignee is appointed and made a party.

A decree made in such a state of the cause is erroneous. *Rylands* v. *Latouche*, 2 Bligh, 567.

In a creditor's suit against the debtor and his trustees, the debtor being out of the jurisdiction of the Court, a decree is made, under which the Master finds various debts secured by specific debentures to be due from him; but the report has not been confirmed absolutely; afterwards, the debtor having come within the jurisdiction, a supplemental bill is filed against him, to which he puts in his answer, and a supplemental decree *nisi* is pronounced against him, and made absolute in due course; the original plaintiff dying, and the persons entitled to revive declining to do so, A, who has become by assignment the owner of some of the debentures which the Master had reported due, obtains permission, notwithstanding the opposition of the defendant, to file a supplemental bill; and the debtor by his answer insists, that debts, of which A has become the assignee, were originally fraudulent and usurious, and were purchased by A with a knowledge of the objections to their validity: Held, that A is entitled to the benefit of the former proceedings.

*Semble*—That if the objections to the validity of A's claim had been stated in opposition to his application for leave to file a supplemental bill, the Court would not have given him that permission.

*Semble*—That though a supplemental decree is pronounced, giving A the benefit of the proceedings in the original cause, the debtor may, by a special application, obtain leave to file exceptions to the Master's report, so as to raise the question of the validity of A's debentures. *Houlditch* v. *Donegal*, 2 Law J. Chanc. 53, s. c. 1 S. & S. 491.

Where the minutes of a decree order that "A and all parties interested should be at liberty to attend the trial," the names of all the parties interested should be specified in it. *Wood* v. *Denne*, 1 Law J. Chanc. 89.

The only mode by which minutes of a decree can be varied, is by petition. *Brown* v. *Sansome*, 9 Price, 479.

Where a motion is to be made for any variations in a decree, the notice of motion must express the proposed variations. *Wright* v. *Howard*, 1 Law J. Chanc. 154.

If a decree absolute be dismissed from the decree *nisi*, the Court will not order it to be amended on motion; therefore, if it appears to have arisen from an obvious mistake and the nature of the case manifestly requires it, it must be altered on a re-hearing. *Williams* v. *Jones*, 13 Price, 265, s. c. M'Clel. 96.

Gaining the enrolment of a decree by surprise, renders it liable to be vacated. *Stevens* v. *Guppy*, 1 Turn. 178.

Under a decree, directing money to be converted into land, the party entitled to the produce cannot elect whether he will take the produce or the land. *Bradish* v. *Gee*, 1 Ken. 73, s. c. Amb. 229: s. p. *Delgarno* v. *Morgan*, 1 Ken. 128.

Bill founded on a letter not stamped, decree made, directed not to be delivered out until the letters stamped were produced to the registrar. *Chervet* v. *Jones*, 6 Mad. 267.

The Master's certificate of disobedience to a decree, need not be filed within four days after it is signed, it being sufficient to file it before the four days' order is delivered out. *Harris* v. *De Tastet*, 1 S. & S. 263.

## (S) RE-HEARINGS.

A bill may be sustained for the re-hearing of a decree, alleged to have been made fraudulently in a suit to which the plaintiff was no party. *Morris* v. *Landon*, 2 Law J. Chanc. 140.

On a re-hearing, evidence in the cause may be read, which was not read at the original hearing.

*Quære*—Whether, upon a special application, the Court will permit a party to use, on a re-hearing, documentary evidence not proved in the cause at the time of the former hearing. *Williams* v. *Goodchild*, 2 Russ. 91.

New evidence admitted on a re-hearing, and a petition of re-hearing permitted to be amended, to state the discovery of such new evidence. *Wyld* v. *Ward*, 2 Y. & J. 381.

Appeals may be prosecuted *in formâ pauperis*. *Bland* v. *Lamb*, 2 J. & W. 402.

## (T) REFERENCES.

### (*a*) *Where directed.*

At the instance of a tenant the Court will not direct a reference to the Master, as to the reduction of rent. *Ex parte Town, in re Alchin*, 1 Turn. 137.

A legatee, on a bill filed by him against the executor, is not entitled to the benefit of the proceedings had in a suit by creditors against the same executor. But the legatee's suit will be referred to the same Master to whom the creditor's suit was referred, with liberty to him to use the proceedings had in that suit. *Broad* v. *Bevan*, 1 Law J. Chanc. 69.

Where there are circumstances under which a mode of valuation agreed upon by the parties fails, the Court will ascertain the value by a reference to the Master. *Arkwright* v. *Stoveld*, 3 Law J. Chanc. 49.

The Chancellor said, that no reference could be made to the Master to receive proposals for leases of property, the subject of the cause, and to approve and settle the same; but that an order might be made empowering the Master to report on them to the Court. *M'Dermott* v. *Kealy*, 1 Jac. 374.

In a suit for the specific performance of an agreement, a motion was made for a reference of title; but the performance of the contract being resisted upon other grounds, the Court will examine the answer, to see whether those other grounds are substantial or erroneous. Therefore, where the subject of a contract was a life annuity, and the defendant insisted that time was of the essence of the contract, the Court refused to make a reference of the title to the Master. *Withy* v. *Cottle*, 1 Turn. 78.

An allegation in the answer concerning a fact lying especially within the knowledge of the plaintiff, does not entitle the defendant to an inquiry on that point. *Walker* v. *Woodward*, 1 Russ. 107.

The allegation in the answer of facts which must be within the knowledge of the plaintiff, but may be incapable of other proof, is sufficient to induce

the Court, at the hearing, to direct an inquiry. *Fereday* v. *Wightwick*, 6 Law J. Chanc. 60.

Whether the answer of one defendant can be read against a co-defendant as to costs—*quære*. Such answer will clearly ground an inquiry before the Master as to the fact. *Chervet* v. *Jones*, 6 Mad. 267.

The Court of Exchequer ordered that causes standing referred to the late deputy remembrancer, should be transferred to the present King's remembrancer. *Reg. Gen.* 13 Price, 264.

(*b*) *Impertinence and Scandal.*

[See PLEADING, IN EQUITY.]

After time has been obtained under an order, a bill cannot be referred for impertinence. *Anon.* 2 Ken. 21. Chanc.

A party cannot have a reference for impertinence after he has answered or submitted to answer that which contains the matter he complains of, but, after answer or submission to answer, matter may be referred as scandalous. *In re Burton*, 1 Russ. 380.

A party cannot refer for impertinence an affidavit filed in support of a motion, if, after that affidavit was filed, he has filed any affidavit in opposition to the motion. *Keeling* v. *Hoskins*, 2 Russ. 319.

Interrogatories and depositions not to be referred on motion of course, before the hearing, for impertinence alone, without scandal. *Osmond* v. *Tindall*, 1 Jac. 625.

After a plaintiff has proceeded on the examination, an order for referring a defendant's examination for impertinence is not as of course. *Johnstone* v. *Ure*, 2 S. & S. 578.

Motion that a general demurrer should be taken off the file, because the bill had been previously referred for impertinence, refused with costs. *Boode* v. *Boode*, 1 Law J. Chanc. 81.

(*c*) *Proceedings.*

*Semble*—Under a decree to account, made upon taking the bill *pro confesso* against a defendant who has appeared, but not answered, he cannot attend the Master until leave of the Court has been obtained. *Heyn* v. *Heyn*, 1 Jac. 49.

A residue being given to a class of persons, and it being referred to the Master to ascertain who belonged to that class, a person, whom the Master has admitted as one of the class, may obtain an order to attend the proceedings, at the expense of the estate, if one solicitor acts in the suit both for plaintiff and defendant, and also for persons claiming to be interested in the residue. *Anon.* 5 Law J. Chanc. 104.

If a plaintiff, after a defendant has put in his examination to the usual interrogatories before the Master, discovers that the latter has omitted certain sums, the Master may, without obtaining an order of the Court, receive new facts and further interrogatories in order to remove the difficulty. *Sidden* v. *Forster*, 1 S. & S. 335.

When it is suggested at the bar, that the party prosecuting a reference has, since the report was made, acquired information, which, if it had been laid before the Master, would probably have led him to a different result; the Court, though it will not upon the mere suggestion refer the matter back to the Master, will order the cause to stand over, with leave to present a petition on the point; and a sufficient case being stated in the petition, and supported by affidavit, the matter will be ordered to be referred back. *Hunt* v. *Dickenson*, 3 Law J. Chanc. 207.

Practice of the Master's office as to making rests in calculating interest. *Rowe* v. *Dodson*, 1 Law J. Chanc. 183, and *Griffith* v. *Heaton*, 1 Law J. Chanc. 197, s. c. 1 S. & S. 271, where the point in this case came again under review.

When reference is made to the Master to appoint a manager of an estate, he may fix on the fittest person, without regard to who may propose him. *Lespinasse* v. *Bell*, 2 J. & W. 436.

When a reference is made on motion to the Master, further directions will be allowed on motion. *Whitcomb* v. *Foley*, 6 Mad. 3.

D, having filed against M and B a bill in equity to cancel, for want of consideration, certain *post obit* bonds, and a general bond which D had executed and delivered to B, to secure the balance of account between M and B, and future advances by B to M; and D having afterwards dismissed the bill as against M, and examined him as a witness, it was decreed on appeal, reversing the judgment below, that D having deliberately executed a deed, acknowledging that the bonds were given to secure certain sums actually advanced by B to D, and a bond in a penalty, defeasible on payment of money advanced and to be advanced by B to M, and accounts stated and settled between B and M, and as no account could be taken in the cause between B and M, who was no longer a party, D had debarred himself from impeaching the securities, or the consideration stated in them. But on reference to the Master to take an account of what was due from D to B on the securities, although it was directed that D should be bound by the accounts stated and settled between M and B, he was to be at liberty to falsify the same, or shew any errors or overcharges therein.

In proceeding under this decree upon the account in the Master's office, a book of accounts was produced, containing a general statement of accounts between M and B, and a particular entry as to an alleged purchase by M from B of certain bonds executed by W. This entry appeared in the midst of the general account, upon two leaves, having an appearance of being inserted in the place of two which had been cut out, but which might have been brought into that state by continued use. Many of the items, extending over a considerable period of time, were in the same ink and handwriting. Payments of prior date were entered after payments of subsequent date, and the account, as it appeared, laboured under other suspicious circumstances. There were also produced before the Master by the consent of all parties, plain copies, to save examined copies of the proceedings in a certain cause, in which one W was plaintiff, and M and B, with others, defendants; and in which cause it was found, upon the decree, (the same books and account having been produced in the cause,) that no money had been advanced or *bonâ fide* allowed by B to M on the bonds in question. Under these circumstances, the Master disallowed the charge of B against D, in respect of the alleged sale of W's bonds by B to M, and his report to that effect was confirmed by the Court below: Held, on appeal, that under the circumstances, and the liberty given by the order to falsify the account, the order confirming the report was right.

Whether such consent to admit copies of such proceedings as before mentioned, precludes the party who consents, from objecting that the originals are not evidence—*quære*. But if he permits them to be read before the Master and the Court, without efficiently raising a distinct objection upon this ground, although by his exception he objects to the report generally, as not supported by evidence—*semb.* that the Master acting upon the reference, with leave to "surcharge and falsify," may administer such equity as above mentioned, by disallowing the items to which such evidence applies.

Where a Master by his report certifies a fact, and exceptions are taken to the report, it lies upon those who are to uphold the report to produce the evidence of the fact. So, if he certifies the result of an account upon the allowance or disallowance of items in dispute, and one of the parties excepts to the report, both as to the principle on which the account is taken, and the evidence in support of the allowance or disallowance of the items, the parties in whose favour the report is made, must produce the evidence on the hearing of the exceptions.

Whether, upon leave "to surcharge and falsify" equities can be administered—*quære*. *Bernall* v. *the Marquis of Donegal*, 1 Bligh, N.S. 504.

(*d*) *Report*.

Where an answer is referred to the Master, the defendant may, previous to his report, file a further answer. *Wynne* v. *Jackson*, 2 S. & S. 226.

Where a reference of title is made to the Master, his report will not be suspended to wait the decision of a suit commenced against the vendor for the recovery of part of the estate, but the two suits may be heard together. *Osbaldiston* v. *Askew*, 2 J. & W. 539.

On an answer being referred for impertinence, the Master's report must be procured within four days. *Joseph* v. *Simpson*, 10 Price, 25: S. P. *Reg. Gen.* 10 Price, 29.

An order for reference of an answer to an injunction bill, for impertinence, not having been acted upon according to the rule of court, requiring the Master's report to be obtained by the plaintiffs within four days after such reference, was discharged on motion, with costs, and the injunction dissolved on the merits. *Hodgson* v. *Prickit*, 13 Price, 451.

The Court will only grant a separate report for the purpose of expediting the proceedings. *Hare* v. *Ruscombe*, M'Clel. 101, s. c. as *Hare* v. *Bruford*, 13 Price, 277.

Motion by plaintiff to restrain the Master from making a separate report until a month after the trial of an indictment for perjury, upon affidavits carried in by that party in support of charges, or until further order, or that the report might be without prejudice to the plaintiff's thereafter prosecuting his claims, refused with costs. *Bolaffey* v. *Bendelack*, M'Clel. 573.

No objection can be taken to the Master's report if the party neglects to except, though the Master has proceeded on erroneous principles. *Brown* v. *Sansome*, 1 M. & Y. 427.

(U) EXCEPTIONS.

(*a*) *To Answers*.

Exceptions cannot be taken to an answer to an amended bill, which would have held equally to the answer to the original bill. *Anon.* 3 Law J. Chanc. 111.

The Court will order exceptions, which are irregularly entitled, to be taken off the file. *Williams* v. *Davies*, 1 S. & S. 426.

The signature of counsel is essential to exceptions to an answer.

And, therefore, exceptions not signed by counsel, taken off the file, though the defendant had taken an office copy of them, and the plaintiff had obtained an order of reference. *Yates* v. *Hardy*, 1 Jac. 223.

Exceptions to an answer for insufficiency must follow the words of a bill; and it is not enough that they are in substance the same with certain parts of the bill. *Hodgson* v. *Butterfield*, 3 Law J. Chanc. 112, s. c. 2 S. & S. 236.

After an order to amend, the right to except to the answer to the original bill is waived;—hence, where a bill was amended, and the defendant put in another answer, stating facts not mentioned in the former, and did not answer particulars required by the bill—on exception, it was holden, that a special application ought to have been made for leave to file exceptions. *Irving* v. *Vinia*, 1 M'Clel. & Y. 563.

Where the effect of a motion would be to waive exceptions to answer, the Court will not qualify their order by making it without prejudice to exceptions being taken. *Phillips* v. *Stevenson*, 11 Price, 733.

Exceptions to an answer filed after the bill has been amended, will not be taken off the file, if no answer is required to the amendments. *Miller* v. *Wheatley*, 1 Sim. 296.

Where an injunction is obtained by plaintiff before answer, and when the answer is put in, he excepts to the same, he cannot move to refer the exceptions *instanter*.

Such an exception must be signed by counsel. *Candler* v. *Partington*, 6 Mad. 102.

An exception to the Master's report of impertinence, may be taken even after an order to expunge the impertinence has been obtained.

After a party, who has obtained an order to expunge, has been served with an order for setting down exceptions to the Master's report of impertinence, it is irregular in him to proceed to expunge, or to enforce the payment of costs. *David* v. *Williams*, 5 Law J. Chanc. 71, s. c. 1 Sim. 17.

Where exceptions are taken to the answer to the original bill, and exceptions are also taken to the answer to the amended bill, a separate rule for the argument of each set of exceptions must be given: and it is irregular to set them down for argument under one rule. *Eastwood* v. *Dobree*, 1 Y. & J. 508.

Where the Court thinks exceptions frivolous, it will give full costs against the exceptant. *Nunn* v. ———, 3 Law J. Chanc. 83.

Where a great number of exceptions were taken to an answer, and shortly before the argument the defendant submitted to answer them, in consequence of which, it was urged, that the answer was clearly evasive, and that the ordinary costs were greatly inadequate; yet the Court refused to give extra costs, but reserved the consideration of them until the hearing of the cause. *Attwood* v. *Small*, 2 Y. & J. 72.

Bill against assignees of a bankrupt for an account and an injunction to restrain proceedings at law.

One of the assignees put in a separate answer, stating that his name had been used in the action at law without his knowledge or authority: that he had not acted as assignee, except in some trifling particulars, not connected with the matter in the bill mentioned; and that he was wholly ignorant of the matter set forth in the bill—Exceptions to the answer, because the defendant had not answered each interrogatory, overruled with costs. *Jones* v. *Wiggins*, 2 Y. & J. 385.

(*b*) *To Reports and Certificates.*

An order inconsistent with the original decree cannot be made upon exceptions to the report. *Brown* v. *De Tastet*, 1 Jac. 284.

The Master's report, with respect to a receiver's accounts, must be questioned by exceptions, and not upon petition. *Shewell* v. *Jones*, 2 S. & S. 170, s. c. *Anon.* 3 Law J. Chanc. 54.

The party exhibiting interrogatories before a Master for examination of the adverse party, cannot set down exceptions taken to the examination for insufficiency, to be signed before the Court, but must obtain an order to refer it to the Master to review his report, and to report thereon, with liberty to except. *Reg. Gen.* 10 Price, 169.

Exceptions to the Master's report must be confirmed before any order can be made upon it. *Scott* v. *Livesey*, 2 S. & S. 300.

After an answer has been reported insufficient, an order to amend, and for the defendant to answer amendments and exceptions together, prevents the defendant from taking exceptions to the report, if it be served before the exceptions are set down. *Farquarson* v. *Balfour*, 1 Jac. 587.

If a general exception is taken to a Master's report, and the Court is of opinion, that the Master is right in any one particular, the exception must be overruled. *Green* v. *Weaver*, 6 Law J. Chanc. 1, s. c. 1 Sim. 404.

Exceptions to Master's certificate, on reference of an answer for impertinence, may not be filed as of course in this Court.

A previous application must be made to the Court for leave to file exceptions. *Thornton* v. *Pellatt*, 11 Price, 732.

(V) STAYING PROCEEDINGS.

[See INJUNCTION.]

If a suit be proper, and the further prosecution of it correct, it will not be stayed on account of the plaintiff's becoming imbecile after its commencement. *Wartnaby* v. *Wartnaby*, 1 Jac. 377.

The Court will in general stay proceedings on reference to the Master to ascertain whether proceedings at law and in equity are for the same cause. But where, the plaintiff having, before the order was drawn up, proceeded at law, the defendant had applied to the court of law and obtained time upon terms,—it was held, that he had waived the benefit of the order, and was bound by the intermediate proceedings. *Amery* v. *Brodrick*, 1 Jac. 530.

The Court will not stay the last proceedings under a decree till after the decision of an appeal in the House of Lords, in the absence of an affidavit duly prepared and signed by two counsel. *Edwards* v. *Morgan*, 1 M'Clel. & Y. 258.

Pending an appeal, the Court will sometimes stay the sale of property which the decree had directed to be sold; but, if the property consists of personal chattels, remaining in the possession of the appellant, he must give ample security for their value. *Newt* v. *Burnard*, 2 Russ. 56.

An action was brought, at the instance of the Crown, against a contractor for the building of certain public works, on a bond given for the performance of his contract: the action was defended, and a verdict and judgment obtained by the Crown. The defendant applied to the Court to stay proceedings on the judgment for a short period, that he might file a bill on the equity side of the court, alleging that he had mistaken his course in defending the action at law; and being advised that he had good ground for equitable relief, he was about to file a bill against the law officers of the Crown. The Court rejected the application on the grounds—that, taking the application as made in the suit at law, the *postea* could not be stayed; that, treating it as an application in equity, there was no suit depending; and that the defendant had not shewn sufficient grounds for equitable relief; and *semble*, that his grounds of equity might have been used by him at law. (Hullock, B. *dissent.*) *Rex* v. *Pete*, 1 Y. & J. 169.

(W) COSTS.

[See COSTS.]

If a bill, which has been dismissed for want of prosecution, is restored on the terms of the plaintiff paying the costs occasioned by the dismissal, and the cause comes to a hearing before these costs are paid, the defendant cannot then object, that the terms of the order of restoration have not been complied with. *Lorimer* v. *Lorimer*, 2 Law J. Chanc. 13.

If, on shewing special cause against an order to dismiss a bill for want of prosecution, the plaintiffs do not establish the fact they endeavoured to do, they must pay the costs of the order to dismiss, in order to procure the bill to be retained by an undertaking to speed. *Atkinson* v. *Hutton*, 13 Price, 6.

If issue is taken on a plea, and the defendant, by evidence, establishes the truth of it, the course of the Court is, to dismiss the bill with costs. *Pitman* v. *Edwards*, 3 Law J. Chanc. 159.

An order consented to in consequence of mistake, will be discharged, but not with costs. *Irving* v. *Pritchard*, 1 Law J. Chanc. 100.

On a bill in equity, it appearing there was a defence at law, the bill was dismissed with costs. An action at law being prosecuted, and the defendants at law having succeeded in the action, the plaintiff in equity then presented a petition for hearing on account of the question of costs, founding the prayer of the petition on the ground of their bill having been a bill substantially for relief, as well as for discovery; because it had prayed, that the cause of the action might be cancelled: The Court, after expressing regret in being compelled to grant the order, made it, but without costs. *Duncan* v. *Worrell*, 10 Price, 31.

Where a party, who is improperly made a defendant, instead of objecting that he ought not to be a defendant, insists by his answer that he has an interest in the matter of the suit, though the bill be dismissed as against him at the hearing, he will not

have his costs. *Randall* v. *Randall*, 4 Law J. Chanc. 50.

The abandonment of a motion after notice does not entitle the party to costs. *Hurd* v. *Partington*, 1 M'Clel. & Y. 40.

### 3. *IN THE ECCLESIASTICAL COURTS.*

The Court not only condemned a proctor in the costs of a suit in which he had malpractised, but seemed inclined to suspend him from his functions. *Prentice* v. *Prentice*, 3 Phil. 311.

Where A has been imprisoned under a significavit, for contempt of court, in a cause between A and B, occurring in an ecclesiastical jurisdiction; the Court of King's Bench will direct his release, if he shew that the style or nature of such cause has been wrongfully set forth in the significavit. The other party in the Spiritual Court, B, may have his remedy, however, by obtaining from the judge a new monition in the matter, warning A to comply with its decree; care being taken in such monition (as well as in the subsequent significavit that will issue, if A continue contumacious) duly to set forth the original cause. *Alston* v. *Dugger*, 1 Add. 307.

To an inhibition disclosing an appealable grievance on the face of it, there must be an *absolute*, and not an appearance under *protest*. *Greg* v. *Greg*, 2 Add. 276.

Process will not be deemed well served on an infant, unless it be in the presence of his guardian, or person having his custody. *Cooper* v. *Green*, 2 Add. 454.

When the proceedings are by articles, they must be brought in, on the court day immediately preceding that upon which the defendant has appeared, and contain the entire charge.

Additional articles may be admitted in criminal suits, but not such as contain new criminal charges, or even advance collateral facts and circumstances, in proof of articles of the original act, directly criminatory. *Schultz* v. *Hodgson*, 1 Add. 319-20.

In personal answers the respondent is not bound to confine himself to mere affirmatives or negatives, conformably to the plea, but he may go into all matters relative to the transactions to which the answers are required.

But *semble*—if the redundant answers be various, they are inadmissible. *Oliver* v. *Heathcote*, 2 Add. 35.

Where depositions were taken under a requisition in a foreign country, and objected to, because they had not been secretly taken, such objection was overruled. *Herbert* v. *Herbert*, 3 Phil. 34.

After prayer of publication, no more witnesses can be examined, unless leave of the Court be obtained for that purpose. *Bruce* v. *Burke*, 2 Add. 404.

An allegation in objection to an inventory brought in, on oath, by party in the cause, admitted, and "answers" decreed. *Quære*—Whether the Court might not assign a "term probatory" and permit witnesses to be examined on such an allegation, in the event of the answers being unsatisfactory. *Brogden* v. *Brown*, 2 Add. 336.

The Court will not admit an exceptive allegation to the testimony of a witness, unless it be pleaded before publication, and discredit the witness materially. *Atkinson* v. *Atkinson*, 2 Add. 484.

A prayer to the Court to rescind the conclusion of a cause, for the purpose of receiving an exceptive allegation, will be rejected, unless a special ground be introduced, as that of fresh matter having newly come to the party's knowledge. *Durant* v. *Durant*, 2 Add. 267.

An exceptive allegation lies to the testimony of a witness, not examined in the principal cause, but examined only in support of an exception to the testimony of a witness in the principal cause. And if admissible generally, [i. e. of pleading (and within time) facts of a nature materially to discredit the witness excepted to; and if duly specifying times, places, persons, and so on,] such an exceptive allegation is clearly entitled to go by proof. *Ball* v. *Ball*, 3 Add. 9.

Where an exceptive allegation was tendered, which appeared not to be essential to the question in dispute—The Court suspended its admission, to enable counsel to argue upon it. *Salmon* v. *Cromwell*, 3 Phil. 220.

*Quære*—Whether the conclusion of a cause after sentence can be rescinded by the Court, when the party for whom the sentence was given is opposed to it. *Thomas* v. *Maud*, 1 Add. 481.

No party, whether such originally, or a mere intervener in a cause, can, of right, plead in the principal cause, after publication has once passed, of evidence taken in that cause. But the Court if prayed, may still, *ex gratiâ*, permit a party so to plead, on cause shewn. Facts set forth in an affidavit, in order to found a prayer to that effect, on the part of an intervener, stated by the Court: and held, for reasons stated, to be insufficient to sustain the prayer. But the party so praying, permitted, under the circumstances, to cross-examine the witnesses on the other side, (so, after their evidence published, that is,) on first giving security for the payment of costs, if finally awarded against him by the Court. *Clement* v. *Rhodes*, 3 Add. 37.

### 4. *IN THE COURTS OF ADMIRALTY.*

The mode of initiating a suit by arrest of ship-tackle, &c. is the ancient formula of the court. *Dundee*, 1 Hag.

An affidavit made by a witness in contradiction to his previous examination, admitted. *Centurion*, 1 Hag. 163. 109.

The Court cannot be expected to decide upon charges partaking strongly of a criminal nature, upon mere voluntary affidavits. *Apollo*, 1 Hag. 315.

*Semble*, That the Court of Admiralty is bound to notice a debt on record. *Flora*, 1 Hag. 303.

A monition deed decreed against an agent of St. Kitt's in respect to the proceeds of a revenue seizure. *Anon.* 1 Hag. 305.

Decree of a warrant to be served at Dublin, on an offence committed in England; the Master having absented himself after the institution of the suit. *The King in his office of Admiralty* v. *Miller*, 1 Hag. 197.

A formal admission of fact by the seizor is conclusive. *Matchless*, 1 Hag. 99.

Questions arising upon grants of the nature of prize, when referred to this Court, must be considered on the principles of prize. *Naples Grant*, 2 Dods. 273.

A sentence of declaration is the proper remedy against the insufficient prosecution of an appeal. *San Juan*, 1 Hag. 267.

The registrar directed to allow no costs for irrelevant statements and affidavits. *Apollo*, 1 Hag. 320.

### 5. IN THE HOUSE OF LORDS.

Care should be taken in framing cases, to shew what are the points of appeal. *Lansdowne* v. *Lansdowne*, 2 Bligh, 97.

Facts which have occurred since the original judgment, may, by leave of the house, be stated in an additional case. *Boyes* v. *Baillie*, 3 Bligh, 491.

*Semble*—That affidavits (filed upon interlocutory proceedings) are to be considered as matters of record; and that the facts disclosed by affidavit so filed, may be viewed by the Court in deciding upon the validity of a plea—*quære*. *Wood* v. *Rowe*, 2 Bligh, 596.

An appeal being against the decision of an issue, as well as against the decree on further directions, it is sufficient to reverse the decree on further directions. *Lansdowne* v. *Lansdowne*, 2 Bligh, 97.

If the plaintiff in a suit has, by the course of the Court, a right to a decree for an account, he does not forfeit such a right by refusing an account which is offered by the defendant, or the Court at the hearing. It is the duty of the Court to decree an account *ex officio*; and if such a decree is not made, it is a valid ground of appeal, notwithstanding the refusal of the plaintiff. *M'Neil* v. *Cahill*, 2 Bligh, 229.

Agents and servants acting under general orders, but without the special direction of their master, having cut a tree on the side of a public road, which in falling killed a passenger—the widow and children of the person killed brought an action for damages against the master and the servants, in which action there was a judgment for the defendants. On appeal against this judgment, the agents and servants, as well as the master, were named as parties in the appeal, but were not served with the peremptory order to answer the appeal, nor brought before the house as parties at the hearing. The proceeding was held defective on this ground, as it would deprive the master of the remedy over, or relief against the agents and servants, in case of a reversal of the judgment as against the master alone.

An appeal, in which the essential parties are not served with the peremptory order to answer, and do not appear at the hearing, cannot proceed as against one of the respondents.

Whether according to the practice of the house, the hearing of the cause may be adjourned for the purpose of serving the absent parties, on payment of the ordinary costs—*quære*.

*Semble*—That under the circumstances of the case, if there had been no such defect of parties, damages ought not to have been given. *Linwood* v. *Van Hathorn*, 3 Bligh, 193.

A suit having been instituted by a devisor and revived by a party as devisee, whose supposed right is displaced by the discovery of a later will, the cause cannot be continued for the benefit of the effective devisee, by agreement between that devisee and the plaintiff in the suit, so as to enable the devisee under the second will (not being a party to the suit) to appeal against the decree; and an appeal cannot be heard before the court of appeal until he is made a party in the suit below. *Rylands* v. *Latouche*, 2 Bligh, 566.

A party having appealed against one part of a decree, in a suit where the title is not in issue, thereby virtually submits *to the rest* of it, and cannot afterwards present a new appeal against other parts of the same decree. When such an appeal is presented, the party served with it ought not to answer, but to present a counter petition to have it dismissed. If he treats it as an effective appeal by answering, and suffering it to proceed before he presents a counter petition, he will not be entitled to costs. *Norbury* v. *Meade*, 3 Bligh, 261.

A decree to carry into execution an erroneous decree being reversed, the cause was remitted, with leave to amend the bill, by adding parties, and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed, by which the debt was secured, and of forty years from the date of the erroneous decree. As between the plaintiff creditor and the debtor there is no presumption, from lapse of time in such a case, and upon such state of the pleadings, that the debt has been paid. But other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question. *Hamilton* v. *Houghton*, 2 Bligh, 160.

A decree which provides for the debt of one creditor under a deed of trust, upon a bill and answers raising questions as to the rights of subsequent incumbrancers, which are unnoticed by the decree, is defective on account of that omission, and, *semble*, invalid as against those parties. But if they do not appeal, how far that defect is to be considered in the judgment in the appeal—*quære*. *Hamilton* v. *Houghton*, 2 Bligh, 185.

In the case of an appeal against a decree, giving the benefit of a former decree which is erroneous, it is not necessary to appeal against the former decree.

After an appeal against a decree of a court of equity had been presented to the House of Lords, and the case printed with an appendix of evidence, as entered in the register's notes of the proofs read on the hearing, an order was made upon motion in the court below, expunging part of the evidence as entered by mistake. This order was reversed as irregular. In such case the proper course is to apply to the house, by petition, for leave to proceed in the court below to rectify the mistake. *Lopdell* v. *Creagh*, 1 Bligh, N.S. 255.

The Court of Session having given judgment on the ground of evidence which ought to have been rejected, but some of which evidence was capable of being produced in an unobjectionable shape, and, there being other evidence which might sustain the claim, on appeal against the judgment, the case was not remitted, but the judgment was reversed on account of the small value of the matter in dispute, and the expense which a remit would cause. *Dunbar* v. *Harvey*, 2 Bligh, 350.

Where the appeal extends to the question of costs, and a term given according to a power to secure an annuity, provides for the payment of all costs and charges relating thereto, the reversal of an erroneous decree ought to be with costs. *Lansdowne* v. *Lansdowne*, 2 Bligh, 351.

If a decree, contrary to the provisions of a deed, orders that all parties shall abide their own costs, no alteration can be made in the House of Lords, in

that respect, where it is not made the subject of appeal. *Lansdowne* v. *Lansdowne*, 2 Bligh, 96.

Where an appeal is irregular, the respondent shall present a counter petition to have it dismissed; if he treats it as an effective appeal, by answering and suffering it to proceed, he will not be entitled to costs. *Norbury* v. *Meade*, 3 Bligh, 261.

Where the substance of a question had been adjudged by former decisions, upon the admission or acquiescence of the party; costs are given upon the affirmance of a subsequent judgment on appeal. *MacDougall* v. *Hogarth*, 3 Bligh, 41.

Upon a summary complaint under the 16 Geo. 2, c. 10, s. 24, the Court of Session have no power to award costs in part; the act directing that they shall allow to the party who prevails full costs of suit. *Angus* v. *Montgomery*, 3 Bligh, 98.

Costs not given because of delay in the prosecution of a suit. *Colclough* v. *Sterum*, 3 Bligh, 181.

Upon a bill charging fraud in the purchase of a reversion by a nephew from an uncle, no costs having been given upon a decree dismissing the bill in the court below, no costs given upon affirming the decree on appeal. *Whalley* v. *Whalley*, 3 Bligh, 1.

### 6. *IN CRIMINAL PROCEEDINGS.*

The Court refused to respite process for a longer time than till the following term, considering the case, under the circumstances, a case for suspending process from term to term only. *In re Clark*, 11 Price, 730.

A man was indicted for a nuisance, in keeping a gaming-house. He pleaded *puis darrein continuance*, that he had been acquitted of the same offence, at the Quarter Sessions. The last continuance was to the first day of Michaelmas term. The plea was not filed until the 19th of November. It was sworn that the acquittal at the Quarter Sessions was obtained by fraud and collusion, on purpose to be pleaded to this indictment; which charge the defendant did not deny in his affidavit.

The Court ordered the plea to be taken off the rolls of the Court. *Rex* v. *Taylor*, 3 Law J. K.B. 87, s. c. 3 B. & C. 612, s. c. 5 D. & R. 521.

It being questionable whether a particular count in an indictment for felony was not bad on demurrer, upon an objection that would be aided by verdict, and this being pointed out to the Judge before plea pleaded—his Lordship, to save the public time, directed the trial to proceed, saying, that if the prisoner should be convicted on evidence which, in his opinion, was applicable to this count only, he would consider it as demurred to, and allow the demurrer to be argued, putting the prisoner in the same situation as if the count had been demurred to in the first instance. *Rex* v. *Daniel Cordy*, 3 C. & P. 425. [Vaughan]

Answer taken off the file and entrusted to one of the Barons' clerks, for the purpose of being produced before the grand jury, on an indictment for perjury preferred by the plaintiff: security in 20*l.* being given for the safe return of the record. *Thompson* v. *Crosthwaite*, 2 Y. & J. 512.

A libellous pamphlet, tending to influence the minds of the jury in favour of the prosecution, is no ground to induce the Court to put off the trial until an action for the libel has been determined. *Rex* v. *Gray*, 2 Ken. 276, s. c. 1 Burr. 510.

If a party has been held to bail, or committed for more than twenty days, on a charge of *felony*, and the grand jury ignore the bill for the *felony*, and find a bill for a *misdemeanor*, in attempting it; the party is entitled to traverse. *Rex* v. *James*, 3 C. & P. 222. [B. Vaughan]

The *trial of* an indictment must be disposed of as it stands on the list; therefore, where an indictment had been entered by both parties, but the entry of the defendant stood first on the list: Held, that they must be tried according to the order in which they were entered. *Rex* v. *Halse*, 1 R. & M. 20. [Abbott]

A prosecutor, by appearing at the trial of a misdemeanor, waives any objection as to the notice of trial. *Rex* v. *Hobby*, 1 C. & P. 660, s. c. 1 R. & M. 241. [Littledale]

If an indictment contain two counts, one charging the offence as a larceny, the other as a receiving, the judge will put the prosecutor to elect which he will go upon. *Rex* v. *Flower*, 3 C. & P. 413. [B. Vaughan]. *Sed quære.*

If two bills of indictment be preferred for the same offence, the one charging it capitally, the other as a misdemeanor, and both be found, the judge will put the party to his election which he will go upon, and direct an acquittal on the other. *Rex* v. *John Smith*, 3 C. & P. 412. [Vaughan]

If several persons be indicted, the counsel for the prosecution, previous to opening his case, is entitled to have any of the defendants he pleases acquitted, for the purpose of making them witnesses. *Rex* v. *Rowland*, 1 R. & M. 401. [Abbott]

Where, on an indictment for a misdemeanor, the counsel for the defendant has opened new facts in his address to the jury, but refused to call witnesses to prove them, the counsel for the prosecution is entitled to a general reply. *Rex* v. *Bignold*, 4 D. & R. 70, s. c. 1 D. & R. N.P.C. 59.

If A and B be indicted jointly, on a joint corrupt contract with a third person for the sale of a cadetship, one may be acquitted, though the other be found guilty. *Rex* v. *Taggart and Baskcomb*, 1 C. & P. 201. [Abbott]

If, on the trial of a misdemeanor, the defendant conducts his own cause, he must stand on the floor of the court; and though his counsel may argue for him any points of law which arise, they are not entitled to cross-examine witnesses. *Rex* v. *Parkins*, 1 C. & P. 548, s. c. 1 R. & M. 166. [Abbott]

Where, as soon as the jury were charged, and previous to any evidence being given, it appeared that a material witness was incompetent, because she had no idea of a future state of rewards and punishments: It was holden, that discharging the jury was improper, and that an acquittal ought to have been directed. *Rex* v. *Wade*, 1 R. & M. C.C.R. 86.

During the trial of a prisoner, under a commission of gaol delivery, he was taken very ill: Held, that the consent of the prisoner's counsel did not authorize the trial to proceed—the course being to discharge the jury, and if the prisoner recovered during the assize, to commence *de novo*. *Rex* v. *Streek*, 2 C. & P. 413. [Park]

Every witness, whose name is indorsed on the

[illegible] of the indictment, should be called; and if the prosecutor for the prosecution refuse so to do, the judge, [illegible] from the course, may do it for him, so as to enable the prosecutor to have the benefit of the cross examination. *Rex* v. *Simmonds*, 1 C. & P. 84. [Hullock]

Although a magistrate has bound a party over to prosecute, yet if it be a frivolous felony, the judge, before whom the cause was tried, will not allow the prosecutor his expenses. *Rex* v. *Powell*, 1 C. & P. [illegible] [Park]

The rule that a Judge may order documents to be impounded, only applies to instruments which are given in evidence. *Rex* v. *Clifford*, 1 C. & P. 341. [Abbott]

On a conviction for felony by verdict, the Court will not receive affidavits, either in aggravation or in mitigation of punishment; but will proceed by the notes of the judge on the trial. *Rex* v. *Ellis*, 5 Law J. M.C. 1.

## PRE-EMPTION.

[See PARTNERS.]

## PREROGATIVE.

[See CROWN, and EXTENT.]

Devise of copyhold and land in fee, upon condition that the devisee, within one month, pay 2000*l.* to the executor, to be applied for charitable purposes; the testator having left no customary heir, and no next-of-kin: Held, that the Crown, and not the lord of the manor, was entitled to the 2000*l.*, by prerogative, if personal estate, because there was no next-of-kin; and if real estate, because there was no customary heir. *Henchman* v. *Attorney General*, 2 S. & S. 498.

## PRINCIPAL AND AGENT.

[See SPECIFIC PERFORMANCE, and SHIP AND SHIPPING.]

(A) PRINCIPAL.
(*a*) *Rights.*
(*b*) *Liabilities.*
(B) AGENT.
(*a*) *Authority.*
(*b*) *Rights.*
(*c*) *Liabilities.*
(C) ACCOUNTING.
(D) EVIDENCE.

### (A) PRINCIPAL.

#### (*a*) *Rights.*

If A permit B to carry on trade in his (A's) name, a payment made to B is a discharge of the debtor, unless A asserts his right previous to such payment. *Gardiner* v. *Davis*, 2 C. & P. 49. [Abbott]

Where an agent treated with the defendants as principal, but, on the delivery of the goods, the ticket was made out in the principal's name,—it was holden, after that, that the defendant was bound to inquire into the nature of the agent's situation, and should not continue to treat him as principal. *Pratt* v. *Willey*, 2 C. & P. 350. [Best]

A factor, with whom goods are deposited for sale, indorses the bills of lading to the defendants, who, knowing him to be a mere agent, accept a bill in his favour. He directs them to sell the goods, and to reimburse themselves the amount out of the proceeds. The defendants accordingly sell the goods in the usual course of business. Trover will not lie by the original owner, but his remedy is for money had and received for the proceeds. *Stierneld* v. *Holden*, 3 Law J. K.B. 127, s. c. 4 B. & C. 5, s. c. 6 D. & R. 17, s. c. 1 R. & M. 219.

The bare relation of principal and agent is not sufficient to entitle the former to relief in equity, if the account can be fairly tried at law. *King* v. *Rossett*, 2 Y. & J. 33.

#### (*b*) *Liabilities.*

*Semble*—If an agent, acting under the direction of a committee for managing the affairs of an incorporate company, commits a conversion, he renders the company liable. *Duncan* v. *the Proprietors of the Surrey Canal*, 3 Stark. 50. [Abbott]

Where an agent in London who had been employed by a country tradesman to purchase goods on credit, bought goods and had them directed as usual, but intercepted them, and appropriated them to his own use,—it was holden, that the tradesman was liable, inasmuch as the agent must be deemed his general agent. *Gilman* v. *Robinson*, 1 C. & P. 642, s. c. 1 R. & M. 226. [Best]: s.p. *Todd* v. *Robinson*, 1 R. & M. 217. [Abbott]

Where a broker made a contract for the purchase of goods, and by mistake delivered a bought note to the vendor and vendee, and did not name his principal, but made a correct entry of it in the book:—it was holden, that the vendee might sue the vendor for a breach of the contract. *Gale* v. *Wells*, 1 C. & P. 388. [Best]

### (B) AGENT.

#### (*a*) *Authority.*

An agent can only act within the scope of his authority as such. *Schumack* v. *Lock*, 3 Law J. C.P. 57.

Where B drew a cheque, and delivered it to his farming bailiff to give to C, in whose favour it was drawn; and the bailiff discounted it with A, a banker residing sixteen miles from where the cheque was drawn; and five days afterwards the drawee stopped payment, A not having presented the cheque: Held, that the bailiff was not acting within the scope of his authority in discounting the cheque, so as to bind his principal. *Waters* v. *Brogden*, 1 Y. & J. 457.

If an agent make a contract which his principal afterwards assents to, such is equivalent to an authority previously given. *Maclean* v. *Dunn*, 6 Law J. C.P. 184, s. c. 4 Bing. 722, s. c. 1 M. & P. 761.

In general, an agent is not warranted in paying a debt due from his principal, without a previous authority, or a subsequent assent.

But where a person fills the character of agent to two parties, and receives from one a sum on account of the other, which sum he carries to the account,—

*semble*, that he may make any deductions afterwards from that sum, which the person who paid it would have had a right to make, in the form of set-off.

Accordingly,—By the articles of war, and by several royal warrants, certain regulations are made with respect to the payment and assignment of an allowance to colonels of regiments, called off-reckonings. A colonel of a regiment of infantry died in February 1822, and a few days after, a successor was appointed; but no inspection, or return of the state of the regimental appointments or accoutrements was made until January 1823, when they were reported serviceable, except in the event of the regiment being ordered on a foreign station. In April and September of the same year, other inspections and returns were made, by which it appeared that numerous articles were unfit for service, and the agents of the late colonel, (who had also received a power from his executors to assign the off-reckonings, which they had done, to two of their clerks,) contrary to the direction of his executor, but in conformity with the decision of the consolidated board of general officers, paid for articles supplied to make up the deficiency: It was held, that such agent might set off this payment against the off-reckonings, but not against the private account of the testator. *Wemys* v. *Greenwood*, 5 Law J. K.B. 257.

An agent authorized to sell goods has (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale. *Capel* v. *Thornton*, 3 C. & P. 352. [Tenterden]

If a supercargo is not to sell, nor receive a commission for the sale, he has not the proper distinguishing feature of a factor. *Matchless*, 1 Hag. 101.

It has been settled that a factor has no authority to pledge the property entrusted to him, and that he is a competent witness in an action by the principal against the pawnee. *Greenway* v. *Fisher*, 1 C. & P. 190. [Abbott]

[But by the statute 4 Geo. 4, c. 83, it is enacted, that agents or factors in future shall be deemed true owners, so as to give consignees a lien on shipments by them without notice; and consignees shall be authorized to pledge, and to bind to the extent of their own right, but so as not to preclude the owners from power to redeem, or to recover the balance of the produce.]

The mere possession of property does not authorize a broker to pledge, unless the principal gives him such indicia of property as to enable him to deal with it as his own. *Boyson* v. *Coles*, 6 M. & S. 14.

But where a principal gave his broker a clear and unequivocal power to dispose of the goods at his discretion,—it was holden, that he had no power to pledge in the absence of an express authority. *Graham* v. *Dyster*, 6 M. & S. 1, s. c. 2 Stark. 21.

A, who was a foreign merchant, consigned goods to B, his correspondent in L; B pledged them with C, a factor, as his own property, and obtained the value of the goods in advance, B afterwards became bankrupt: Held, that A might, in an action of trover, recover the goods from C. *Duclos* v. *Ryland*, 5 B. Mo. 518, n.

Where a party draws bills on his factor, to whom he consigns goods, to provide for the payment of the bills, the factor is not authorized to pledge the goods, for the purpose of raising money to pay the bills when they become due. *Gill* v. *Kymer*, 5 B. Mo. 503.

Where the plaintiffs consigned goods to their factor, and at the same time drew bills upon him for the amount, which they themselves ultimately paid, and the factor sent them to the defendant, with whom he had general dealings, without intimating that they were the property of a third person, and drew a bill upon him for the amount, which the defendant accepted and paid; after which the factor became insolvent, having before that time apprised the defendant that he had received a notice of countermand of the sale from the plaintiffs, but the defendant afterwards sold the goods: Held, that the defendant was liable for the value of the goods, in an action for money had and received.—He would have been equally liable, had he not known that the goods were the property of the plaintiffs. *Jackson* v. *Clarke*, 1 Y. & J. 216.

A and B having by their brokers purchased cottons, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession, as the brokers of A. Immediately after the purchase, B paid A one half the value; when considerable purchases had been made, the brokers were informed that B had an interest in the goods purchased, and upon directions of A and B, divided the goods held on their joint account, by appropriating specific warrants to each party. A, after this, directed the brokers to procure him a loan on the security of the warrants, and C advanced money by discounting bills drawn by A upon the brokers; as a security for which, the whole of the warrants were deposited with C, by the brokers. Before the bills became due, the brokers were directed by A to get one half renewed. C having discounted fresh bills for this purpose, the brokers, who had obtained the warrants from C, for the purpose of dividing them and returning him one half, left in the hands of C, as a security, the warrants belonging to B, C not knowing that B had any interest in them: Held, that B might recover from C, in respect of the goods thus pledged to him by A. *Williams* v. *Barton*, 3 Bing. 139, s. c. 10 B. Mo. 139.

A company of foreign merchants, who had been accustomed to send cottons to England from the Brazils consigned to a commission-merchant for sale, sent three consignments to him by three ships at different times. By a letter, they requested him to send them remittances before the cottons were sold. The bags were marked with the initials of that company, and the same marks were mentioned in the bills of lading.

The merchant gave the bills of lading to a company of brokers, to dispose of the cotton, but did not inform them whether he was principal or only factor. The brokers, before the goods were sold, advanced money to the merchant, who afterwards became a bankrupt, and the consignors sued them for the proceeds. The Court held, that the brokers had the means of knowing that the merchant was only a factor; that the authority went no further than for the merchant to have a lien for any advance he might make himself, not by a third person; that the whole transaction was in the nature of a pledge, and that the action was well brought against the brokers by the foreign merchants. *Quieros* v. *True-*

*man*, 3 Law J. K.B. 36, s. c. 3 B. & C. 192, s. c. 5 D. & R. 342.

The King of Prussia raised five millions of pounds sterling by his agents in London, as a loan, for the repayment of which he signed a *general bond*, containing stipulations for the payment of the interest, and the gradual reduction of the principal.

*Special bonds*, reciting the general bond, and made payable to bearer, were given to the contractors to be disposed of. The plaintiff being the owner of five Prussian bonds, put them into the hands of a factor to receive the interest for him. He pledged them to the defendants: The Court held, that such bonds could not be recovered back from the defendants, who were ignorant that they were not the real property of the factor. *Gorgier* v. *Mieville*, 2 Law J. K.B. 206, s. c. 3 B. & C. 45, s. c. 4 D. & R. 641.

Acceptances of a factor for his principal, which are provided for by the principal before they become due, do not constitute such a demand against the principal, as to enable the factor, previous to the 1st of October 1826, when the 2nd section of the 6 Geo. 4, c. 94, came into operation, to pledge the warrants for goods belonging to the principal, as a security for advances made to himself. *Blandy* v. *Allan*, 3 C. & P. 417. [Best]

To entitle a person who claims a lien on goods pledged with him by a factor, to retain them under the 6 Geo. 4, c. 94, the debt for which they are pledged must really and substantially have been incurred after the 1st of October 1826, and the act of pledging must have taken place after that day.

Accordingly, where goods were pledged before the 1st of October 1826, for a debt then due, and the debt was continued after that day by the renewal of a bill given before—it was held, that the pledge was not effectual under the above act, as against the owners of the goods. *Ross* v. *Willis*, 6 Law J. K.B. 215.

By stat. 6 Geo. 4, c. 94, s. 5, if a person receive goods from a factor in deposit or pledge, with a knowledge that the person who delivers them is a factor in respect of those goods, he is entitled to the same right of lien upon them which the factor had when he made the deposit or pledge.

But where a principal sent some East India warrants for silk to a factor, and drew upon him on account of the proceeds of the silk, and ultimately the principal had to pay the bills after renewal: It was held, that the persons with whom the factor had deposited the warrants as a security for a loan, in order to take up the bills which were in a course of renewal, had no lien upon them for a debt due from the factor to them, independent of the sum they lent at the time of the deposit, and which latter the factor had repaid. *Fletcher* v. *Heath*, 6 Law J. K.B. 95, s. c. 7 B. & C. 517, s. c. 1 M. & R. 335.

Goods consigned to a factor for sale, and by him deposited in the warehouse of a wharfinger, cannot be held by the latter to answer his general demand against the factor. *Mellish* v. *Cattley*, 5 Law J. K.B. 74.

If A, holding B's goods with a lien on them against B, transfer them to C, C cannot hold them against B to the extent of A's lien under the 5th section of 6 Geo. 4, c. 94, unless the transfer be expressly made as a pledge. *Thompson* v. *Fermar*, 1 M. & M. 48.

Although an agent cannot sell the property of his principal in the absence of an authority, it is a question for the jury to say, whether he has an implied authority or not, dependent on the circumstances. *Dyer* v. *Pearson*, 3 B. & C. 33, s. c. 4 D. & R. 648.

Under a general authority to receive goods, and dispose of them to the best advantage, the person so authorized may legally and properly commence proceedings against any wrong-doer, who withholds the possession of the goods; and the costs of those proceedings are legally chargeable upon the goods themselves, as a necessary expense: and in such a case, the costs of an unsuccessful arbitration, which a jury shall think was properly gone into, will become a part of the expense, and will be equally chargeable, as well as the general costs. *Curtis* v. *Barclay*, 4 Law J. K.B. 82, s. c. 5 B. & C. 141, s. c. 7 D. & R. 539.

A broker cannot, without the assent of his principal, delegate his authority. *Henderson* v. *Barnewall*, 1 Y. & J. 387.

### (*b*) *Rights.*

There is no rule at law nor in equity, which prohibits a steward from being a lessee under his employer, nor from receiving a beneficial lease; but the latter can derive no advantage from his situation, and therefore is bound to shew that his employer was fully informed of the value. *Selsey* v. *Rhoades*, 2 S. & S. 41.

The Court will not grant an injunction to restrain a confidential agent from suing his employer upon a bond given by the latter, in respect of demands that arose during the continuance of the agency, but given after its termination. If a case were made of peculiar distress at the time of the bond given, the Court might interfere. *Strathmore* v. *Fortune*, 1 Law J. Chanc. 108.

A factor, entering into a contract of guaranty, is entitled to his commission immediately on his effecting the sale, and not in respect of the event, which is merely collateral. *Solly* v. *Weis*, 8 Taunt. 371, s. c. 2 B. Mo. 420.

An agent employed to endeavour to carry a bill through parliament for making a railway, which ultimately fails, being himself a subscriber, cannot maintain an action for his work and labour and expenses, incurred as such agent, either against the body of subscribers at large, or against the chairman of the meeting. *Holmes* v. *Higgins*, 1 Law J. K.B. 47, s. c. 1 B. & C. 74, s. c. 2 D. & R. 196.

A foreign agent, upon whom the entire management of a ship devolves, under circumstances of great distress, and who acts with *bonâ fide* intentions in her concerns, is entitled to be equitably supported. *Tartar*, 1 Hag. 1.

In an action by a spirit-broker, it was holden that he was entitled to half-a-crown per puncheon, for the expenses of putting up to sale, though the property was bought in. *Stewart* v. *Kahle*, 3 Stark. 161. [Abbott]

A factor has a lien against his principal. *Kruger* v. *Wilcocks*, 1 Ken. 32.

Where the defendants, as brokers, contracted for a quantity of stones, to remain on the premises of the vendor, rent free, for one month, and after that

at a certain rent, to be paid by their principal, who subsequently gave orders for a removal of part, and directed that the residue should not be removed until further orders from him: Held, that, never having in fact been in the possession or control of the brokers, they had no lien upon the goods for their general balance. *Taylor* v. *Robinson*, 8 Taunt. 648, s. c. 2 B. Mo. 730.

Where a policy of insurance has been left in the possession of an agent, merely for safe custody, and and, although money is advanced by him to the assured, without any other security than the policy, the agent has no lien on the policy of insurance for the money advanced: *sed aliter* if left with him as a security generally. *Muir* v. *Fleming*, 1 D. & R. N.P.C. 29. [Abbott]

(c) *Liabilities.*

A contract establishing between the contracting parties the relationship of principal and agent, is made absolute in law by the latter acting under it. *Roberts* v. *Ogilby*, 9 Price, 269.

An agent may deviate from his instructions in his endeavours to do the best for his principal; but he takes upon himself the risk whether his principal will approve of his conduct. If the principal does not express his dissent within a reasonable time, it will be considered that he approves of the arrangements made by his agent, who will then be exonerated from all consequences. *Prince* v. *Clarke*, 1 Law J. K.B. 69, s. c. 1 B. & C. 186, s. c. 2 D. & R. 266.

An agent, to exempt himself from a personal liability, must use particular words; therefore, if at the commencement of an agreement he describes himself as an agent, but in a subsequent part says, *he will execute*, &c. he is personally liable. *Norton* v. *Heron*, 1 R. & M. 229, s. c. 1 C. & P. 648. [Best]

If a consignee and agent of a vessel enters into an agreement, describing himself as "consignee and agent on behalf of M," and it is further stated "that the said parties agree," the agent, if he signs the agreement without describing himself as such, renders himself personally liable. *Kennedy* v. *Gouseid*, 3 D. & R. 503.

If a person authorizes an agent to sell goods, who does so, disclosing to his principal who the vendee is, the principal can maintain no action against the agent for the price of the goods, unless the agent acts under a *del credere* commission. *Alsop* v. *Silvester*, 1 C. & P. 107. [Hullock]

Where, in an action for goods sold and delivered, the question was, whether they were purchased by a third person on his own account, or for his principal; and it was left to the jury to say to whom credit was given: Held, that it was properly left, and that it was not necessary to leave it to them to say whether the vendor knew, at the time of the sale, that he was dealing with the purchaser in his character of agent. *Edwards* v. *Smith*, 5 Law J. C.P. 11.

The delivery of goods must be to the mate, or to some officers of the ship, in order to discharge a wharfinger from his responsibility for goods left with him to be sent coastwise. *Leigh* v. *Smith*, 1 R. & M. 224, s. c. 1 C. & P. 638. [Best]

An action on the case will not lie against commissioners appointed under acts of parliament, who act gratuitously for the benefit of the public, for injuries occasioned by the neglect of workmen in their employ; nor where, by local acts, actions against such commissioners are directed to be brought against their clerk, will such action lie against him, he not being personally a party to the cause of such injury.

The remedy of the party injured is against the agents by whose negligence the injury was occasioned. Thus, in an action against the clerks of the commissioners acting under a local act for paving and lighting the town of Birmingham, and their surveyor and workmen, the Court permitted a verdict found for the plaintiffs, to stand against two of the defendants; but held clearly that it could not be sustained against the clerks to the commissioners. *Hall* v. *Smith*, 2 Law J. C.P. 113, s. c. 2 Bing. 156, s. c. 9 B. Mo. 226.

Where an auctioneer has delivered goods without receiving the price from the purchaser: Held liable, in an action for not giving a full account of the produce of the goods. *Brown* v. *Staton*, 2 Chit. 353.

If an auctioneer signs a contract for the sale of a house in his own name, and receives the deposit (his principal being present), and, after the purchaser has left the room, pays over the deposit to such principal—the purchaser may, notwithstanding this, maintain an action against the auctioneer, to recover back his deposit, if a good title cannot be made. *Gray* v. *Gutteridge*, 3 C. & P. 40. [Tenterden]

Where A, an auctioneer, was employed to dispose of an estate belonging to B, signed an agreement with C, for the purchase in his own name, and B shortly afterwards signed it, and added, "I hereby sanction this agreement, and approve of A's having signed the same on my behalf": Held, that A was the agent of B, and not personally responsible. *Spittle* v. *Lavender*, 5 B. Mo. 270, s. c. 2 B. & B. 452.

If a person employed by the administrator of a deceased debtor, to wind up the concerns of the deceased's business, give an undertaking to a creditor of the deceased, to furnish money to meet an acceptance which such creditor has given in furtherance of an accommodation arrangement for delaying payment, in the hope that funds may be forthcoming, he is liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, and had not received any funds which he could apply to the discharge of the debt. *Maud* v. *Waterhouse*, 2 C. & P. 579. [Abbott]

(C) Accounting.

An agent, not having his accounts ready within a reasonable time, will be made to pay costs, even though he should have offered to pay, on account of what might be due from him, a sum equal to the balance with which he was actually chargeable. *Collyer* v. *Dudley*, 2 Law J. Chanc. 15.

Upon allegations, that, under the decrees of the Cortes and orders of the Spanish government, the plaintiff had a lien for the payment of a debt due to him on a certain portion of stock, which, along with other stock had been, by the commissioners of the Spanish government, placed at the disposal of, and sold by, certain agents here, a bill is filed praying an account (amongst others) against the agents:

Held, that a good and complete defence may be made to such a bill by a plea, stating matter from which it appears, that the stock placed at the disposal of these agents was intended for special purposes, unconnected with the satisfaction of the plaintiff's demand, and did not include the stock specifically appropriated to meet his demand; and that it is no objection to the plea, that after the special purposes are answered, there may be in the hands of the agents a surplus in which the plaintiff may have an interest.

A creditor cannot file a bill for an account against the agent of the principal, against whom his claim is, unless he makes out a case of collusion between the principal and agent. *Jabatt* v. *Campbell*, 3 Law J. Chanc. 8.

An agent's account, in which he charges himself with sums received, is not conclusive against him as to the fact of those receipts. The account may be opened to let in the fact of the sums not having been received, in either of the following cases:—If the account, on the face of it, discloses that the money has not been actually received: If the principal shew, by his conduct, that he knows the money has not been actually received: or, If the principal do not express his dissent to a subsequent correction of the account by the agent, in which correction he relieves himself from the sum with which he had previously charged himself. *Shaw* v. *Dartnall*, 5 Law J. K.B. 35, s. c. 6 B. & C. 56, s. c. 9 D. & R. 55.

If an agent credit his principal for money received, it will be concluded that it has been received, until the contrary shall be proved; and although an agent state in his account, as well as by letter, that certain sums which appear on the credit side, have not, in fact, been received; yet if he charge commission for such sums, and allow the principal to draw for a balance in which they are included, the jury, as against that agent, may consider whether these circumstances are not sufficient to lead them to infer that he acted under a commission *del credere*. *Shaw* v. *Woodcock*, 5 Law J. K.B. 296, s. c. 7 B. & C. 73.

### (D) Evidence.

The defendants' agents, at their request, received money on their account, and wrote to apprise them of their having so received it for them. The defendants, in answer, gave directions for remitting the amount to them: Held, that, under these circumstances, the letter of the agents was admissible in evidence to charge the defendants with the receipt of the money. *Coates* v. *Bainbridge*, 6 Law J. C.P. 220, s. c. 5 Bing. 58, s. c. 2 M. & P. 142.

An agent can only act within the scope of his authority as such; and declarations made by him, as to a particular fact, are not admissible in evidence, unless they related to an act done by him in the course of his particular employment as such agent. *Schumack* v. *Lock*, 3 Law J. C.P. 57.

If the attorney of a creditor write to A asking payment of a debt due from B, and A answer the letter and pay 200*l.* of the debt; and afterwards the attorney again write to A, asking payment of the residue of the debt, and A send a letter promising payment, this last letter is evidence in an action against B. *Roberts* v. *Lady Gresley*, 3 C. & P. 380. [Tenterden]

A stock-broker is bound to produce his book, though it may criminate himself; because, by the 7 Geo. 2, c. 8, s. 9, it is enacted that every broker should keep a book, and enter therein all purchases and sales made by him. *Rawlings* v. *Hall*, 1 C. & P. 13. [Burrow]

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## PRINCIPAL AND SURETY.

[See Bond, Debtor and Creditor, and Guarantie.]

Magna Charta extends only to conditional, and not to absolute securities. *Attorney General* v. *Atkinson*, 1 Y. & J. 207.

Where two persons execute a bond, the one as principal, the other as surety, and no other assurance is executed at the time, the surety paying the bond debt, is a simple contract creditor only of the principal. *Copis* v. *Middleton*, 2 Law J. Chanc. 82, s. c. 1 Turn. 229.

A court of equity will not relieve a surety by bond, upon the ground of the creditor having given time to the principal debtor, unless there has been an express and positive contract between them for that purpose. *Heath* v. *Key*, 1 Y. & J. 434.

A variance in the performance of a contract by the plaintiff, with the assent of the principal, but without the consent of the surety, will discharge the surety, though the variance should tend to diminish his risk—[*dissentiente* Mr. Justice Littledale]. *Whitcher* v. *Hall*, 4 Law J. K.B. 167, s. c. 5 B. & C. 269, s. c. 8 D. & R. 22.

Where sureties had engaged to pay, within one month after demand on them, a sum not exceeding 500*l.*, which might become due from the principal: Held, that taking a warrant of attorney without any communication with the sureties, and before any demand had been made on them, was not within the rule, that dealing with the principal debtor, without the concurrence of the sureties, would release the latter. *Prendergarst* v. *Devey*, 6 Mad. 124.

A condition in a bond to save A harmless from all actions, legal proceedings, and costs, &c. which may be the consequence of A's delivering over to defendant a bill of exchange, part of the proceeds whereof a third person is entitled to, is forfeited, by payment over by A to such third person of his share of the proceeds, upon his demanding the same, without his bringing any action, and though A gave no notice of the payment to the defendant. *Ker* v. *Mitchell*, 2 Chit. 487.

Bond conditioned, that if F M shall duly account for all monies, &c. received by him in plaintiff's service as a clerk; and also, that if the said F M shall embezzle, &c. plaintiff's property, and shall, within three days after proof thereof, pay &c. plaintiff the damage sustained by such misbehaviour or misconduct; or in default thereof, if the defendant shall, after notice given, make a full recompense to plaintiff, then the bond to be void. The plaintiff, in order to render the defendant (the surety) liable for F M's not accounting, must give the defendant notice of the not accounting, as well as of the embezzling. *Phillips* v. *Fordyce*, 2 Chit. 676.

Where a bond, given by a principal to his surety as an imdemnity, is conditioned in terms merely to

indemnify the surety, it is necessary for the latter, when suing upon the bond, to shew that he has been damnified.

But where such a bond is conditioned that the principal shall pay such a sum to A B, and shall also indemnify the surety against his being called upon by A B, it is sufficient for the surety, when suing upon the bond, to shew that the principal did not pay A B, without going on to shew that he, the surety, has been thereby damnified. *Penny* v. *Foy*, 6 Law J. K.B. 230, s. c. 8 B. & C. 11, s. c. 2 M. & R. 181.

Entries made by the collector of taxes in his collecting book, are admissible in evidence against a surety after the death of the principal. *Goss* v. *Watlington*, 6 B. Mo. 355, s. c. 3 B. & B. 132.

Bessell, on the advance of 300*l.* by Gregory, gives her a promissory note for that sum and interest, indorsed by Shortman & Croden, as a further security for the money. The note becomes due, is presented and dishonoured, and Bessell, being unable to discharge it, agrees to sell to Gregory household goods, &c. for 580*l.* and to take back the note, with the interest due on it, in part of payment. Possession is given to Gregory of the household goods, &c. and the note is delivered up to Bessell, and destroyed; afterwards a commission of bankruptcy is issued against Bessell, and there being no act of bankruptcy previous to the sale of the household goods, &c. to Gregory, they are demanded by the assignees, and delivered up to them. Gregory demands payment of the note from the drawer and indorsees, and on refusal, files a bill against them. An account was directed of what was due on the note, for principal and interest, with the costs of the suit, as against Shortman & Croden, and the bill dismissed without costs, as against Bessell, the plaintiff undertaking to prove the note under the commission for the benefit of Shortman & Croden. *Gregory* v. *Bessell*, 6 Mad. 186.

A surety is not discharged by the creditor taking from the debtor a cognovit in an action he had brought against the debtor, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course. *Hulme* v. *Coles*, 2 Sim. 12.

Formerly it was supposed, that in the case where one of several sureties paid the whole debt owing from the principal, his remedy was only in equity for a contribution; but in modern times it has been held, that if one in the nature of a surety pays a debt, he may maintain an action against the party liable for the debt.

The Bank of Scotland having discounted bills to the amount of 8000*l.* which were dishonoured, the acceptors becoming bankrupts, agree with the drawers to retain the dishonoured bills, and receive the dividends which might become payable from the bankrupt's estate; and, as additional security, to take four promissory notes, indorsed by four sureties for 2000*l.* each to guarantee the unsatisfied bills, or any balance upon them which might remain unpaid, to the extent of 2000*l.* each. This agreement having been carried into effect, when the notes were nearly due, upon the application of the original debtors for delay of payment, the Bank of Scotland gave up one of the promissory notes, and accepted a new one from the surety who had indorsed it; renewed notes were also given by two other of the sureties, and with the fourth surety a treaty was carried on respecting a renewal, pending which he died. The dishonoured bills had also been delivered over by the bank to the original debtors, upon the treaty for the renewal of the notes: Held, (reversing *pro tanto* the judgment of the Court below,) that the fourth surety and his estate, by the legal effect of the transaction, was discharged as to three-fourths, and liable only as to one-fourth, of the balance due upon the dishonoured bills, after giving credit for all monies received or receivable from any of the parties upon the bills, or their estates; and that, on payment of such fourth part of such balance, the bank was responsible to the estate of the fourth surety for all future dividends upon the dishonoured bills. *Stirling* v. *Forester*, 3 Bligh, 575.

On an application to discharge a recognizance which had been estreated, it appeared that the petitioner was surety for A under an order of bastardy —that the petitioner subsequently became embarrassed and left D, and came to L to endeavour to procure employment, during which period A took the benefit of the insolvent act, and died; the petitioner then returned to D, and was arrested for the amount of his recognizance: Held, although it was shewn that the petitioner had no property, that, as it appeared that the parish had been charged for many years with the burthen cast on them by the principal, they could not grant the application without the consent of the parish officers; nor would they grant a rule to compel the parish officers to shew cause why they should not give their consent. *In re Smith*, 13 Price, 3.

## PRINTER.

[See COPYRIGHT, and INJUNCTION.]

A man's name appearing at the bottom of a play-bill is not, of itself, *primâ facie* evidence that he printed it. *Rex* v. *Williams*, 2 Law J. K.B. 80.

No action can be maintained for printing an immoral and libellous publication, as the "Memoirs of Harriette Wilson." *Poplett* v. *Stockdale*, 2 C. & P. 198, s. c. 1 R. & M. 337. [Best]

*Semble*—It is illegal to publish part of a depending cause. *Deacon* v. *Deacon*, 2 Russ. 607.

## PRISON.

[See PRISONER.]

The Warden of the Fleet is not bound to permit a party to inspect or take copies of a *habeas corpus* and commitment of a person charged in execution for a debt due to such party, as all the proceedings under which such person was charged, were incorporated in the list of causes under which he was detained, and which was in the custody of the clerk of the papers of the prison. *Davies* v. *Brown*, 3 Law J. C.P. 53.

The Warden of the Fleet had omitted to bring a defendant into court under a writ of *habeas corpus*; on a motion for an attachment against him, one of his officers swore that the defendant had the benefit of the rules, but that he could not be found until after the time for bringing him into court had ex-

pired, when he was confined within the prison until he was discharged under an order of the insolvent debtor's court: But the Court discharged the rule for the attachment, upon the Warden paying the costs of the motion. *Park* v. *Torre*, 6 B. Mo. 260, s. c. 3 B. & B. 93.

In an action against the Warden of the Fleet for an escape, the bill alleged that the prisoner was brought before the Court by *habeas corpus*, and that by the Court the prisoner was committed to prison until, &c. "as by the said commitment more fully and at large appears;" upon special demurrer, for want of more special averment, that the commitment was of record: Held, that such recommitment was by order of the Court, and of necessity must be of record. And, *semble*, that on special demurrer the omission of such averment is fatal. *Barns* v. *Eyles*, 8 Taunt. 512, s. c. 2 B. Mo. 561.

No officer of the King's Bench prison, or any of the persons employed by the Marshal therein, in the management or superintendence of the prison or prisoners, shall either directly or indirectly be concerned in selling any article to, or doing any work for, any of the prisoners; and the Marshal shall remove from his place every such officer or person aforesaid who shall be guilty of violating this rule, pursuant to the rule of court of Michaelmas Term, in the 58th year of his late Majesty. *Reg. Gen.* K.B. Hil. 7 & 8 Geo. 4. (1827) 5 Law J. K.B. 168; 6 B. & C. 267.

Prisoners confined in the Marshalsea detected in playing at hazard, punished by the Court of King's Bench. 2 B. & C. 344.

Rules of the Fleet prison enlarged. 2 Law J. C.P. 150; 2 Bing. 163.

Prisoners having a day-rule to return within the walls or rules at or before nine o'clock in the evening. *R. Hil.* 1827, 5 Law J. C.P. 100.

Fleet prison gates to be closed at nine at night from Michaelmas to Lady-day, at ten from Lady-day to Michaelmas. *Reg. Gen.* 5 Law J. C.P. 162, s. c. 4 Bing. 247.

Upon every action, from which a prisoner is discharged from the Fleet prison, the Clerk of the Papers in the prison is entitled to a fee of 2*s.* 6*d.* *In re Rochfort*, 1 Law J. C.P. 90, s. c. 1 Bing. 255, s. c. 8 B. Mo. 157.

## PRISON BREACH.

Indictment on 16 Geo. 2, c. 31, for delivering instruments to a prisoner to facilitate his escape from gaol: Held, that if the record of the conviction of the prisoner, whose escape was to have been effected, is produced by the proper officer, no evidence is admissible to dispute what it states; or to shew that it has never been filed amongst the other records of the county; though the indictment refers to it with a *prout patet* as remaining amongst those records: Held, also, that the delivering is within the act, though the prisoner has been pardoned of the offence of which he was convicted, on condition of transportation.

And a party may be convicted, though there is no evidence that he knew of what specific offence the person he assisted had been convicted. *Rex* v. *Shaw*, 1 R. & R. C.C.R. 526.

## PRISONER.

(A) PRIVILEGES.
(B) ALLOWANCE.
(C) DISCHARGE.
(*a*) *In general.*
(*b*) *Under the Lords' Act*

### (A) PRIVILEGES.

When Justices of the Peace examine a prisoner under a charge of felony, the prisoner is not entitled, as a matter of right, to have a person skilled in the law present as an advocate in his behalf, as it is only a preliminary investigation, and not conclusive. *Cox* v. *Coleridge*, 2 D. & R. 86, s. c. 1 B. & C. 37.

Where a defendant had been convicted of a misdemeanor, and sentenced by the Court to a certain period of imprisonment, to pay a fine, and ordered to remain in custody until the fine should be paid; the term of imprisonment having expired, but the defendant remaining in custody of the Marshal from an inability to pay the fine: the Court, on affidavit by physicians of the dangerous state of his health, admitted him to the benefit of the rules for a limited time. *Rex* v. *Bennett*, 4 D. & R. 833.

No prisoner shall be entitled to any room in the Fleet prison by reason of seniority, except from the time of his being charged in the actions in which he is not supersedable. *Reg. Gen.* 4 Law J. C.P. 137; 3 Bing. 442.

A prisoner breaking the rules of the King's Bench prison, may be restored to them by permission of the Court. *In re Barber*, 3 Law J. K.B. 225.

But when a person has once broken the rules of the King's Bench, the Court will not order him to have the rules again, without he first obtain the leave of the Marshal. *In re Powell*, 3 Law J. K.B. 57.

Prisoner for debt brought up without a day-rule, upon a suggestion that he was unable to pay the expense thereof. *In re Clark*, 3 D. & R. 260.

### (B) ALLOWANCE.

[And see *post*, C.]

The public are not bound to find food for those persons committed to gaol for trial, who are able but unwilling to work; therefore, where upon report by justices to sessions, that untried prisoners committed for trial who were able to work, and had the means of employment offered them by which they might earn their support, but who refused to work, it was ordered they should be allowed bread and water only: This Court, on application for a mandamus to compel justices to order other food, held, that it would not lie, for that the sessions, in ordering even an allowance of bread and water, had done more than they were bound by law to do. *Rex* v. *the Justices of the North Riding of Yorkshire*, 2 B. & C. 286, s. c. 3 D. & R. 510.

[But see, contrà, subsequent enactments of 5 Geo. 4, c. 85, s. 17.]

Although a note given to an insolvent debtor, is not entitled in the Court, yet it is good. *Clarke* v. *Davies*, 2 Chit. 226.

A note, signed by the plaintiff's attorney, for the Payment of the weekly sixpences under the Lords'

Act, is insufficient and void. *Eagle* v. *Brown*, 5 Law J. C.P. 37.

The attorney who conducts the cause, is not, by his retainer in the cause, authorized to sign a note for the allowance of sixpences to a prisoner charged in execution, his authority being at an end when final judgment is signed. *Meebeath* v. *Cooke*, 6 Law J. C.P. 124, s. c. 4 Bing. 578, s. c. 1 M. & P. 513.

## (C) DISCHARGE.

### (a) *In general.*

A party detained by process served on him, pending a detention under an illegal arrest, will, on motion, be discharged. *Attorney General* v. *Dorkins*, 11 Price, 156.

If a defendant, after being held to bail, be discharged out of custody in the King's Bench, on filing common bail, on the ground of a defect in the affidavit of debt, a detainer lodged against him in the Fleet, for the same cause of action, on the day of his discharge, is irregular, and the Court will order him to be discharged, though the action in the King's Bench be discontinued, but the costs not paid. *Claughton* v. *Ferquharson*, 7 B. Mo. 312.

A prisoner detained on an information for breach of revenue laws, will be discharged unconditionally, if the arrest were illegal in the first instance. *Attorney General* v. *Coss*, 11 Price, 345.

Where a defendant, arrested in this country for the same cause of action for which proceedings had been instituted in the Supreme Court of New South Wales, applied to be discharged from custody, on entering a common appearance, and deposed that, by the practice of that court, when process was issued, and a *non est inventus* returned, an attachment issued (which proceeding had been adopted by the plaintiffs against him in New South Wales), whereupon the defendant's goods were seized, and rendered to the plaintiff in execution, unless bail were put in to pay the condemnation money; *and that either the one or the other must have taken place against him at the suit of the plaintiffs, according to the practice of that court:* the Court refused to discharge him, being of opinion that the affidavit did not shew clearly that the plaintiffs had the same remedy in the colony, which they might have in this country.

*Semble*—Where, under process from the Supreme Court of New South Wales (established by act 4 Geo. 4, c. 96, the goods of a defendant are attached and rendered to the plaintiff in execution, or bail are put in to pay the condemnation money, he cannot be arrested for the same cause of action in this country.

No objection can be taken, arising out of an affidavit, which is not referred to in the rule *nisi*.

A variance between the affidavit of debt and the cause of action is no ground for discharging the defendant out of custody, on entering a common appearance, before the declaration is filed.

Where, in a joint action, one defendant is arrested, and there are no means of compelling the appearance of his co-defendant, so that, after declaration, he will be entitled to a *supersedeas*, the Court will not entertain an application for his discharge, until the declaration be filed. *Naylor* v. *Eagar*, 2 Y. & J. 90.

All prisoners who have been or shall be in custody of the Warden for the space of six months after they are supersedable, though not superseded, shall from time to time be discharged out of the custody of the Warden, as to all such actions in which they have been or shall be supersedable. *Reg. Gen.* 4 Law J. C.P. 137; 3 Bing. 442.

A declaration was delivered in Easter term 1822, and after plea, issue was joined in Trinity term following. A cognovit was given on the 6th of November, and on the 11th the defendant surrendered in discharge of his bail: the plaintiff entered up final judgment in Hilary term 1823, and now in Trinity term proposed to charge the defendant in execution: Held, that although the defendant might, on a former occasion, be supersedable, it was no ground for not charging him in execution. *Morland* v. *Weston*, 3 D. & R. 31.

A prisoner was charged in execution. The attorney for the plaintiff filed the committitur-piece with the clerk of the dockets in Easter term. The clerk ought to have entered the committitur on the judgment-roll within four days after that term; but he did not enter it until after Trinity term; and the Court, therefore, discharged the prisoner. *Purdam* v. *Buckridge*, 2 Law J.K.B. 38, s. c. 2 B. & C. 342, s. c. 3 D. & R. 597.

The Court refused to discharge a prisoner out of custody, on the ground of being charged in execution with a larger sum than had been recovered, the mistake having proceeded from an error in the judgment-roll, and subsequent proceedings:—therefore the Court ordered the amendment of the judgment-roll and committitur, by making them consistent with the postea and Master's allocatur. *Flindell* v. *Fairman*, 11 Price, 410.

Prisoners are not to be superseded, nor discharged out of custody, after notice given by them to plaintiffs under insolvent acts, though plaintiffs forbear to proceed further, until some motion has been made to the Court. *Reg. Gen.* M. 3 Geo. 4, 1 Bing. 120.

Where a prisoner has given notice of his intention to apply to be discharged, under an insolvent act, the plaintiff's *laches* will not entitle the defendant to a *supersedeas;* and the same rule applies to the personal representative of a deceased plaintiff. *Holmes* v. *Murcott*, 2 Law J. C.P. 65, s. c. 1 Bing. 431, s. c. 3 B. Mo. 529.

Motion to discharge a defendant in execution out of custody was refused, though the application was not made until eighteen months after the plaintiff's death; it appearing that his executors did not consent to the discharge. *Dunsford* v. *Gouldsmith*, 8 B. Mo. 145.

Where administration had been taken out, the Court refused, without the authority of the administratrix, to discharge defendant out of execution after the death of the plaintiff, although his administratrix and his assignees (he having been a bankrupt) disclaimed all interest in the action. *Fothergill* v. *Walton and Rondeau*, 6 Law J. C.P. 178, s. c. 4 Bing. 711, s. c. 1 M. & P. 743.

### (b) *Under the Lords' Act.*

Notwithstanding an insolvent has been remanded by the Commissioners of the Insolvent Court, for misconduct, he may be discharged under the Lords' Act, 32 Geo. 2, c. 28, s. 13. *Austin* v. *Hankin*, 6 B. Mo. 573.

The Court has power to discharge a prisoner under the Lords' Act, although he has been remanded by the Insolvent Debtors Court, for not giving a clear and satisfactory account of his property. *Goldsmith* v. *Taylor*, 7 B. Mo. 370.

If an insolvent, who has proceeded irregularly, makes an affidavit of ignorance, he is entitled to be discharged. *In re Jones*, 2 Chit. 226.

Forgery of an acceptance by a defendant on a bill of exchange given by him to the plaintiff, no ground for opposing a discharge under the Lords' Act, 32 Geo. 2, c. 28. *Rice* v. *Lee*, 3 Law J. C.P. 4.

The addition of deponent and place of abode must appear in an affidavit under the Lords' Act, for discharge of a prisoner remanded in execution under that act, for non-payment of the weekly 3*s.* 6*d.* *Anon.* 3 Law J. K.B. 253.

On a prisoner's being brought up to be discharged under the Lords' Act, it appeared that a commission of bankrupt had been issued against him since his arrest and imprisonment, and that he had not passed his final examination,—the Court ordered him to be remanded until such examination had taken place:—and, on his being afterwards brought up, it appearing that he had passed it to the satisfaction of the commissioners, and that a commission had been awarded accordingly: he was ordered to be discharged on inserting an assignment in his schedule to the plaintiff of all his estate, title and interest in the property therein mentioned, subject to the commission, and payment or satisfaction of his debts under it. *Nunney* v. *Hall*, 8 B. Mo. 423.

Where defendant, not being able to find plaintiff's abode, caused the plaintiff's attorney to be served with a notice of his intention to be brought up to be discharged under the Insolvent Act, and the attorney refused to disclose the plaintiff's residence, the Court would not allow the attorney to give the note for the allowance of sixpences, but discharged the insolvent. *Cormack* v. *Bain*, 4 Bing. 230.

Where a prisoner has had the benefit of the general Insolvent Act, he is not entitled to be discharged under the Lords' Act. *Galossis* v. *Longhurst*, 2 Chit. 354.

An order to bring up an insolvent under the Lords' Act, at the next assizes, does not authorize him to be brought up at a special gaol delivery. *Memorandum*, 7 D. & R. 235, n.

An insolvent was brought up at the assizes under the compulsory clauses of the Lords' Act, 32 Geo. 3, to deliver a schedule of his estate, and, not being prepared to do so then, was remanded generally, but, as more than sixty days would have elapsed before the next assizes, the Court at the instance of the prisoner made an order on the gaoler to bring him up at the subsequent assizes for examination, notwithstanding the lapse of sixty days. *Rex* v. *Belk*, 7 D. & R. 234.

Where the debt exceeds 300*l.* a debtor cannot be compelled, under the Lords' Act, to come up and assign over his property for the benefit of his creditors. *Barker* v. *Slater*, 1 Law J. K.B. 29, s. c. 2 D. & R. 165.

A defendant who has been in prison upwards of twelve months, in execution on a judgment for less than 20*l.*, and has given notice to the plaintiff of his intention of applying to the Court for his discharge under the 48 Geo. 3, c. 123, is entitled to a rule absolute in the first instance. *Davies* v. *Rogers*, 2 Law J. K.B. 172, s. c. 2 B. & C. 804, s. c. 4 D. & R. 361.

If, under the 32 Geo. 2, c. 28, sections 16 and 17, a prisoner be brought before the Court, for the purpose of giving an account of his property, which he refuses to do, the Court cannot remand him until a future day, and then to be brought up again for the same purpose; but they can only remand him when he will return to prison in the same custody. If, therefore, the damages for which he has been charged in execution, do not exceed 20*l.*, exclusive of costs, and he has lain in prison more than twelve months, the Court will discharge him under the 48 Geo. 3, c. 123, notwithstanding the 32 Geo. 2. *Aliter*, if he be detained under an order, which makes his imprisonment in the nature of a criminal custody, for the 48 Geo. 3. only applies to civil custody. *Langdon* v. *Rossiter*, 13 Price, 186.

The Court granted a rule, absolute in the first instance, for the discharge of a prisoner, under the 48 Geo. 3, c. 123, s. 1, unless cause should be shewn before a Judge at Chambers within fourteen days after the end of the term. *Anon.* 6 Law J. C.P. 48.

Where a defendant has been in custody for a year, upon a judgment for a debt not exceeding 20*l.*, the Court will discharge him, under the 48 Geo. 3, c. 123, although he be entitled to an annuity sufficient to satisfy the judgment. *Wood* v. *Kelmerdine*, 2 Y. & J. 10.

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## PRIZE.

[See ADMIRALTY, and PRACTICE.]

(A) LICENCE.
(B) JOINT CAPTURE.
(C) HEAD-MONEY.
(D) DISTRIBUTION.
(E) RESTITUTION AND RE-CAPTURE.
(F) PRIZE AGENT.

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### (A) LICENCE.

It is of no consequence who are the persons who act under a licence, where the terms of it are general. *Acteon*, 2 Dods. 52.

If a captor destroys a ship for which a British licence has been granted, he or his government is responsible for the loss occasioned by such destruction; but if the existence of the licence was not disclosed to him by those whose duty it was to inform him, and he had no sufficient means to inform himself, he is exempt from responsibility. *Felicity*, 2 Dods. 381.

### (B) JOINT CAPTURE.

An abandonment of pursuit and a return to the former course of the ship, before the act of capture, defeats the claim of joint capture, notwithstanding some assistance may have been rendered at the early part of the chase. *The Rattlesnake*, 2 Dods. 32.

Where a prize, coming out of a blockaded harbour, was captured by one of the blockading squadron stationed off the mouth of the port; it was determined that the other vessels of the squadron, although

stationed at some distance, were entitled to share in the prize. *La Henrietta*, 2 Dods. 96.

Where two vessels join for the purpose of effecting a capture, the continuance of the chase is sufficient to create the right of joint capture, whether the vessels are in sight of each other or not. *L'Etoile*, 2 Dods. 106.

A general claim of joint capture may be supported by a King's ship, on the ground of sight only; but this general rule is liable to exceptions. *La Melam*, 2 Dods. 122.

One of his Majesty's ships of war being *in itinere*, and barely seeing or hearing a firing on the land, is not entitled to take any share in the beneficial effects of an attack made by a force with which she had rendered no assistance, or had any communication. *Genoa and Savona*, 2 Dods. 88.

That is clearly a conjunct expedition, which is directed by competent authority, combining together the actions of two different species of force for the attainment of some common specific purpose.

Mere co-operation may rise into absolute conjunction. *Booty in the Peninsula*, 1 Hag. 48.

Where a ship has been captured, and it is impossible to obtain witnesses from that vessel, a claim of joint capture may be proved by the evidence of witnesses who have released their claims. *Galen*, 2 Dods. 21.

### (C) HEAD-MONEY.

Where an enemy's ship of war was set on fire by her own crew, in consequence of the approach of a British force, and totally destroyed: Held, that head-money was due from the enemy's vessel. *Uranie*, 2 Dods. 172.

Head-money not due on ship captured by conjunct forces of army and navy in harbours, rivers, &c. *La Bellone, Duperre*, 2 Dods. 343.

An application for head-money for five Capuchin Friars (passengers), was refused. *L'Hercule*, 1 Hag. 211.

Head-money refused, there being no proof of an effective exchange of prisoners. *La Lune*, 1 Hag. 210.

### (D) DISTRIBUTION.

Whoever receives prize proceeds, is responsible for them to the captors. *Mary Crafts*, 2 Dods. 378.

Greenwich Hospital is not entitled to a per-centage upon booty taken by a conjunct expedition of sea and land forces. *Genoa and its Dependencies, Spezzia, Savona, and other towns*, 2 Dods. 444.

A prize was taken by a revenue cutter, during the suspension of the commander, by the mate, who acted as commander under an order from the Commissioners of Customs: Held, that he was entitled to the commander's share under the king's warrant of distributions: Held, also, that where an actual deputed mariner on board, acted as mate without any appointment, that he is not thereby divested of his former character, and consequently the commander is only entitled to a reduced share. *Taylor* v. *Pill*, 8 Taunt. 805.

The commander-in-chief on a foreign station, in the case of a fleet, or the captain, in the case of a single ship at sea, *quasi* commander-in-chief, may appoint a successor to a boatswain, and such successor will be thereby raised above the rank of petty officer or seaman, and may, previous to the confirmation of such appointment by warrant from the Admiralty, assign prize-money without being subject to the restrictions of the 45 Geo. 2, c. 72, imposed by the legislature for the protection of petty officers and seamen. *Wellard* v. *Moss*, 1 Law J. C.P. 18, s. c. 1 Bing. 134, s. c. 7 B. Mo. 503.

Claim of Sir A C, upon two grounds: first, that he assumed the command of the fleet under orders from the Admiralty; secondly, that without any direct orders from the Admiralty, he had a right, acting upon his own authority as admiral, though subject to responsibility for so doing, to take upon himself the command of the fleet; not sustained. *Captures on the Jamaica Station*, 1 Hag. 129.

If an admiral is appointed by the Admiralty, and actually has given an order to a fleet, he is entitled to share in captures, though he was not within the station at the time they were made. *Captures on the Jamaica Station*, 1 Hag. 138.

When a grant of money, in lieu of booty, is made jointly to trustees for distribution amongst the naval and military forces employed in the capture, the trustees are bound to act conjointly, and if they delegate their trust to others, the persons deputed by them, though severally appointed, must likewise act conjointly. There ought always to be a joint and concurrent appointment, and a joint and concurrent distribution, 54 Geo. 3, c. 86. *Tarragona*, 2 Dods. 487.

Property taken in a roadstead is generally condemned as *droits* of the Admiralty. *La Esperanza*, 1 Hag. 87.

### (E) RESTITUTION AND RE-CAPTURE.

The general rule, that a party who has been unjustly deprived of his property by capture, is entitled to restitution with costs and damages, is, like all similar general rules, subject to exceptions.

Whether a captor has acted from improper motives or not, the measure of restitution to the claimant is the same.

Although a captor be only actuated by feelings of public duty, in destroying the property he has taken, yet he is responsible to the claimant, and must apply to his own government for indemnification. *Acteon*, 2 Dods. 51, 2, 3.

A vessel, the property of an allied sovereign, recaptured from the enemy, was restored to the original owners, free from salvage or expense. *Alexander*, 2 Dods. 37.

Where an American privateer had taken a British vessel and cargo, within the period allowed for hostile capture by the treaty of peace, but recaptured by a British ship of war after the expiration of that time, she was restored to the American captors. *Somerset*, 2 Dods. 56.

Captors having a *bonâ fide* possession, and using due care, are not responsible for losses occasioned by mere misfortune. *John Beck*, 2 Dods. 336.

A seizor is clearly entitled to be indemnified his expenses, when nothing vexatious can be objected against him. *Woodbridge*, 1 Hag. 73.

### (F) PRIZE AGENT.

Limited responsibility of a foreign prize agent who acted a fair part, and did everything for the best under the circumstances of the case. *Trabacolos*, 1 Hag. 294.

A prize agent makes certain advances to captors prior to a regular distribution of the proceeds, and becomes a bankrupt: Held, that the sureties and their representatives are liable for his deficiencies in the first instance: enforcement of a monition to refund suspended. *Triton*, 1 Hag. 290.

A monition, calling upon a prize agent to exhibit distribution lists, not enforced. *Ca Ira*, 1 Hag. 251.

## PRIZE FIGHT.

All persons present at, or countenancing a prize fight, are guilty of an offence; and it is the duty of magistrates and constables, when they have information of a fight, to secure the combatants beforehand, and compel them to enter into a recognisance, and, if they refuse, to commit them. *Rex* v. *Billingham*, 2 C. & P. 234. [Burrough]

## PROBATE.

[See WILL.]

## PROCEDENDO.

[See CERTIORARI.]

The Court will grant a *procedendo*, if a *certiorari* issues after a confession in the court below. *Rex* v. *Gwyn*, 2 Ken. 440, s. c. 2 Burr. 753.

In a case which, at the assizes, had been put off for a day, and a *certiorari* was afterwards produced, the Court would not grant a *procedendo*. *Rex* v. *Ridgway*, 1 Law J. K.B. 53.

Without notice or any special reason, a *certiorari* was delivered to the judges of the Court of Great Sessions in Wales, on the day before trial. The Court of King's Bench quashed the *certiorari*, and directed a *procedendo* to issue. *Jones* v. *Davies*, 1 Law J. K.B. 54, s. c. 1 B. & C. 143.

Where a cause, having been removed from the inferior court, is sent back by *procedendo*, this Court will not again remove it, on account of the suggested importance of the cause; though the defendant offer to bring the money into court. *Hayward* v. *Wright*, 6 Law J. K.B. 359, s. c. 8 B.& C. 386, s. c. 2 M. & R. 366.

## PROCHEIN AMY.

Where a *prochein amy* dies, the Court will order the bill to be dismissed within a given time, unless a new *prochein amy* be named. *Anon.* 1 Law J. Chanc. 60.

Where a plaintiff was a married woman, and, her *prochein amy* having died, it was ordered that within two months she should name a new *prochein amy*, or that the bill should be dismissed, and the costs paid out of the fund in court. *Barlee* v. *Barlee*, 1 S. & S. 100.

*Quære*, Whether the Court will grant a rule for an efficient *prochein amy* to be appointed, and security for costs to be given—Held, that the motion was too late, after having moved to put off the trial. *Anon.* 2 Chit. 359.

Although it was suggested that a new *prochein amy*, who was to be substituted for another, was in indigent circumstances; yet the Court refused to inquire into the circumstances of the proposed party. *Davenport* v. *Davenport*, 1 S. & S. 101.

Where the *prochein amy* of a married woman becomes insolvent, the Court will stay proceedings, till another next friend is named, or security given for costs. *Pennington* v. *Alvin*, 1 Law J. Chanc. 202, s. c. 1 S. & S. 264.

*Quære*, Whether the *prochein amy* of a married woman and infants, who, after the institution of the suit, takes the benefit of the Insolvent Debtors Act, will be allowed to prosecute the suit. *Pennington* v. *Pennington*, 1 Law J. Chanc. 71.

Where a suit was instituted in the name of an infant, by his next friend, under suspicious circumstances, though there was no other suit pending in which the infant was concerned, a reference was directed, to inquire, whether it was for his benefit that the suit should be prosecuted. *Anon.* 5 Law J. Chanc. 52.

A suit being instituted on behalf of infants by a solicitor wholly unconnected with the family, it was, on the motion of the defendant, referred to the Master to inquire whether it would be for the infants' benefit that the suit should be prosecuted, the defendant undertaking to render to the Master the accounts prayed for by the bill. *Richardson* v. *Miller*, 1 S. & S. 133.

*Quære*, Whether the next friend of an infant, who omits to call for the payment of the trust monies into court, may not be made answerable for any loss of interest, which the infant may sustain thereby. *Gresley* v. *Heathcote*, 3 Law J. Chanc. 107.

The defendant cannot give in evidence admissions made before action brought by the plaintiff, suing as *prochein amy*. *Webb* v. *Smith*, 1 R. & M. 106. [Littledale]

## PROCTOR.

[See PRACTICE, IN THE ECCLESIASTICAL COURTS.]

## PRODUCTION AND INSPECTION OF DEEDS, BOOKS, AND PAPERS.

[See EVIDENCE, and VENDOR AND PURCHASER.]

(A) IN GENERAL.
(B) OF A PUBLIC NATURE.
(C) OF A PRIVATE NATURE.
(D) PARISH BOOKS.
(E) RECORDS.
(F) COURT ROLLS.
(G) CORPORATION BOOKS.
(H) COPIES.

### (A) IN GENERAL.

A party interested in documents, in the custody of his adversary, is entitled to their production. *Inman* v. *Hodgson*, 1 Y. & J. 28.

The Court will not suffer a party to be called on for the production of papers, unless a good and substantial reason be adduced to the Court. *Vansittart* v. *Barber*, 11 Price, 641.

The practice of courts of equity, that a schedule must be delivered before the Court will order the production of deeds and papers, applies only to cases in a bill of discovery. *Anon.* 6 Mad. 97.

A defendant, who is called upon by the bill to set forth a list of papers, relating to "the matters aforesaid," need not set forth a list of papers relating to transactions which are mentioned in the bill only by way of inducement, but do not form any part of the case made by the bill. *Agar* v. *Bective*, 1 Law J. Chanc. 132.

A book, admitted to be in the defendant's possession, must be produced, though the answer admits the fact, in reference to which the production is required. *Thomas* v. *Morgan*, 3 Law J. Chanc. 157.

Under the general charge in a bill, that the defendant has divers papers, writings, &c. in his possession or power, relating to the matters in the bill mentioned, the plaintiff is entitled to the production of cases, submitted for the opinion of counsel, admitted by the answer of the defendant to be in his possession, but not to the opinions given upon those cases.

Though a plaintiff is, generally speaking, entitled to the production and discovery of all papers relating to the matters in the bill mentioned, in the defendant's possession or power; yet, it seems, that he is not entitled to the production of letters stated by the answer of the defendant to have been received by him since the filing of the bill, in answer to inquiries made by him in respect to some of the matters in question, with a view to his proofs in the cause; nor to any particulars respecting such letters, which would disclose the names of the witnesses, or the facts likely to be proved by them. *Preston* v. *Carr*. 1 Y. & J. 175.

Where deeds had been brought into the Master's office, under an order of reference made in a suit for specific performance of two contracts relating to different parts of lands of the parties, one for an exchange, and the other for a purchase, referring it to the Master to settle a conveyance from the defendant to a purchaser of the exchanged lands, upon whose report so much of the bill as related to that contract was ordered to be dismissed with costs—An application was made to the Court, that the documents belonging to the plaintiff which had been brought into the Master's office according to the terms of the order, might be delivered back to him; but it was refused, on the defendant shewing that they would be of service and necessary to him, in defending the same suit as to the other contract, upon the ground that the order, in such cases, was matter of regulation: And it was holden, that, under the circumstances, the Court might still retain the papers, the defendant having an interest in the order, and the documents brought in under it, and having paid the purchase-money and interest into court. *Boyer* v. *Green*, 13 Price, 250.

A party ordered to produce books, &c. before the Master, is bound to leave them, if the Master thinks fit so to direct. *Sidden* v. *Liddiard*, 1 Sim. 368.

Where documents are admitted by some defendants to be in the joint possession of themselves and other defendants, a motion for the production of those documents cannot be made against some of the defendants only. *Anon.* 4 Law J. Chanc. 170.

In granting an order for the inspection of deeds, the Court will, when necessary, restrain the privilege to certain specified parts in the instrument. *Ramsbottom* v. *Cooper*, 2 Chit. 231.

Inspection of a book produced by the plaintiff, under a commission issued after publication passed, will not be allowed. *Forester* v. *Helme*, M'Clel. 558.

The mere deposit with the clerk in court, of a box containing the papers under lock, is not a compliance with an order for production and inspection, unless the key be left with such clerk: saying, you may send for the key when you want it, is insufficient. *Preston* v. *Carr*. 1 M'Clel. & Y. 457.

*Quære*—Whether a motion for production of papers, &c., operates as a waiver of the plaintiff's right to except. *Phillips* v. *Stephenson*, 11 Price, 733.

### (B) OF A PUBLIC NATURE.

A bishop's registry of presentations is a public book; and a mandamus lois to him to grant inspection of it to one claiming a right to present to a vacant living, though the bishop claim a right to collate to it. *Finch* v. *the Bishop of Ely*, 6 Law J. K.B. 223, s. c. 8 B. & C. 112, s. c. 2 M. & R. 127.

Although persons who have the custody of books and documents are trustees for a public purpose, the Court will not compel them to produce them, unless they are trustees for (among others) the person who applies for the production.

Therefore, where the inhabitants of a county were indicted for not repairing a public bridge, and they pleaded that the inhabitants of a particular parish had immemorially repaired, and were liable to repair; and it appeared, on motion, that certain estates had been left to trustees for the repair of the bridge, and that those trustees had accounted to the parish in question,—The Court refused to order the trustees to produce their books and accounts for the inspection of the defendants; inasmuch as the trustees filled that character apparently for the parish in question, and not for the county at large. *Rex* v. *the Justices of Buckingham*, 6 Law J. K.B. 346, s. c. 8 B. & C. 375.

In an action against the Marshal for an escape, the Court will compel the Marshal to grant an inspection of the habeas corpus and committitur. *Fox* v. *Jones*, 6 Law J. K.B. 131, s. c. 7 B. & C. 732, s. c. 1 M. & R. 570.

Where an information was filed by the Attorney General under the 43 Geo. 3, c. 58, s. 25, against an army agent, for a discovery of accounts from 1792 to 1802; who pleaded a settled account, by clearing warrants, and, the plea having been overruled, afterwards moved to amend the plea, and for the purpose of so doing, that the Attorney General or the Secretary at War might be ordered to produce certain vouchers, accounts, &c., rendered annually, during that period, by the defendant to the War Office, and there deposited, and which the defendant swore were material to his defence—the Court, under the particular circumstances, ordered the proceedings upon the information to be stayed until the documents were produced. *Attorney General* v. *Brooksbank*, 1 Y. & J. 439.

A mandamus to the clerk of the peace, for the

inspection of rates and documents relating thereto, does not lie until an application has been made to the justices assembled in quarter sessions. *Anon.* 7 D. & R. 373, n.

(C) OF A PRIVATE NATURE.

When the validity of a deed is impeached, it must be produced at the instance of the plaintiff, notwithstanding the defendant has a lien upon it. *Balch* v. *Symes*, 1 Turn. 87.

On a bill impeaching a conveyance, on the ground of fraud, the Court will not on motion order the conveyance to be produced. *Tuyler* v. *Drayton*, 2 S. & S. 309.

The Court will not compel a tenant in tail to produce a title deed without a more direct interest be shewn than that, if its effect be such as is sworn to by the party claiming under it, that legatees will lose the benefit of legacies bequeathed to them by that party's ancestor from whom he immediately derives title. *Wilson* v. *Forster*, 1 M'Clel. & Y. 274.

If a deed of assignment be deposited in the hands of A, he is not bound to produce it on the part of the assignor, in an action between the assignor and a third person. *Schlenker* v. *Moxey*, 1 C. & P. 178.

The Court granted a rule for the inspection of a lease, in order to obtain the names of witnesses. *Anon.* 2 Chit. 230.

Where two parts of a lease were interchangeably executed, and the part in the possession of the plaintiff was lost, the Court would not interfere to compel the defendant to permit the plaintiff to inspect and take a copy of that part which was in his possession. *Woodcock* v. *Worthington*, 2 Y. & J. 4.

*Quære*, Whether, where A is possessed of title deeds, relating to his own property as well as to that of B's, B, who has no covenant for the production of the deeds, is entitled to call upon A in equity for their production. *Barclay* v. *Raine*, 1 S. & S. 449.

The Court does not usually compel a party to produce his title deeds as evidence; but, where a party produces them to defeat his adversary, the opposite side is entitled to an inspection of them. And, therefore, where, in a tithe suit, the defendant produced at the hearing divers books and accounts to defeat the plaintiff's title, the Court introduced into the decree a direction that the defendants should produce the accounts, &c., before the Master, and also at the trial of an issue directed by the Court. *Willis* v. *Farrer*, 2 Y. & J. 241.

The motion on behalf of a party having a vested interest in reversion, remainder, or otherwise, in real property, expectant on a life interest in possession, for the production and depositing in court any of the title deeds in the proper custody of the tenant for life, must point out and particularize certain specific deeds, and state, fully and clearly, the object of the required interference of the Court.

An application for the title deeds generally, for the purpose of furnishing the remainder-man with an opportunity of inspection, in order to enable him to mortgage his interest, will not be entertained by the Court. *Shaw* v. *Shaw*, 12 Price, 163.

Previous to the trial of a tithe cause, the Court on motion ordered, that books, &c., belonging to a third person, in the hands of the plaintiff, might be delivered up to the defendant's clerk in court for inspection. *Foreman* v. *Cooper*, 11 Price, 515.

In a suit by a vicar against occupiers for tithes, a motion was made by the plaintiff for production of deeds, papers, and writings, admitted by the answer of one of the defendants to be in his possession or power. The defendant resisted the application, on the ground that several of such documents related to, and shewed his title as lay impropriator to some of the tithes in question. The Court held, that the plaintiff was not entitled to the production of such of them as related to the title of the defendant to the tithes in question. *Collins* v. *Gresley*, 2 Y. & J. 490.

Where it is sworn, that the instrument set out in the bill is forged, the Court will permit the defendant to inspect it previous to filing his answer. *Jones* v. *Lewis*, 2 S. & S. 242.

On a question of settlement, a mortgagee, a rated inhabitant of the appellant parish, subpœnaed by the respondent parish, is not compellable under a *subpœna duces tecum*, to produce the title deeds, of his mortgagor: nor can his attorney be allowed to produce an abstract of the deeds, or to give parol evidence of their contents. *Rex* v. *Upper Boddington*, 5 Law J. M.C. 10, s. c. 8 D. & R. 726.

Where bills of exchange, on which the action is brought, are in the possession of the defendant, the Court, in the exercise of its discretionary power, will not on an affidavit made by the plaintiff, containing a general charge of their having been fraudulently obtained from him by the defendant, when the charge is generally denied by the latter, order the production of the bills, that they may be compared with the declaration to prevent a variance. *Threlfall* v. *Webster*, 1 Law J. C.P. 28, s. c. 1 Bing. 162, s. c. 7 B. Mo. 559.

Books of account having been seized under an extent issued against a collector and his partner in trade;—on their bankruptcy, it was holden, that their assignees were entitled to inspect such books, though before the trial of the issue between the Crown and the assignees, upon a claim made by the latter. *Rex* v. *Winkles*, 1 M'Clel. & Y. 33.

In trover for seizing the plaintiff's goods under a distress for rent due to the defendant from a third party, the Court refused to compel the production (for the purpose of its being stamped) of an unstamped agreement, under which the goods of the tenant were alleged to have been released from the distress. *Lawrence* v. *Hooker*, 6 Law J. C.P. 195, s. c. 5 Bing. 6, s. c. 2 M. & P. 9.

In an action by the plaintiffs, the owners of a ship, against the defendant, their broker, the Court refused to order the latter to allow the former to inspect, or take a copy of, a letter received by the defendant from a correspondent abroad, although it affected the interest of the plaintiffs. *Rowe* v. *Howden*, 6 Law J. C.P. 87, s. c. 4 Bing. 539, s. c. 1 M. & P. 334.

In an action on a charterparty against a charterer, the Court refused to compel the plaintiff to allow the defendant an inspection of the ship's log-book. *Rundle* v. *Beaumont*, 6 Law J. C.P. 92, s. c. 4 Bing. 537, s. c. 1 M. & P. 396.

(D) PARISH BOOKS.

Parish books are not accessible to the inspection of parishioners for the purpose of gaining informa-

tion, which may be useful to them in prosecuting a claim to an estate in the parish. *Rex* v. *Smallpiece*, 2 Chit, 288.

But the Court will make a rule absolute in the first instance, to compel a parish to permit a parishioner to inspect the parish books, to enable him to try the validity of a church-rate. *Anon.* 2 Chit. 290.

The Court will not compel parish officers to produce the parish books, for the inspection even of a parishioner, unless he shew that it *is* for parochial purposes only that he desires the inspection. *Rex* v. *Osmond*, 4 Law J. K.B. 52: s. p. *Rex* v. *Clere*, 4 Law J. K.B. 53, s. c. 5 B. & C. 899, s. c. 7 D. & K. 393.

After application has been made to the Sessions for the inspection of parish papers, and refused,—the Court will grant a mandamus to the clerk of the peace, to permit the attorney on behalf of such person contributing to the county rate, "to inspect and take copies of the last two rates made for the borough, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and all other proceedings and documents relating thereto." *Rex* v. *Justices of Leicester*, 4 B. & C. 891, s. c. 7 D. & R. 370.

The penalty given by the 17 Geo. 2, c. 3, for refusing a parishioner an inspection of the rate-books, is not recoverable in the absence of proof, that he has been injured by such refusal. And if the demand of inspection be not made at a reasonable time and place, it is a nullity: as, where the demand was made at an inhabitant's house at eight o'clock in the evening, and not at the house of the overseer. *Spencely* v. *Robinson*, 3 B. & C. 658, s. c. 5 D. & R. 572.

*Semble*—That an inhabitant of a parish is entitled to an inspection of the poor rate, and, in a case of refusal, is a "party grieved" so as to entitle him to maintain an action against the overseer, under the statute 17 Geo. 2, c. 3.

But, in an action against an assistant overseer, it is necessary for the plaintiff to shew that, according to the defendant's appointment by the select vestry, it was a part of his duty to produce the rate to the parishioners. *Bennett* v. *Edwards*, 6 Law J. M.C. 62, and K.B. 104, s. c. 7 B. & C. 586, s. c. 1 M. & R. 482.

### (E) Records.

The Court will grant a rule to compel the production of the record where a regular issue has been taken; but if the rule is opposed in the first instance, no costs will be given. *Anon.* 2 Chit. 241.

In the absence of special circumstances, a mandamus will not be granted for the inspection of the records of a court leet. *Rex* v. *Mayor of Maidstone*, 6 D. & R. 334.

### (F) Court Rolls.

In an action between two commoners litigating the right of common, the Court will grant a mandamus to the steward of the manor, to allow the inspection of the court rolls. *Rogers* v. *Jones*, 5 D. & R. 485.

### (G) Corporation Books.

A mandamus lies to compel a mayor and corporation to allow the burgesses, at all seasonable times, to inspect the charters and grants made to the borough. *Ex parte the Mayor and Aldermen of Stafford*, 1 Law J. K.B. 41.

### (H) Copies.

The Court will direct a copy of a deed to be furnished by one party in a cause to the other, when it appears ever so slightly that he may want it. *Lloyd* v. *Roland*, 2 Law J. K.B. 94.

Where the defendant has pleaded a deed, of which the plaintiff has no counterpart, and has put on the record the parts only which are in favour of his own case; the Court will oblige him to put the other parts on the record, or to give a copy of the deed. *Edwards* v. *Moss*, 1 Law J. K.B. 191.

In an action on a deed, where a party has had it taken from him, under a warrant against him for felony, the Court will, upon its being shewn that a demand has been made upon the magistrate and constable for a copy, order them to give one to enable the party to declare, and to produce the original on the trial, the plaintiff consenting to pay expenses. *Harris* v. *Aldrit*, 2 Chit. 229.

Where a trustee has possession of the counterpart of a lease, and refuses to produce it, the Court will grant a rule to shew cause why an attested copy being annexed to the notice, under 1 Geo. 4, c. 87, should not be sufficient. *Doe d. Tidd* v. *Roe*, 1 Law J. K.B. 6.

Upon an affidavit, that no copy or counterpart of a lease on which the plaintiff had sued was in the possession or power of the plaintiff, and that the attorney who drew the lease and counterpart had absconded, the Court refused to order the defendant, who was in possession of the lease, to permit a copy of it to be taken. *Lord Portmore* v. *Goring*, 5 Law J. C.P. 132, s. c. 4 Bing. 152.

By the 17 Geo. 2, c. 3, copies of the rate-books shall, upon demand of the overseer, be forthwith given: Held, that the overseer was entitled to a reasonable time to make the copy. *Spenceley* v. *Robinson*, 3 B. & C. 658, s. c. 5 D. & R. 572.

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## PROHIBITION.

A prohibition to the ecclesiastical court after sentence, is demandable where a defect of jurisdiction is apparent on the libel. *Panton* v. *Wright*, 2 Ken. 14, s. c. 2 Burr. 314.

The Court of Chancery will not grant a prohibition against the consistory court of London, to a person who has submitted to its jurisdiction, though the want of original jurisdiction appeared. *Dougal* v. *Dougal*, 3 Phil. 597.

The Court will not grant a prohibition, but leave the party to appeal after sentence of contumacy in the spiritual court. *Sims* v. *Sim*, 2 Ken. 538.

The Court granted a prohibition to the spiritual court, to stay proceedings on the will of a married woman, executed under a power contained in her marriage settlement, authorizing her to dispose of a particular part of her property. *Jenkins* v. *Whitehouse*, 2 Ken. 161, s. c. 1 Burr. 431.

The Court granted a prohibition to an ecclesiastical court, on behalf of the plaintiff in that court, in a suit for tithes, a modus having been pleaded. *Hayward* v. *Culliford*, 2 Chit. 362.

The Court granted a rule that the *postea* should be handed over to the prosecutor, and for him to be at liberty to enter up judgment, defendant having neglected to settle the case reserved in *quo warranto* for usurping the office of mayor. *Rex* v. *Smith*, 2 Chit. 398.

After the trial of an information in the nature of a *quo warranto*, at which a party is found guilty of usurping an office, the relator has a reasonable time allowed to him to move for a writ for a new election; but if he does not make a motion within a reasonable time, the defendant may move for it. *Rex* v. *M'Kay*, 4 Law J. K.B. 37, s. c. 4 B. & C. 65.

After verdict, on an information in the nature of a *quo warranto*, on the ground of the defendant having erroneously pleaded, the Court set it aside, upon the defendant's paying costs, but gave him leave to amend. *Rex* v. *Philips*, 1 Ken. 531, s. c. 1 Burr. 292.

Unless, on an information in the nature of a *quo warranto*, it be a case within the 9 Anne, c. 20, judgment for costs ought not to be given. *Rex* v. *Williams*, 2 Ken. 68, s. c. 1 Burr. 402, s. c. 1 Blac. 92.

On an information in the nature of a *quo warranto* for usurping the office of bailiff, in a borough sending members to parliament, but not a town corporate; judgment being given for the Crown: Held, that the 9 Anne, c. 20, did not give the relator costs. *Rex* v. *M'Kay*, 5 B. & C. 440, s. c. 8 D. & R. 393.

## RAPE.

If something occurs to create an alarm to the party while he is perpetrating the offence, it may be for the jury to say whether he left the body *re infecta* because of the alarm, or whether he left it because his purpose was accomplished. *Rex* v. *Burrows*, 1 R. & R. C.C.R. 519.

## RATE.

(A) In general.
(B) County Rate.
(C) Church Rate.
(D) Poor Rate.
(*a*) *How made.*
(*b*) *Publication.*
(*c*) *Persons rateable.*
(*d*) *Property rateable.*
(*e*) *Where assessed.*
(*f*) *Proportion.*
(*g*) *Rating in aid.*
(*h*) *Demand.*
(*i*) *Distress.*
(*k*) *Appeal*—[See Sessions.]

### (A) In general.

Where a local act of parliament, after directing commissioners to regulate, light, cleanse, and water the streets of a certain township, empowered them to raise by rate or assessment such sums from time to time, as might be required to defray the expense of the same, upon the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brewhouses, gardens, or garden grounds, tenements, or other buildings, further enacted, that any person occupying any messuage, dwelling-house, warehouse, building, or other tenement of the yearly value of 30*l.* within the township, should be a commissioner: Held, under this act, the 32 Geo. 3, c. 69, that the trunks and pipes, works and other apparatus of a water company for supplying the township with water, did not constitute a tenement within the meaning of the same, and consequently were not liable to be valued or assessed. *Rex* v. *the Manchester and Salford Water-works Company*, 1 B. & C. 630, s. c. 3 D. & R. 20.

On the assessment of a rate—held, that the owner of markets kept in the streets of M, for the sale of goods by persons who rented stalls, but who had not any fixed stall, is not an occupier of a tenement within the meaning of the Manchester and Salford Police Act, 32 Geo. 3, c. 69, and therefore not liable to this rate. *Rex* v. *Mosley*, 2 B. & C. 226, s. c. 3 D. & R. 385.

Where justices at sessions were empowered to assess a special rate, upon the parishes and townships within the county, "the *overseer* and *overseers* of each parish, &c. being authorized to levy such rate in like manner, and by such ways and means as any poor rate is now by law collected:" it was held, that commissioners invested by a parochial act with the sole power of making and collecting rates, although the office of overseer was still continued, were the proper persons to raise such special rate within the parish for which they acted. *Certis* v. *the Kent Water-works*, 5 Law J. M.C. 106, s. c. 7 B. & C. 316.

A person assessed to a rate, may file a bill on behalf of himself and all others assessed to the rate, for the purpose of preventing payment of it from being enforced, if the propriety of enforcing the payment of the rate is, in itself, the subject of equitable jurisdiction. *Attorney General* v. *Heris*, 2 Law J. Chanc. 189, s. c. 2 S. & S. 67.

A court of equity will not appoint a receiver of rates, which are to be assessed by commissioners and collected at a future period. *Drewry* v. *Barnes*, 3 Russ. 94.

### (B) County Rate.

A rate in the nature of a county rate may be levied in Berwick-upon-Tweed, that being a place not subject to the commission of the peace of any county in England, and never having contributed to a rate made for any county, and although no rate had ever been levied there before, the corporation having defrayed out of their own funds the charges to which the sums raised by a county rate are applicable. *Rex* v. *the Justices of Berwick-upon-Tweed*, 6 Law J. M.C. 95, s. c. 8 B. & C. 327, s. c. 2 M. & R. 578.

Where an order of sessions authorized a county treasurer to raise money on the credit of the county rates, and he obtained advances from time to time from his banker, and died in their debt; the Sessions being satisfied that the money so advanced had been *bonâ fide* applied to the county purposes, made an order for assessing and levying a sum of money towards the repayment of the debt, but the Court

quashed the order. *Rex* v. *the Justices of Hendsher*, 2 D. & R. 843.

Under the 55 Geo. 3, c. 51, any party may appeal against a county rate made in fixed proportions. *Rex* v. *the Justices of York*, 2 B. & C. 771.

If the sum in which a parish has been assessed towards a special county rate be paid from the parish funds, a rate cannot be made upon the parish at a future time to reimburse the amount so advanced. *Cortis* v. *the Kent Water-works*, 5 Law J. M.C. 106, s. c. 7 B. & C. 316.

## (C) CHURCH RATE.

It is, though usual, not essential to the validity of a church rate, that it be "confirmed by the ordinary"; and the circumstance of a church rate not being so confirmed, is no obstacle to its being sued upon in the ecclesiastical court. *Knight* v. *Gloyne*, 3 Add. 53.

An unequal assessment of a rate is a ground of appeal. *Lee* v. *Chalcraft*, 3 Phill. 639.

But if inequality be not proved, the party objecting will have to pay the expenses. *Thompson* v. *Cooper*, 3 Phill. 640.

On an application for the admission of a responsive allegation to a libel, pleading a church rate, including "*stock in trade*," shewing that the rate was untenable on two grounds—1st, that the parishioners were not rated in respect of "shipping"; and, 2d, that several parishioners possessing "stock in trade," were entirely omitted in the rate: The Court ordered it to go to proof. *Miller* v. *Bloomfield*, 2 Add. 30.

A parishioner may vote at a vestry election, notwithstanding he has not paid his church rates. *Faulkner* v. *Elger*, 4 B. & C. 449, s. c. 6 D. & R. 517.

## (D) POOR RATE.

### (a) *How made.*

An act of parliament directed that "the sum necessary to be raised for the relief of the poor, &c. should be *settled* and *ascertained*, upon which a rate should be made": Held, that an adjudication, that a sum not exceeding a specified amount was necessary, and a rate at so much in the pound, made and raised thereupon, sufficiently satisfied the terms of the act. *Cortis* v. *the Kent Water-works*, 5 Law J. M.C. 106, s. c. 7 B. & C. 316.

Hurrell was rated to the poor of K; in the first rate, after the statement of the rental, the description was "late Hurrell, now ——;" and in the subsequent rates, "late Samuel Hurrell": Held, sufficient by Wood, B. at Nisi Prius. *Hurrell* v. *Wink*, 8 Taunt. 369.

If a poor-rate does not specifically set out the property in respect of which the party is rated, it will be quashed. *Rex* v. *the Undertakers of the Aire and Calder Navigation*, 2 B. & C. 713, s. c. 4 D. & R. 253.

### (b) *Publication.*

A notice that a rate of so much in the pound will be collected forthwith, is a good publication of the rate, although it is not stated that it has been allowed by the justices. *Bennett* v. *Edwards*, 6 Law J. K.B. 104, s. c. 7 B. & C. 586, s. c. 1 M. & R. 482.

### (c) *Persons rateable.*

A corporation which is rateable to the poor under the general law, will not be exempted by a local act, wherein the words "person or persons" have been employed to designate those liable, although that act, in giving the power of appeal, require that the parties dissatisfied shall enter into a recognizance with two sureties. *Cortis* v. *the Kent Water-works Company*, 5 Law J. M.C. 106, s. c. 7 B. & C. 316.

An inhabitant of Thavies Inn was for his house assessed to the poor rate of the parish of Saint Andrew, Holborn. He would not pay; a distress was made: he brought an action of trespass, and the jury gave him a verdict. The Court would not grant a new trial, as the Inn had always been considered extra-parochial. *Fraser* v. *Wood*, 2 Law J. K.B. 10.

The chambers situated in Serjeants' Inn, Chancery-lane, are liable to contribute to the poor rate of the parish of St. Dunstan. *Lens* v. *Brown*, 1 C. & P. 224. [Gifford]

Poor rates are not chargeable on the occupiers of houses in Serjeants' Inn, Fleet-street. *Rex* v. *Butterworth*, 2 C. & P. 391. [Best]

A corporation being seised in fee of certain pasture lands, appointed a ranger, (among other things) to keep the gates, preserve the fences, and impound cattle. At a court held annually, it made certain regulations concerning their pastures, and the number of cattle each burgess was to turn on, and the sum to be paid as a compensation; which money, after deducting the expenses of management of the land, was to be distributed among the burgesses who did not place their cattle on the land: Held, that the corporation was rateable to the poor. *Rex* v. *the Mayor of Sudbury*, 2 D. & R. 651, s. c. 1 B. & C. 389.

### (d) *Property rateable.*

Trustees who hold property merely for the public benefit, are not rateable to the poor in respect of that property.

*Semble*—That the trustees of a river which has been made navigable by act of parliament, are not to be considered as occupiers of the soil of that river, unless it has been specifically vested in them by that act.

Where, therefore, an act of parliament, passed for the making of part of a river navigable, appointed trustees, and empowered the receiving of certain tolls, &c., and directed, that, after the payment of the expenses connected with the navigation, the surplus of the tolls received, if any, should be employed towards the amending and repairing of bridges and highways within the county, and in such other manner as the justices at Quarter Sessions should direct: It was held, that the occupation of the trustees was solely for the public benefit, and, consequently, that a poor rate made upon them in respect of the tolls could not be sustained. *Rex* v. *the Trustees of the River Weaver*, 5 Law J. M.C. 102, s. c. 7 B. & C. 70.

Premises occupied solely for public purposes, are not liable to be rated to the poor. And they will be considered to be so occupied, where the persons occupying are compelled to appropriate the profits in a manner that is beneficial only to the public at

large, and not to themselves, except as a part of that public.

Thus, where an act of parliament vested the property of docks in certain trustees, and, after directing the rates received by those trustees, in the first instance to be appropriated to the payment of the expenses of the passing and carrying into execution of the act, and to other purposes connected with its objects, enacted, that any surplus that might remain should be applied to the payment of the debts due from the estate; and when all those were discharged, required the trustees to lower the rates, as far as the same could be done in the then state of the docks, &c., leaving sufficient for all charges and management, and other concerns of the docks, and improving and maintaining the same: It was held, that the trustees occupied solely for the public benefit; and therefore, had been improperly rated to the poor. *Rex* v. *the Trustees of the Liverpool Docks*, 5 Law J. M.C. 145, s. c. 7 B. & C. 61.

Certain proprietors of lime quarries agree to deliver lime-stone to a canal company at 7*d.* per ton; and in case of neglecting to deliver it in the quantities required, that the company may enter the lime quarries of any of the proprietors, and take what lime-stone they think fit, paying them 2*d.* per ton. The proprietors of the quarries having failed to supply the lime-stone required, the company entered and continued for more than twenty years to take the lime-stone at 2*d.* per ton: Held, that the company had no exclusive occupation, but a mere privilege, and consequently were not rateable to the poor. *Rex* v. *Trent & Mersey Navigation*, 3 Law J. K.B. 140, s. c. 4 B. & C. 57, s. c. 5 D. & R. 47.

A poor rate assessed upon payments made for sittings, for putting up stalls and tables, for the standing of carts, in a market-place, and for placing baskets on the ground thereof, is a rate in respect of the profits of the soil, and is, therefore, sustainable under the statute of Elizabeth, or under a local act, which empowers the rating of "all and every the occupiers of lands, houses, and tenements." *Rex* v. *St. Peter of Mancroft, Norwich*, 6 Law J. M.C. 69.

Where firs and bushes were planted for the protection of oaks and ash trees, and cut from time to time as the trees grew larger, and required more room, but when once cut did not grow again, and some of them yielding profit when sold: Held, not saleable underwood, within the 43 Eliz., and therefore not rateable to the poor. *Rex* v. *Ferrybridge*, 1 B. & C. 375, s. c. 2 D. & R. 634.

By a canal act, it was provided that lands, whether covered with water or not, and also all dwelling-houses, wharfs, &c. belonging to the company, should be rateable to the maintenance of the poor in the several parishes where they were respectively situated; the lands according to their quantity and quality, and the dwelling-houses, wharfs, &c., according to the nature and respective uses thereof; and should be assessed in like manner as lands of a like quality, and dwelling-houses, wharfs, &c., of the like and similar size or nature in the respective parishes where the same should be situate, should be assessed; and that the rates, duties, and other personal property of the company, liable to be rated to the poor, should be assessed in like manner and in the same proportion as other personal property should be assessed: Held, that land of the company used by them for the purpose of the canal, was rateable *qud* land not in respect of its improved value, but in respect of that which would have been its value, if it had not been used for the purposes of the canal.

The company had on the margin of a large basin, a piece of land adjoining the private yard of a timber-merchant. This piece of land next the basin consisted of natural ground; it was not faced with brick or timber, and the ground below the water gradually sloped down to the bottom of the basin. The timber-merchant landed his timber upon this piece of land, and it was there marked and measured by the revenue officers. No acknowledgment or rent was paid to the company for this privilege of landing the goods there, but their rates and duties were increased, a greater number of ships entering the basin in consequence of this privilege: Held, that this piece of land was not a wharf within the meaning of the act of parliament, and was not liable to be rated as such to the relief of the poor. *Rex* v. *the Regent's Canal Company*, 5 Law J. M.C. 151, s. c. 6 B. & C. 720.

Houses built on lands embanked from the Thames in pursuance of the statute 7 Geo. 3, c. 37, which vests those lands in the owners "free from all taxes and assessments whatsoever," are not liable to be rated for the relief of the poor. *Rex* v. *the London Gas Light and Coke Company*, 6 Law J. M.C. 113, s. c. 8 B. & C. 54, s. c. 2 M. & R. 12.

Where a statute gave in lieu of tithes an annual corn rent, issuing out of the lands, with a power of distress and sale to enforce payment: It was holden, that the rector was rateable to the poor for this annual payment. *Rex* v. *Boldero*, 4 B. & C. 467, s. c. 6 D. & R. 557.

By an inclosure act, it was provided, that a certain corn rent, "free from all taxes and declarations whatsoever, except land-tax," should be issuing out of the lands to be enclosed, and other lands in the parish, and be paid to the rector in lieu of all great and small tithes, &c.: Held, that this corn-rent was not liable to be assessed to the relief of the poor. *Mitchell* v. *Fordham*, 5 Law J. M.C. 79, s. c. 6 B. & C. 274.

No poor rate attaches to a mere right of common. *Rex* v. *Churchill*, 4 B. & C. 750, s. c. 6 D. & R. 635.

The profits arising from the sale of gas, manufactured from coals, for the purpose of lighting a town, are not, under the 43 Eliz. c. 2, rateable to the relief of the poor. *Rex* v. *the Birmingham Gas Light and Coke Company*, 1 B. & C. 506, s. c. 2 D. & R. 735.

A steam-engine, used solely for the purpose of draining a mine, must be considered as part of the mine, and therefore not rateable. *Rex* v. *Bilston*, 5 Law J. K.B. 32, s. c. 5 B. & C. 851, s. c. 8 D. & R. 734.

Stock in trade cannot be rated for the poor rate, unless the owner actually lives and resides in the parish; although the foreman, who carries on the whole of the business for the owner, lives and resides on the premises, and represents the principal. *Rex* v. *Justices of North Curry*, 4 Law J. K.B. 65, s. c. 4 B. & C. 953, s. c. 7 D. & R. 424.

Upon an appeal against a rate, it appeared that it omitted, first, persons not resident in Hull, but having

stock in trade there, which had produced a specified profit in the last year; secondly, a tenant of houses, which he underlet at a specified profit, the under-tenants being rated, but excused from paying on account of poverty; thirdly, owners and part-owners of ships registered at Hull, and trading to and from that port, and within the port at the time when the rate was made: some of these persons were resident in Hull, others were not. Some profits had been derived from the ships in the preceding year, but the appellants could not shew the amount. This rate was made in pursuance of the 9 & 10 Wil. 3, whereby the poor of the town of Kingston-upon-Hull are placed under the management of a corporation established by that act, and are to be maintained by money to be levied by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriation of tithes, and all stocks and estates in the said town, in equal proportions according to their respective worths and values: The Court held, that the act in question made all personal property rateable, whether the owners were or were not resident in Hull, and that, consequently, the first and third classes of persons ought to have been included in the rate; and that it was not incumbent on the appellants to shew the amount of profits made by the ships, for that it being established they were profitable, they ought not to have been altogether omitted: Secondly, that the tenant of houses underlet as before mentioned, was not liable to be rated. —It also appeared, that the Hull Dock Company were rated at the full amount of their profits, without first making any deduction for the poor rate. And the Court held, that this was wrong; that the worth and value could only be the profits minus the outgoings; and that, therefore, supposing other property to be rated at a rack rent, the poor rate should have been calculated upon such a sum as would, together with the rate, make up the whole amount of profits. *Rex* v. *the Hull Dock Company*, 3 B. & C. 516, s. c. 5 D. & R. 516.

### (*e*) *Where assessed.*

A canal company are rateable to the relief of the poor, as occupiers of land covered with water, to each and every parish through which their canal passes. *Rex* v. *the Trent and Mersey Navigation*, 1 B. & C. 545, s. c. 2 D. & R. 752.

A poor rate is payable from the proprietors of a river navigation, to each and every parish through which the navigation passes, though no dues are received in such parish, in proportion to their profits, upon the whole line of navigation. *Rex* v. *the Earl of Portmore*, 1 B. & C. 551, s. c. 2 D. & R. 798.

Where the owners of a navigation, which passed through different parishes, were rated in one for the entire amount of their tolls: The Court determined that the rate could not be supported. *Rex* v. *Palmer*, 1 B. & C. 546, s. c. 2 D. & R. 793.

By a local act, the Oxford Canal Company were empowered to take a tonnage duty of so much per mile, on goods carried along the canal. By a subsequent act, a compensation duty of a sum in gross, for every ton passing from the Oxford Canal into the Grand Junction Canal, or from any other navigable canal into the Oxford Canal, and so from thence into the Grand Junction Canal, was given to the Oxford Canal Company, without any regard to the distance the same should pass along the Oxford Canal: Held, first, that the proprietors of the Oxford Canal were rateable to the poor in every parish through which their canal passed, in respect of the mileage duty earned on the whole canal, in proportion to the quantity of land occupied by it in each parish. Secondly, that they were liable to be rated in every parish along which their canal passed, for a proportion of the compensation duty. *Rex* v. *the Oxford Canal Company*, 3 Law J. K.B. 168, s. c. 4 B. & C. 74, s. c. 6 D. & R. 86.

By the statutes 16 Geo. 3, c. 66, 25 Geo. 3, c. 87, and 30 Geo. 3, c. 60, the Dudley Canal Company was incorporated, but none of these acts contained any clause respecting the mode in which the company should be assessed to parish or other taxes. By the 33 Geo. 3, c. 321, the old proprietors and certain new ones were re-incorporated, for certain purposes, with the same powers as were given by the previous acts, to which reference was made; and this act for the first time empowered the company to make collateral cuts. By sec. 34, it was enacted, that the said company of proprietors should from time to time be rated to all parliamentary and parochial taxes and assessments, for or in respect of the land and grounds taken and used by the said company, and all warehouses and other buildings erected, or to be erected, by the said company of proprietors, as other lands, grounds, and buildings, lying near to the said canal and collateral cuts, were or should be rated: Held, that this clause was not to be construed retrospectively, so as to divest the parish of K of the right of assessing the canal to the relief of the poor, by including in the rateable valuation the profits derived from the company's tonnage dues. *Rex* v. *Dudley Canal*, 7 D. & R. 466.

A lighthouse in one parish cannot be rated in respect of tolls or dues which are payable to the proprietor, and are received in another parish. *Rex* v. *Coke*, 5 Law J. M.C. 32, s. c. 5 B. & C. 791, s. c. 8 D. & R. 666.

An incorporated gas company are liable to be rated as occupiers of the land in a parish in which their pipes are used for the conveyance of gas, although the manufactory which generates the gas is in another parish. *Rex* v. *Brighton Gas Light Company*, 4 Law J. K.B. 213, s. c. 5 B. & C. 466, s. c. 8 D. & R. 308.

### (*f*) *Proportion.*

A lighthouse is rateable at the sum at which it may be valued, but not as to the duties and contribution-money in respect of ships, hoys and barks passing the same. *Rex* v. *Coke*, 5 Law J. M.C. 32, s. c. 5 B. & C. 797, c. 8 D. & R. 666.

Coal mines are rateable in respect of the annual value of the produce, after deducting the annual outgoings; but no deduction is to be allowed in consideration of the annual exhaustion of the bulk; or of the money expended in the first instance, in the purchase or the planting of the mines. *Rex* v. *Attwood*, 5 Law J. M.C. 47, s. c. 6 B. & C. 277.

The Birmingham and Worcester canal act, 31 Geo. 3, directed that the company should be rated, in respect of their lands, in the same proportion as other lands lying near the same should be rated, "and as the same lands would be rateable in case

the same were the property of individuals in their natural capacity." By another act, 38 Geo. 3, the like provision was made as to the company's rateability only, omitting the latter words, "and as the same lands," &c.: Held, that the company were liable to be rated for their lands, &c. only at the same value as other adjacent lands, and not according to the improved value derived from the land being used for the purposes of a canal. *Rex* v. *St. Peter*, 5 B. & C. 473, s. c. 8 D. & R. 331.

A canal company is rateable to the relief of the poor in every parish through which the canal passes, in proportion to the profits which the land occupied by them in such parish yields; and, therefore, where a canal passed through several parishes, in which the tonnage dues payable varied, it was held, that the company were rateable to the relief of the poor of each parish for the amount of tonnage dues actually earned there, and not for a part of the whole amount earned along the whole line of the canal, in proportion to the length of canal in that parish. *Rex* v. *the Inhabitants of the parish of Kingswinford*, 7 B. & C. 236, s. c. as *Rex* v. *the Dudley Canal Company*, 6 Law J. M.C. 3.

A poor rate imposed upon the only one of several partners who resides within the parish for which it is imposed in respect of partnership property or profits there situate or accruing, must be in proportion to the share or interest which that partner has in the subject of the rate. *Rex* v. *Gosse*, 5 Law J. M.C. 97, s. c. 7 B. & C. 60.

### (g) *Rating in aid.*

Assessing one parish to the poor rate in aid of another, is not contrary to the meaning of the 43 Eliz. c. 2. *Rex* v. *the Inhabitants of Milland*, 2 Ken. 267, s. c. 1 Burr. 576.

### (h) *Demand.*

Where a personal demand for the payment of a poor rate is required to be made upon the parties to whom it applies, or a demand in writing, to be left at their last or usual place of abode, or upon the premises charged,

*Semble*—That a written demand, served by the collector upon the chairman of a company at a general meeting of the proprietors, will be sufficient. *Cortis* v. *the Kent Water-works Company*, 5 Law J. M.C. 106, s. c. 7 B. & C. 316.

### (i) *Distress.*

An action will not lie at the suit of the sheriff, against overseers of a parish for taking goods under a warrant of distress for poor rates, where he has allowed the defendant, notwithstanding the execution, to continue as the ostensible owner of property. *Spicer* v. *Tidy*, 1 Law J. K.B. 10.

It is doubtful whether a British born subject, who follows the profession of a music master, and a teacher of languages, and is also prompter at the Italian Opera, can be considered as the domestic servant of an ambassador, because he officiates as first chorister in the ambassador's chapel. But such a person renting a large house, and letting out part of it in lodgings, is clearly liable to have his goods distrained upon for the poor rates. *Novello* v. *Toogood*, 1 Law J. K.B. 181, s. c. 1 B. & C. 554, s. c. 2 D. & R. 833.

In an action of replevin, the defendant avowed the taking as overseer of the poor, under statute 43 Eliz. of and by virtue of a certain distress warrant, for an aggregate amount, due on seven distinct rates, six of which had been confirmed on appeal, on the ground of the appellant not being in sufficient time, and the other was quashed by consent; it did not appear that any precise demand had been made prior to the suing out the warrant. The jury found a verdict for the defendant, for the aggregate sum of the six rates, deducting the amount of the other. The Court set this verdict aside, and ordered a verdict to be entered for the plaintiff, alleging that this case was to be distinguished from the case of a distress for rent, and that a precise demand was necessary, previous to the issuing of the warrant of distress, contrary to the opinion of Wood, B., before whom the cause was tried. *Hurrell* v. *Wink*, 8 Taunt. 369.

The occupier of a farm, upon the coming in of two executions and a distress for rent, notoriously assigned all his property (except a lease) to two persons in trust, to satisfy those executions and the distress, and to pay his creditors rateably, and all the rates and taxes, and in trust to pay the surplus (if any) to himself, whereupon the sheriff left his premises.

The overseer and constable afterwards distrained for poor rates, and the Court held that the assignment was good in law, and in an action against the overseer and constable, no demand of the warrant under 24 Geo. 2, c. 44, was necessary. *Bell* v. *Robinson*, 2 Law J. K.B. 192.

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## RECEIPT.

If one of two persons has given a receipt to a debtor for the cause of action, such transaction may be impeached by fraud; and if there has been a collusion, the receipt will not be an answer to an action brought in the names of the two persons. *Skaife* v. *Jackson*, 3 Law J. K.B. 43, s. c. 3 B. & C. 421, s. c. 5 D. & R. 290.

A receipt, whether stamped or not, if fraudulently obtained, is of no authority in the Court of Admiralty. *Minerva*, 1 Hag. 59.

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## RECEIVER.

(A) Appointment.
(B) Rights, Duties, and Liabilities.
(C) Discharge of.
(D) Sureties.
(E) Practice.

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### (A) Appointment.

The Court will grant the appointment of a receiver, where the answer forms a strong presumption against the title. *Stitwell* v. *Williams*, 6 Mad. 49.

How far the defective constitution of a suit as to parties, is an objection to the appointment of a receiver. *Gray* v. *Chaplin*, 2 Russ. 126.

Receivers of the debts due to a business, appointed at the suit of persons to whom a share of the profits

shall become assigned, against a subsequent assignee of the debts. *Candler* v. *Candler*, 1 Jacob, 225.

A receiver was appointed, where the defendants, in answer to a bill to set aside the purchase, admitted great inadequacy of price, and stated their ignorance as to other circumstances of fraud alleged. *Stilwell* v. *Wilkins*, 1 Jac. 280, s. c. 6 Mad. 49.

In appointing a receiver, the Court will not proceed further upon the equitable right of a tenant in common, than it would upon his legal right. *Knowles* v. *Clayton*, 2 Law J. Chanc. 181.

The Court will appoint a receiver in India of a testator's assets, on the application of an executor resident in England, but the receiver must give sureties resident in England. *Cockburn* v. *Raphael*, 2 S. & S. 453.

This Court will appoint a receiver, pending a suit in the ecclesiastical court to recall probate on a case of strong presumption. *Rutherford* v. *Douglas*, 1 S. & S. 111, n.

The Court will not appoint a receiver, as between mortgagor and mortgagee, so long as any thing remains due. *Rowe* v. *Wood*, 2 J. & W. 559.

A bill being filed by an equitable mortgagee against a subsequent equitable mortgagee and the mortgagor, who was out of the jurisdiction, and had not appeared, but was sworn to be, by his agent, in receipt of the profits of the mortgaged premises: Held, by the Vice Chancellor, that the Court will not appoint a receiver. ——— v. *Chadwick*, 4 Law J. Chanc. 67.

The grantor of an annuity, secured by an equitable charge on certain lands which are subject to a prior charge, goes to reside abroad; but, by his agent, continues in the receipt of the rents and profits; the Court on the application of the annuitant, will appoint a receiver, though the grantor has not appeared to the suit. *Tanfield* v. *Irvine*, 2 Russ. 149.

Where a tenant in tail in remainder had agreed to pay a sum of money after the death and issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery to give effect to the mortgage, but on coming into possession of the estate refused to perform his covenant, the Court appointed a receiver of the rents. *Free* v. *Hinde*, 2 Sim. 7.

A receiver will not be appointed of rates to be assessed by commissioners and collected at a future period. *Drewry* v. *Barnes*, 5 Law J. Chanc. 47.

### (B) Rights, Duties, and Liabilities.

A receiver is allowed a salary; but if he neglect his duty, then a Master in Chancery has the power to deprive him of it, and also to order him to pay interest on the amount of money retained in his hands. *Dawson* v. *Raynes*, 2 Law J.K.B. 186, s. c. 2 Russ. 466.

The Court will not empower a receiver to sue for debts due to the estate where the proceedings would be oppressive to creditors, or it is unlikely that any fruits would be derived from it. *Dacie* v. *John*, M'Clel. 575.

A receiver, who is a solicitor, will not be permitted to bring actions as such in the name of the trustee of the estate if such trustee dissents. *Della Cainea* v. *Hayward*, 1 M'Clel. & Y. 272.

It is the duty of the persons beneficially interested, and not of the receiver, to make such applications to the Court as may be requisite for protecting the possession. If the possession of tenants under the receiver is disturbed, and no application is made to the Court to prevent that disturbance, the tenant is entitled to the costs of protecting his own possession. *Miller* v. *Elkins*, 3 Law J. Chanc. 128.

Where a partnership has expired by effluxion of time, and in a suit for an account, &c. a receiver has been appointed before decree, the Court will not compel the defendant, the former managing partner, to deliver up to the receiver, for the purpose of making out bills of costs, partnership books, and accounts, which have remained in his hands, and title deeds belonging to a third party, which came into the possession of the co-partners as solicitors, such defendant offering the receiver free access thereto, and to assist in making out the bills. *Dacie* v. *John*, 13 Price, 446, s. c. M'Clel. 206.

A receiver, though he passes his accounts and pays his balances regularly, is not entitled to make interest, for his own benefit, of monies which come into his hands in his character of receiver during the intervals between the times of passing his accounts. *Shaw* v. *Rhodes*, 2 Russ. 539.

### (C) Discharge of.

Receiver allowed the costs of his application to be discharged. *Richardson* v. *Ward*, 6 Mad. 266.

### (D) Sureties.

A receiver, who had omitted to account regularly, became bankrupt, being indebted to the trust-estate in a large sum; and, for some time, no steps were taken to have his accounts duly passed: Held, that under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay such interest.

*Semble*—That, in general, the sureties of a receiver are answerable for such interest, as well as for such principal, as the receiver himself is liable to pay. *Dawson* v. *Raynes*, 2 Law J. K.B. 186, s. c. 2 Russ. 466.

### (E) Practice.

A receiver, though prayed for, will not be appointed at the hearing, unless a motion of petition for that purpose has been previously made or presented, and ordered to come on at the same time with the cause. *Coope* v. *Banning*, 2 Law J. Chanc. 11, s. c. 1 S. & S. 534.

Upon a motion for a receiver, the answer of one defendant, another material defendant not having answered, can be regarded only as an affidavit. *Kershaw* v. *Matthews*, 4 Law J. Chanc. 155, s. c. 1 Russ. 361.

On a motion that the receiver of an infant's estate might be directed to keep down the interest of two mortgages; the Court held, that no order could be made, because it would be an acknowledgment that the mortgages were due, until the Master could inquire into the circumstances. *Anon.* 6 Mad. 9.

## RECOGNIZANCE.

[See BAIL.]

In the Exchequer, the form of the recognizance after final judgment, and before the prisoner is charged in execution, is, that they shall satisfy the condemnation, or render to the prison of the Fleet, on or before the 4th day of the next following term. *Bottomley* v. *Mealhurst*, 13 Price, 589, s. c. M'Clel. 310.

By order of court, after reciting that upon appeals of sheriffs for the several counties, cities, and towns in England, upon the process of this court, issued out to them for the levying recognizances forfeited and estreated into this court, as well from the assizes as sessions of the peace; and the said sheriffs do seldom or never take any of the said debts in charge, but do frequently *nihil* the same, upon pretence that they cannot levy the same, by reason of the insufficiency of the persons: It is directed by this Court, that the several clerks of assize, and justices of the peace for the several and respective circuits, cities, towns, and counties within the kingdom of England, do take care for the future, that good and sufficient persons to answer the ends of their respective recognizances be henceforth had and taken. And it is also ordered, that all and every clerk and clerks of assize, and of the peace, and town clerks, and their respective deputy or deputies, within the kingdom of England, do carefully observe and perform the same in all respects, as far as they are or may be concerned therein, and do give immediate and effectual notice thereof to all justices of the peace and other persons concerned in the taking of any recognizances, that they take sufficient security in the premises, with certain descriptions of the persons, and their respective habitations and places of residence, and publish this order in their respective assizes and sessions of the peace, and otherwise, so that obedience may be given thereunto. And the Surveyor General of the Green Wax of this court is hereby required from time to time, as occasion shall require, to see this order sent out with the process of this court, which issues to levy forfeited and estreated recognizances. And the several sheriffs to whom such process is or shall be respectively directed, are hereby enjoined to deliver the order, or a true copy thereof, to the respective clerks of assize, clerks of the peace, and town clerks, for their respective circuits, cities, and towns, and counties, or their respective deputies, in order to have the same observed. 10 Price, 114.

The Court of Exchequer has jurisdiction to stay process on estreated recognizances, whenever a good and sufficient reason be furnished. *In re Fridlington*, 9 Price, 658.

The 3 Geo. 4, c. 46, and 4 Geo. 4, c. 37, do not control the jurisdiction of the Court of Exchequer; therefore, recognizances estreated into that court may be discharged, mitigated, or compounded by the Court, according to the equity and circumstances of the case. *Ex parte Pellow*, M'Clel. 111, s. c. 13 Price, 299.

Under the 4 Geo. 3, c. 10, the Court will on petition discharge a person out of prison, who is in custody, under an estreated recognizance, if the Court think his punishment has been severe enough. *Rex* v. *Cartman*, 11 Price, 637.

Under the 4 Geo. 4, c. 10, or the standing writ of privy seal, the Court of Exchequer has no jurisdiction over recognizances forfeited at Quarter Sessions, whereof the yearly duplicate or certificate required by the 14th section of the 3 Geo. 4, c. 46, has been delivered into court. *Rex* v. *Hawkins*, 1 M'Clel. & Y. 27.

The Court may mitigate a penalty, though they refuse to discharge the recognizance. *In re Hoper*, M'Clel. 578.

Under circumstances, the Court refused not only to discharge the recognizance of three persons bound for the appearance of one of them, the principal, at the Quarter Sessions, to answer a charge of misdemeanor, but even to respite it generally till further order. *In re Clarke*, 11 Price, 730.

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## RECORD.

[See AMENDMENT, and PRODUCTION OF DEEDS, BOOKS AND PAPERS.]

The Court will sometimes permit a record to be amended after a trial, upon payment of the costs of the day. *Draper* v. *Garratt*, 1 Law J. K.B. 113.

No part of a record will be set aside on motion. *Rex* v. *Berbury*, 10 Price, 46.

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## RECOVERY.

(A) WHERE VALID.
(B) PASSING.
(C) AMENDMENT.
(D) EFFECT.

### (A) WHERE VALID.

A feoffment under a naked possession, is not sufficient to support a common recovery by the tenant in tail in remainder. *Taylor* v. *Horde*, 1 Ken. 143, s. c. 1 Burr. 60, s. c. Cowp. 689.

If the deeds to make a tenant to the freehold be executed by the remainder man only, in the lifetime of the tenant for life, and the recovery be suffered with double vouchers after her death, it is valid in law. *Doe d. Wilmot* v. *Pickering*, 2 Law J. K.B. 9, s. c. 3 D. & R. 497.

The assignment of error to reverse a common recovery was, that the vouchee, who was also tenant in tail, died before judgment in the recovery: Held sufficient to induce the Court to reverse the common recovery. *Sheepshanks* v. *Lucas*, 2 Ken. 76, s. c. 1 Burr. 410.

An equitable recovery is valid, though the tenant to the præcipe is made by a bargain and sale not enrolled within due time. *Smith* v. *Frederick*, 1 Ken. 174.

A testator devised an estate to A for life, remainder in tail to the son and sons of the said A, in such shares as he should by will appoint, with other remainders over. A had four sons, B, C, D and E, who, for the purpose of barring all estates tail, and of extinguishing the power of appointment, conveyed the entirety of the premises to G K as tenant to the præcipe, for the purpose of suffering one or more recoveries, in which A, B, C, D and E should be vouched; a recovery was suffered first, in which

B and C were vouchees; a second recovery was afterwards suffered, of the same premises and to the same purposes, in which E was vouchee; a third recovery was also suffered, in which D was vouchee. D, the elder, died without executing any appointment: upon objection to the title to the estate, for that the last recovery was inoperative to bar the estate tail of D, the previous estate of the tenant of the præcipe having been taken out of him by the former recoveries suffered pursuant to the deeds of lease and release, and the declaration of uses: Held, that notwithstanding the peculiar interest in the entirety of these tenants in tail, their respective interests were not affected by the recoveries in which they were not vouched, and that an estate of freehold co-extensive with such unaffected interests, remained in the tenant to give validity to the last of these recoveries. *Collyer* v. *Mason*, 5 B. Mo. 597, s. c. 2 B. & B. 685.

If one of several vouchees appear at bar, and the others by dedimus, the name of the former need not be inserted in the warrant of attorney. *Awbrey, dem.; Simmons, vouch.*, 4 Law J. C.P. 184.

If the tenant to the præcipe is confined by illness, he may appear at bar by an attorney duly constituted by him for that purpose. *Osborn, plain.; Meredith, ten.; Herlock and wife, vouch.*, 5 Law J. C.P. 21.

## (B) PASSING.

Recovery permitted to pass, notwithstanding an alteration in the caption of the warrants of attorney, the affidavit of the due acknowledgment thereof, and the notarial certificate. *Small, dem.; Bremridge, ten.; Adams, vouch.*, 1 Bing. 72.

A recovery was allowed to pass, notwithstanding the words "to gain or lose in a plea of trespass," were inserted in the warrant of attorney, instead of the usual expressions "to gain or lose in a plea of land": the word "trespass" being rejected as surplusage. *Palmer, dem.; Meredith, ten.; Eddingtons, vouch.*, 2 Law J. C.P. 8, s. c. 1 Bing. 343, s. c. 8 B. Mo. 339.

The Court will permit a recovery to pass, although the words "their attorney," is omitted in the warrant of attorney given by the voucher. *Wood, dem.; Aldersey, ten.*, 1 Law J. C.P. 68, s. c. 1 Bing. 213, s. c. 8 B. Mo. 51.

Where, in a recovery, the words "Devon to wit," were introduced in the margin of the warrant of attorney, and in the body, the premises were described as being situate in the county of the city of Exeter: Held, to be immaterial, as the words in the margin might be considered as surplusage. *Bland, plaint.; Fairbank, ten.; Tucker, vouch.*, 5 Law J. C.P. 13.

When the vouchee executed the warrant of attorney he was sane, but before the passing of the recovery he became insane: Held, that the recovery could not pass. *Walcott, vouch.*, 3 Bing. 423.

The Court will not allow a recovery to pass, if the word *calleth* to warranty be substituted for *voucheth*. *Linney, vouch.*, 5 Law J. C.P. 95, s. c. 4 Bing. 101.

If two of the commissioners named in the dedimus, and before whom the acknowledgment was taken, be the attornies for the vouchees, the Court will not allow the recovery to pass. *Connop, dem.; Lennard, ten.*, 1 Law J. C.P. 112, s. c. 8 B. Mo. 274.

Where the vouchees of a recovery lived in *Guernsey*, and the acknowledgment was taken before the commissioners at *Guernsey*, who had neglected to indorse their names on the dedimus: The Court refused to permit the recovery to pass, and ordered the documents to be returned to the commissioners for their indorsement. *Watts, dem.; Milne, ten.; Pickford, vouch.*, 6 B. Mo. 62.

The Court refused to allow the tenant's appearance to be recorded, where the dedimus described the vouchee as a commoner, and the acknowledgment was signed as if by a peer. *Tatten, dem.; Grey, vouch.*, 2 Bing. 313.

The completion of a recovery *nunc pro tunc*, will be directed where it has been delayed in consequence of one of the vouchees being absent from the country. *Carr, pl.; Phillip, dem.; Evans, vouch.*, 5 B. Mo. 557.

A motion may be made on the last day of term, that a tenant's appearance at bar may be recorded. *Anon.* 1 Law J. C.P. 114.

## (C) AMENDMENT.

It is essential, in support of a motion to amend a fine or recovery, that an affidavit, stating that the possession has followed the fine or recovery, should be produced. *Bisgood, dem.; Bruton, ten.; Ivee, vouch.*, 6 B. Mo. 259.

Words misplaced in a recovery, ordered to be inserted in their appropriate places. *Anon.* 1 Law J. C.P. 114.

The exemplification of a recovery may be amended by transposing the words *an inbound common*, from a line where they had been inadvertently inserted, to their appropriate place, they having no meaning without such transposition to effectuate the intention of the parties. *Willisford, pl.; Fairbank, ten.; Gill, vouch.*, 8 B. Mo. 324.

A recovery will be allowed to be amended, where, by mistake, the name of the vouchee is inserted in the præcipe, instead of the name of the tenant. *Cox, dem.; Price, ten.; Gill, vouch.*, 1 Bing. 22.

A recovery cannot be amended by a transposition of the names of the demandant and tenant, without the other instruments connected with the recovery be produced. *Allen, dem.; Hexley, ten.; Massey, vouch.*, 6 B. Mo. 46.

An amendment in a recovery was allowed by changing the demandant's name, although there was no affidavit of intention or identity of the party or premises. *Bird, Dem.; Quilter, ten.; Tindal, vouch.*, 8 Taunt, 556.

That which is the deed of a party, will not be altered by the Court. Therefore, where a vouchee in a recovery had signed his name to the deed, in order to make a tenant to the præcipe, the Court refused to allow an amendment, by the insertion of an additional baptismal name. *Shaw, dem.; Spence, ten.; Hunt, vouch.*, 8 Taunt. 645.

The Court will not amend a recovery by adding to the description where the description is already sufficient to pass the lands. *Howman, dem.; Orchard, ten.; Barney, vouch.*, 8 Taunt. 683.

In a deed to lead the uses, the premises were described as "the advowson and right of patronage of the rectory of A, and tithes thereto belonging;" and in the recovery, as "the rectory and tithes, together with the advowson of A:" Held, that the de-

scription in the recovery was sufficient; and the Court refused to amend it to make it conformable to the deed. *Downes, dem.; Downes, ten.*, 6 Law J.C.P. 1.

An amendment in a recovery, cannot be allowed by increasing the quantity of land, if the deed to lead the uses contains sufficient terms to shew that it was intended to pass, and it is unnecessary to insert the exact admeasurement in the deed. *Maryatt, dem.; Elmore, ten.; Shard, vouch.*, 6 B. Mo. 50.

To authorize the insertion of additional premises in a recovery, there should be specific proof of the intention of the parties that they were to be included, although there may be general words in the deed to lead the uses of such recovery. *Nicholls, dem.; ——, ten.; Harris, vouch.*, 2 Law J. C.P. 68.

The Court will not allow a recovery to be amended by increasing the number of acres of land, unless it appear clear from the deed to lead the uses, that the whole of the estate was intended to pass by the recovery. *Adams, pl.; Kinderley, ten.; Southcomb, vouch.*, 5 Law J. C.P. 17.

Where, in a deed to make the tenant to the præcipe, lands were conveyed by the description of a farm generally, without particularizing the quantity or quality of the land, and the recovery was of 50 acres only; the Court increased the quantity to 70 acres, the farm, on a late admeasurement, appearing to contain that number. *Battishall, pl.; Cann, vouch.*, 3 Law J. C.P. 1, s. c. 9 B. Mo. 740.

A recovery cannot be amended by inserting part of the premises named in the deed to lead the uses, which had been omitted in the copy of the præcipe. *Oddie, dem.; Foster, ten.*, 3 Bing. 446.

The Court permitted a recovery of land to be amended by the insertions of *meadow and pasture. Fricker, dem.; Farbank, ten.; Bishop, vouch*, 1 Bing. 22, s. c. 8 B. Mo. 259.

The Court will not amend by adding the word "meadow." *Cooke, dem.; Yates, vouch.*, 5 Law J. C.P. 91, s. c. 4 Bing. 90.

A recovery may be amended by adding the word "woodlands." *Brackenburgh, dem.; Tatton, vouch.*, 5 Law J. C.P. 108.

The Court will permit a recovery to be amended by the insertion of a "fee farm rent." *Times, dem.; Meredith, ten.; Edwards, vouch.*, 5 B. Mo. 474.

Premises in a recovery which had been suffered in 1759, were described as consisting of a "mill, lands, and hereditaments, in the parish of M." By a deed of bargain and sale in 1771, "all the tithes and hereditaments, except in M, were conveyed," which, it was stated, were comprised in the recovery of 1759, and were accordingly omitted in the latter: Held, under the first recovery, that such tithes did not pass; but as it appeared that the tithes of all the vouchee's estates were intended to pass by the latter, except those which were supposed to have been included in the first: Held also, that the latter might be amended by inserting the "tithes in M." *Ward, dem.; Palmer, ten.; Earl of Coventry, vouch.*, 6 B. Mo. 224.

The Court permitted a recovery to be amended, by inserting the words "advowson of the church," instead of the word "rectory." *Coore, dem.; Spragg, ten.; Blackburn and wife, vouch.*, 8 Taunt. 338.

The Court will permit a recovery to be amended by substituting "an advowson" for "a rectory," if it appears, by the deed to lead the uses, that the former was intended to pass. *Haller, dem.; Woolley, ten.; Palmer, vouch.*, 6 B. Mo. 53.

An amendment, by inserting the word "advowson," cannot be made in a recovery which has been suffered seventy years ago, notwithstanding it was omitted by mistake, and had formed part of the estate since the recovery was suffered, unless an affidavit be produced, shewing how the presentations had gone from that time to the application for the amendment. *Colclough, dem.; Pred, ten.; Savage, vouch.*, 7 B. Mo. 268.

The amendment of a recovery, by inserting the word "advowson," will not be suffered in the absence of an affidavit of presentation. *Holmes, dem.; Seton, ten.; Foreman, vouch.*, 3 Bing. 176, s. c. 10 B. Mo. 585.

A recovery may be amended by inserting the word "advowson" before "vicarage," it appearing that the premises were described as the "advowson of a vicarage," in the deed to lead the uses; which having been lost, the officer read the description of the premises from the enrolment of such deed. *King, dem.; Shepherd, ten.; Jeffries, vouch.*, 3 Law J.C.P. 121, s. c. 10 B. Mo. 251.

A recovery may be amended by inserting the words "the advowson of," before those of "the rectory of the church of H," on an affidavit, stating that there had been no vacancy since the recovery was suffered, and that the church was now full. *Chambers, pl.; Blake, ten.; Bampfylde, vouch.*, 7 B. Mo. 586.

The Court permitted a recovery to be amended, when the premises were described as situate "in the parish of A, in the city of B, and in the parish of C, in the county of the same city, and made consistent with the deed to lead the uses; although they were described in the exemplification of the recovery, as being situate in "the parishes of A and C, in the city of B." *Bisgood, dem.; Bruton, ten.; Ives, vouch.*, 6 B. Mo. 259.

Lands having been described in a recovery, and in the deed to lead the uses thereof, as in the parish of A; whereas there was, in fact, no such parish; but A was a township in the parish of K: Amendment allowed, by the addition of the name of such parish. *Kinderley, dem.; Graham, ten.; Ogle, vouch.*, 4 Law J. C.P. 108.

A farm, intended to be comprised in a recovery, lay partly in one parish and partly in another. In the recovery only one parish was named.

An amendment, by inserting the name of an additional parish, was refused, the deed containing no express words to authorize such amendment, although there was strong evidence to shew that the whole of the lands were intended to be included. *Lord Elliott, vouch.*, 2 Law J. C.P. 64, s. c. 1 Bing. 425, s. c. 8 B. Mo. 521.

A recovery may be amended by inserting a parish, although it was omitted by name in the deed to lead the uses, which embraced two parishes only, or elsewhere in the county where the premises were situated. *Rogers, dem.; White, ten.; Lloyd, vouch.*, 3 Law J. C.P. 51, s. c. 9 B. Mo. 740.

The amendment of a recovery may be made by inserting a parish not named in the deed to lead the uses, the lands intended to pass having been specified therein as to the number of acres, as well as the names of the vendor and occupier, at the time the

recovery was suffered. *Woodyer, ten.; Nicholls, vouch.*, 9 B. Mo. 195.

A recovery may be amended by altering the name of a parish, although it was erroneously described in the deed to lead the uses. *Banazalette, dem.; Dawson, ten.; Kingmore, vouch.*, 5 Law J. C.P. 31.

What evidence sufficient to justify the alteration of a parish in a recovery, where a wrong parish was inserted in the deed to lead the uses. *Anon.* 2 Bing. 93.

In a recovery, the Court refused to allow the original writ and proceedings to be amended by the substitution of one county for another; notwithstanding an affidavit that the premises were situate in the county intended to be inserted, and that the parties had no property whatever in that mentioned. *Dolling, dem.; Rice, ten.; Euston, vouch.*, 6 Law J. C.P. 47, s. c. 4 Bing. 426, s. c. 1 M. & P. 178.

If a colony in a foreign state be styled as an island in a recovery, and the error be ascertained and altered by a person in that colony, the Court will suffer the recovery to pass. *Bayley, dem.; Bremridge, ten.; Adams, vouch.*, 7 B. Mo. 372.

A writ of summons in a recovery may be altered in the return, if there be several vouchees residing in different counties, and one of them cannot sign until after the former return. *Bramwell, dem.; Winter, ten.; Osborne, vouch.*, 7 B. Mo. 269.

A præcipe at the head of a warrant of attorney in a recovery, may be amended, by substituting the word "dove-houses" for "dwelling-houses." *Goold, dem.; Stocker, ten.; Collard, vouch.*, 3 Law J. C.P. 206.

The acknowledgment of the first vouchee in a recovery having been taken at Calcutta on the 11th of January 1827; and the commissioners in the *dedimus potestatem*, having omitted to indorse the usual return thereon; and the word "sixteenth" having, in the jurat of the affidavit of the commissioners, of the due acknowledgment of the first vouchee, been written on erasure; and the second vouchee, who was only tenant for life, having died on the 5th of February 1827, before the proper number of returns to the writs of summons: The Court allowed the returns to be abridged. *Still, dem.; Raymond, ten.; Law, vouch.*, 6 Law J. C.P. 46, s. c. 4 Bing. 425, s. c. 1 M. & P. 136.

### (D) EFFECT.

By indentures of lease and release, of June 1750, made between H R and D his wife, M R and C R of the first part, J S and J E of the second part, and R W and O H of the third part, and by a recovery suffered in pursuance thereof, certain messuages and lands of H R and D his wife, M R and C R were limited to the use of such persons as they should jointly appoint, and, in default of such appointment, to the use of such persons as H R and D his wife, and M R (in case they should all survive C R) should appoint; and until such appointment, as to parts of the estate, to the use of C R for life, and as to the residue, to the use of such persons as H R should appoint, and for default of, and until such appointment, to H R in fee: and by indentures of lease and release, of October 1751, the release made between R W the elder. and R W the younger, of the first, H R and D his wife, M R and C R of the second, and W M, J L, R W, (of G) and P W, of the third part,—after settling divers messuages to R W the elder, and R W the younger, to the uses therein mentioned: It was witnessed, that in consideration of a marriage intended to be had between R W the younger and M R, and for settling the messuages to the uses therein expressed, H R and D his wife, M R and C R granted, bargained, sold, released, and confirmed, *directed, limited, and appointed*, unto W M, J L, R W, (of G) and P W, in their actual possession, the several messuages comprised in the indentures of June 1750, and all other messuages whereof H R was then seised of any estate, and all the estate, right, and title of H R and D his wife, M R and C R, to hold the same to W M, J L, R W, (of G) and P W, to the same uses, until the marriage as before; and after the marriage, as to part of the estate, to the use of H R and D his wife, for life, and as to the other part, to the use of H R for life, and as to the lands limited to C R for life by the deed of 1750, to her use for life, remainder to the use of W M, J L, R W, (of G) and P W, in trust to preserve contingent uses during the lives of H R and D his wife, and C R, remainder of the said limited estates, and all other the estates, to the use of R W the younger and his intended wife, and the survivor for life, remainder to W M, J L, R W (of G) and P W, to preserve contingent remainders; remainder to their use for 500 years, and after the determination of that term, remainder to the first son of the marriage in tail; and it was declared, that as well the said term of 500 years, as another like term thereby created, should be held upon trust, to raise portions for younger children;—and then followed covenants by H R and D his wife, M R and C R, for title; that the messuages were free from incumbrances, and also a covenant for further assurance: Held, that under the indentures of 1750 and the recovery suffered in pursuance thereof, and the indentures of 1751, the *legal fee* of such of the estates comprised in the first mentioned indentures as were settled and assured by the last, did not vest in W M, J L, R W, (of G) and P W. *Wynne v. Griffiths*, 4 Law J. K.B. 130, s. c. 5 B. & C. 923, s. c. 8 D. & R. 470, s. c. 3 Bing. 179, s. c. 10 B. Mo. 592.

A tenant in tail, subject to an outstanding term, in contemplation of a recovery, by deed, in consideration of 10*s.*, granted, bargained, and sold the premises, and the reversion, &c. thereof to A and B, their heirs and assigns; to hold to them, to the use of A, that he might become tenant of the freehold, in order to suffer a recovery. The deed was afterwards enrolled as a bargain and sale: The Court held, that, although it contained words of bargain and sale, and had been enrolled, it operated as a grant of the reversion to A and B; and that A became solely seised of the premises, so as to be a good tenant of the freehold of the entirety for the purpose of suffering a recovery. *Haggerston v. Hanbury*, 4 Law J. K.B. 269, s. c. 5 B. & C. 101, s. c. 7 D. & R. 723.

Lands being settled by H upon the sons of R successively in tail male, with divers remainders over, and the ultimate reversion to H and his heirs, H is attainted of high treason, and afterwards B the issue in tail, being in possession under the limitations of the settlement, suffers a recovery. Whe-

ther it is effectual to bar the reversion vested in the crown by the attainder—*quære*. *Bloss* v. *Clanmorris*, 3 Bligh, 60.

Meadow will pass in a recovery under the word "land." *Cooke, dem.; Yates, vouch.*, 5 Law J. C.P. 91, s. c. 4 Bing. 90.

## REGISTRY.

If two deeds be executed, bearing different dates, that which is first registered, even with notice of the other deed, has priority both in law and equity, although it be posterior in date and execution.

On points in which the two deeds are inconsistent, the deed last registered is personally binding on the parties who execute; and the lands and property comprised in the deed first registered, are also bound, after satisfying the trusts of the first, by the contracts and trusts of the deed last registered. *M'Neill* v. *Cahill*, 2 Bligh, 228.

## RELATIONS.

Those persons only who are entitled according to the Statute of Distributions, are comprehended under the term *relations*. *Wright* v. *Atkyns*, 1 Turn. 161.

## RELEASE.

[See RECEIPT.]

A release to one of several joint acceptors, discharges all. *Rex* v. *Bayley*, 1 C. & P. 435. [Littledale]

A parol release will not discharge an annuity deed. *Cupit* v. *Jackson*, M'Clel. 495.

When a co-plaintiff releases the defendant, the Court will not interfere, unless it is quite clear that he has only a mere naked trust. *Wells* v. *Gutheridge*, 1 Law J. K.B. 248.

In the absence of fraud, the Court will not set aside a release given by one of several plaintiffs to a defendant, after action brought. *Furnival* v. *Weston*, 7 B. Mo. 356. [See *Manning* v. *Cox*, 1 Law J. C.P. 36.]

The Court will not relieve against releases, after a possession in pursuance of them for thirty years. *Hickenbotham* v. *Ould*, 2 Ken. 92, Chano.

A general release given by a trustee, in fraud of his trust, is void; therefore, where an action had been brought in his name for the benefit of the *cestui que trust*, the Court ordered a release of the action, executed and delivered by the trustee, to be delivered up to be cancelled. *Manning* v. *Cox*, 1 Law J. C.P. 36, s. c. 7 B. Mo. 617.

A plea of release, if the consideration be impeached, must contain averments, supported fully by an answer, covering the grounds upon which the consideration is impugned, and cannot extend to a discovery of the consideration. *Parker* v. *Alcock*, 1 Y. & J. 432.

If, in an action of covenant for arrears of an annuity, the defendant plead a release, lost by time and accident, and, to induce the jury to presume a release, shew that the annuity was not paid for seventeen years, and that the plaintiff had borrowed money of the grantor of the annuity, and regularly paid him interest, without setting off the annuity: The jury ought not to find for the defendant, unless they are satisfied that there is fair ground for supposing, that, at some particular period during the seventeen years, the plaintiff *actually* executed a release of the annuity; and, to rebut the presumption of such a release, the jury may look at the situation of the parties, and take into their consideration the circumstances of the plaintiff being a near relative of the grantor of the annuity; having large expectations from him, and of the grantor being a very old man, peremptory with his relatives, and very attentive to his pecuniary concerns. *Bigg* v. *Roberts*, 3 C. & P. 43. [Tenterden]

## RELIGION.

[See INDICTMENT and UNITARIAN.]

## REMAINDER.

[See DEVISE.]

Where a legatee for life dies before his testator, the remainder still retains its immediate effect, and a power of appointment being first given to the legatee for life, makes no difference. *Chatteris* v. *Young*, 6 Mad. 30.

To support a contingent remainder in trustees, they must have a right of entry, and not merely a right of action. *Davies* v. *Bush*, 1 M'Clel. & Y. 88.

## RENT-CHARGE.

[See LIMITATIONS, STATUTE OF.]

Rent-charges, when small, are subjects of compensation as incidents of tenure. *Esdaile* v. *Stephenson*, 1 S. & S. 122.

The same rules as apply to the recovery of the corpus of a rent-charge extend to the arrears. *Cupit* v. *Jackson*, M'Clel. 495.

In the simple case of a rent-charge upon lands in Ireland, it is payable in Ireland, and in Irish currency.

Where the words are, "to grant a rent-charge of 3000*l.* lawful money of Great Britain," the Court presumes an intent from domicile and other circumstances.

The rules of law arising out of the effect of the *lex loci contractus*, or that the money is to be paid as a rent-charge issuing out of lands in cases where no provision is made by the deed or instrument of contract, are inapplicable to a case where the instrument itself furnishes the means of interpretation. *Lansdowne* v. *Lansdowne*, 2 Bligh, 88.

## REPLEVIN.

(A) BOND AND SURETIES.
(B) REMOVAL FROM INFERIOR COURT.
(C) PLEADINGS.
(*a*) *Declaration.*
(*b*) *Avowries and Cognisances.*
(*c*) *Pleas.*
(*d*) *Replication.*

(D) EVIDENCE.
(E) VERDICT AND DAMAGES.
(F) JUDGMENT.
(G) COSTS.

(A) BOND AND SURETIES.

A rent-charge is within the 23rd section of the 11 Geo. 2, c. 19, and the sheriff is authorized to take a replevin bond under a distress for such rent; and where a clause is inserted in the condition, to indemnify the sheriff and his officers from all costs, damages and expenses, which they might be put to by reason of the replevin, or touching any matter or thing relating thereto, it does not vitiate the bond, or render it void, as having exceeded the terms contained in that statute. *Short* v. *Hubbard*, 3 Law J. C.P. 35, s. c. 2 Bing. 349, s. c. 10 B. Mo. 107.

A replevin bond, though not in every respect consistent with the 11 Geo. 3, c. 19, is good. As, where the sheriff took such a bond conditioned to prosecute the action with effect, and to indemnify the sheriff; but there was no proviso that the suit should be prosecuted *without delay:* It was holden good. *Dunbar* v. *Dunn*, 10 Price, 54.

Whether the sheriff's warrant to replevy can be directed to and executed by an infant—*quære. Cuckson* v. *Winter*, 6 Law J. K.B. 309.

Where one of the sureties in a replevin bond is a material witness in the cause, the Court will grant a rule for substituting another surety in this place. *Bailey* v. *Bailey*, 1 Law J. C.P. 9, s. c. 1 Bing. 92, s. c. 7 B. Mo. 439.

A tenant, upon having a distress put on his premises, replevied his goods. A replevin bond was entered into, and the usual steps taken to try the cause. Before the trial, an agreement was made to stay proceedings, and for the payment of the rent on a given day, and that the replevin bond should remain as a security. An action may be maintained against the surety in the bond, because the suit has not been prosecuted with effect. *Hallett* v. *Mountstephen*, 1 Law J. K.B. 76, s. c. 2 D. & R. 343.

The replevin bond is forfeited, if the plaintiff does not prosecute his suit with effect, that is with final success; and the distrainor may therefore proceed upon the replevin bond merely upon his obtaining judgment; and without suing out a writ of *retorno habendo*. The distrainor does not waive his remedy at common law, or his right to proceed on the replevin bond, by proceeding to execution under the statute 17 Car. 2, c. 7, the object of which was to give him an additional remedy. The sheriff is liable to an action on the case, for losing the replevin bond. *Perreau* v. *Bevan*, 4 Law J. K.B. 177, s. c. 5 B. & C. 285, s. c. 7 D. & R. 72.

In replevin, the plaintiff took no proceedings for more than a year and a half after entering his plaint. The plaint was not nonprossed. The sheriff assigned the bond, and the assignee sued on it: Held, that the condition to prosecute the suit without delay, was not performed. *Axford* v. *Perrett*, 6 Law J. C.P. 116, s. c. 4 Bing. 586, s. c. 1 M. & P. 470.

The liability of sureties in a replevin bond, is limited to the amount of the rent in arrear at the time of the distress, and costs; and they are not liable for subsequent rent: and therefore, where, on the trial of an action of replevin, a verdict was taken, by agreement between the plaintiff in an action and the avowant, for the penalty of the bond, subject to a reference, not only as to the amount of the rent due at the time of the distress, but of the rent *then* due, and also of certain penal rents, (the sureties being no parties to such agreement,) and the arbitrator awarded damages to the full amount of the penalty of the bond; the Court held that the sureties were entitled to be relieved from the bond, it appearing that the rent originally distrained for had been fully paid before the trial of the replevin. *Ward* v. *Henley*, 1 Y. & J. 285.

A reference to arbitration, made by the parties in a replevin suit without the consent of the sureties in the replevin-bond, discharges the latter. *Archer* v. *Hale*, 6 Law J. C.P. 79, s. c. 4 Bing. 464, s. c. 1 M. & P. 285.

After a recovery against a sheriff for taking insufficient sureties in a replevin bond, he brought an action against his clerk in replevin, for taking sureties which were not responsible: Held, that the plaintiff could not have a verdict, in the absence of proof that they were not *apparently responsible*. It seems that, when the sureties reside out of the bailiwick of the sheriff, by whom the bond is taken, it is necessary to search the office where they do reside, to ascertain whether any process has been sued out against them. *Sutton* v. *Waite*, 8 B. Mo. 27.

(B) REMOVAL FROM INFERIOR COURT.

Where a distress was levied by virtue of a warrant from a Justice of the Peace, under the Statute of Labourers, 20 Geo. 2, c. 19, the plaintiff replevied, and removed his replevin by writ of *re fa lo* into the Court of Common Pleas. The Court discharged a rule *nisi* to set it aside, which had been obtained on the ground that the 6th section of the act provided, that no *certiorari* or other process should remove proceedings under that statute into any court at Westminster, holding that the replevin was a collateral proceeding, and not within that section. *Wilson* v. *Weller*, 8 Taunt. 521, s. c. 2 B. Mo. 574.

(C) PLEADINGS.

(*a*) *Declaration.*

In an action on a replevin bond, it is not necessary to aver that a return has not been made, although it appear on the face of the declaration to have been awarded, where it is averred, that the suit has not been prosecuted with effect. A breach of either of the conditions for prosecuting with effect, returning the goods, or indemnifying the sheriff, will singly be sufficient to support the action. *Dunbar* v. *Dunn*, 10 Price, 54.

In replevin, the plaintiff declared that the defendant, on &c., in the parish of A, in the county of K, *in a certain close there*, took the cattle of the plaintiff. The defendant demurred, because the place of taking was not named. The Court allowed the plaintiff to amend; the costs to abide the event. *Potten* v. *Bradley*, 6 Law J. C.P. 210, s. c. 2 M. & P. 78.

(*b*) *Avowries and Cognisances.*

A legal distress may be made by one of several co-heirs in gavelkind, for rent due to him and his companions, without an express authority from the

latter; therefore, an avowry in his own right, and a cognizance as their bailiff, are sufficient, without shewing an authority. *Leigh* v. *Shepherd*, 5 B. Mo. 297, s. c. 2 B. & B. 465.

*Semble*, that an avowry stating the plaintiff to have held under a demise, at a certain yearly rent, without stating when the rent was payable, does not mean that the rent was payable yearly. *Laycock* v. *Tuffnell*, 2 Chit. 531.

Avowry, by the defendants, as executors of T F, that the plaintiff, for all the time during which the rent was accruing due, and from thence until and at the time when &c., and until and at the death of T F, held the place in which &c., as tenant to T F in his lifetime, under a demise made to him, at a yearly rent, payable quarterly, and because two years rent, due from the plaintiff to T F in his lifetime, remained unpaid to him or his executors, and because the plaintiff remained in possession of the place in which &c. from the death of T F till the time when &c., the defendants, as executors of T F, well avowed the taking &c.: Held, on demurrer, that such avowry was sufficient, and might be supported. *Staniford* v. *Sinclair*, 3 Law J. C.P. 247, s. c. 2 Bing. 193, s. c. 9 B. Mo. 376.

Where the defendant avowed for rent in arrear for a dwelling-house, with the appurtenances demised to the plaintiff at a yearly rent; and it was proved that the plaintiff occupied the upper part of the house only; and that the shop and yard were let to other tenants: Held, that this was no variance. *Page* v. *Chuck*, 3 Law J. C.P. 124, s. c. 10 B. Mo. 264.

### (c) *Pleas.*

In replevin, plea of former distress for the same rent was held bad on demurrer, as it did not shew that the rent was satisfied by the former distress. *Hudd* v. *Ravenor*, 5 B. Mo. 542, s. c. 2 B. & B. 662.

In an action of replevin the plaintiff cannot plead a set-off to an avowry for rent. *Laycock* v. *Tufnell*, 2 Chit. 531.

In replevin to cognizance for arrears of rent to D T and H T.—Plea, that before D T and H T had any interest in the premises, one T R was seised in fee, and mortgaged them in fee to J C; that being so seised, and after the mortgage became absolute, under colour of a certain pretended agreement of sale of the said premises, between the said T R and D T and H T, the latter demised to the plaintiff, who thereupon became and continued possessed thereof, until &c.; that the mortgagee afterwards assented to such demise, and required plaintiff to attorn to him as such mortgagee; that he did attorn accordingly, and agreed to pay to him the arrears of rent then due; but that he neglecting to pay the same, and the said D T and H T not having any legal estate in the premises, the said mortgagee distrained for such arrears of rent; and that, to prevent his goods from being sold, the plaintiff necessarily paid such arrears to such mortgagee, and so no rent was in arrear to the said D T and H T:—

The Court of Common Pleas held, that it was bad on demurrer, as amounting to the plea of *Nil habuit in tenementis*. *Alchorne* v. *Gomme*, 2 Law J. C.P. 18, s. c. 2 Bing. 254, s. c. 9 B. Mo. 130.

Where a plaintiff in replevin, whose claim was unfounded on a custom to demise without deed, right of common appurtenant, pleaded generally a custom to demise the right of common, and a demise according to the custom. On general demurrer, it was held, that supposing the custom was good, the plea was bad on the face of it, for alleging a demise of a thing in grant, without a profert of the deed of grant, or without alleging in lieu thereof a custom to demise without deed. *Lathbury* v. *Arnold*, 1 Bing. 217, s. c. 8 B. Mo. 72.

Cognizance for rent arrear under a demise from W. It appeared by the lease, that W was a receiver in Chancery, "in a cause wherein A was plaintiff and B defendant;" the *reddendum* was to W or any future receiver: Held, that the lessee could not plead *non tenuit*. *Dancer* v. *Hastings*, 5 Law J. C.P. 3, s. c. 4 Bing. 2.

Where, in an action of replevin for taking the plaintiff's cattle, the defendant avowed under a grant of common of pasture from D V, to the burgesses of a borough, for each of the burgesses inhabiting therein; and the plaintiff pleaded in bar, that the corporation had a prescriptive right to appoint a reasonable number of herds, for taking care of the cattle put on the common, and a like right of appointing, as a remuneration to each herd, a reasonable number of stints of each such herd, to be depastured on such common, and then prescribed for common of pasture of such stints: Held to be sufficient after verdict; although it was objected that the number of herds or stints ought to have been set out with certainty on the face of the plea, and that the custom was invalid, and could not be supported by such a grant. *Elliot* v. *Hardy*, 3 Law J. C.P. 153, s. c. 3 Bing. 61, s. c. 10 B. Mo. 317.

To an action of replevin for taking the plaintiff's cattle, the defendant avowed the taking as being possessed of a close, and that the cattle were there damage feasant. The plaintiff, by his plea in bar, prescribed for a right of sole feeding and depasturing the cattle in the close in which &c., from the Feast of St. Thomas until the 18th of April, yearly, and every year: Held, that as the plaintiff had claimed his right by prescription, it must refer to St. Thomas's day, old style; and that it was properly described in the plea as the Feast of St. Thomas, and which must be intended to mean Old St. Thomas's day. *Smith* v. *Flower*, 4 Law J. C.P. 113, s. c. 3 Bing. 401.

As a general rule, subject to exceptions, all goods and chattels are liable for rent of the premises whereon they are; and, if the owner of goods or chattels contends that his case is within one of the exceptions, he must in replevin shew the special matter by his pleading. And accordingly, where, to an avowry for rent in arrear, the owner pleaded that the cattle had not been *levant et couchant* on the premises, his plea, on demurrer, was held to be ill; because it might be that they were on the premises either through his own neglect or with his consent. Either of those circumstances would have rendered them liable; and he therefore should have negatived them both. *Jones* v. *Powell*, 4 Law J. K.B. 281, s. c. 5 B. & C. 647, s. c. 8 D. & R. 416.

The plaintiff in replevin omitted to plead in bar to one of the avowries. The Court considering him in the light of a defendant, would not give him leave to amend, without an affidavit of merits. *Ellis's case*, 1 Law J. K.B. 189.

(*d*) *Replication.*

Where a plea in bar to an action of replevin was, that "long before the said time when, &c. to wit, on &c., at &c., defendant demised the *locus in quo* to plaintiff;" and replication, "that long before the said time when &c., to wit, on &c., at &c., defendant did not demise *modo et formâ*." On demurrer, that the replication contained an immaterial traverse and negative pregnant: Held, that the words, "before the said time, &c." were the material part of the traverse, and proof of a demise at any time before the distress would maintain the action: Held also, that the day and place subsequently mentioned were immaterial, and that the replication was good. *Cuff* v. *Coster*, 2 Chit. 296, s. c. 1 D. & R. 42.

(D) EVIDENCE.

The plaintiff declared in replevin for growing corn. The defendant avowed, that the plaintiff and A were her tenants, and that she had taken the corn as a distress for rent. The plaintiff denied that tenancy. At the trial, evidence was given by the defendant, that a lease had been prepared in their joint names for the plaintiff and A, who was his son, which had been paid for by them, or one of them, but that it had never been executed by them. It did not appear that the plaintiff and A had done any act to make them jointly liable for rent, or that they were jointly interested in the corn. The plaintiff tendered A as a witness, to prove that the premises were held, not at a fixed price, but under a corn rent: Held, that the rejection of his evidence, on the ground of his being a party to the record, was improper. *Bunter* v. *Warre*, 1 Law J. K.B. 208, s. c. 5 B. & C. 689, s. c. 3 D. & R. 106.

It had been proved by the avowants that an attornment had been made by the plaintiff, after ejectment brought against him seven years before the commencement of the replevin suit, during which period it did not appear that rent had been demanded, but the plaintiff offered to prove a feoffment to himself, by the person under whom the avowant claimed, and certain letters had been offered from that person containing expressions adverse to the avowant's claim, which evidence had been rejected, on the ground that the plaintiff could not be allowed to dispute his tenancy after an attornment:—the Court granted a new trial. *Gravenor* v. *Woodhouse*, 1 Bing. 38.

Avowries, first, by W and T for rent due to W and T from plaintiff, as tenant to W and T; secondly, by W and T and his wife, in right of his wife, for rent due to W and T and his wife, in right of his wife from plaintiff as tenant to W and T and his wife, in right of his wife, were holden to be supported by evidence of an attornment from plaintiff to W and T and his wife. *Gravenor* v. *Woodhouse*, 1 Bing. 38, s. c. 2 Bing. 71, s. c. 7 B. Mo. 289.

In an action of replevin, on the question whether the plaintiff held certain premises at a fixed rent specified in the avowry: the Court held, that unstamped receipts, tending to shew that the plaintiff had previously paid for the premises the like rent so specified, were admissible to support the issue. *Hawkins* v. *Warre*, 3 B. & C. 690, s. c. 5 D. & R. 512.

In such action, if it be proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant. *Duncan* v. *Meikleham*, 3 C. & P. 172. [Vaughan]

Avowant, who had a term which expired on the 11th of November 1826, let the premises orally from the 11th of September to the 11th of November in that year, for 270*l.*, payable immediately: Held, that this was a lease, of which parol evidence might be given, and not an assignment requiring a writing; but that, being a demise of the whole of avowant's interest, he had no right to distrain. *Preece* v. *Corrie*, 6 Law J. C.P. 205, s. c. 5 Bing. 24, s. c. 2 M. & P. 57.

Where in an action against the sheriff for taking insufficient sureties in replevin, the declaration averred the execution of the bond by the sureties: It was holden, that such averment need not be proved, as the sheriff had assigned the bond to the plaintiff. *Barnes* v. *Lucas*, 1 R. & M. 264. [Abbott]

Replevin for taking plaintiff's corn in four closes; avowry for rent arrear, stating that plaintiff held the closes in which, &c. at and under a certain yearly rent: plea in bar, *non tenuit modo et formâ*. It appeared in evidence that the tenant held the four closes mentioned in the declaration, and two others also at the rent mentioned in the avowry: Held, that this evidence supported the avowry. *Hargrave* v. *Shewin*, 6 B. & C. 34, s. c. 9 D. & R. 20.

(E) VERDICT AND DAMAGES.

To an action of replevin for distraining plaintiff's cattle, the first cognizance stated the *locus in quo* to be a common, the mode of stocking, &c. of which was by custom regulated by the jurors at the leet; that an order was there duly made, that no person should keep any steer on the common after two years under the penalty of 20*s.* a head, as a penalty for breach of such regulations; and on refusal to pay such penalty the same should be levied by distress;—it then averred, that the cattle, being steers more than two years old, were taken as a distress for the damages, &c. A second cognizance stated the cattle distrained damage feasant. To the first, the plea in bar alleged, that the steers were less than two years old, on which issue was joined. To the second, the plea stated the custom, averred his seisin, and that before the said time when, &c. he put and turned on the said cattle, being steers less than two years old, upon which the same issue was joined, and verdict found for the defendant. Upon motion to enter judgment for plaintiff, *non obstante veredicto*, on both issues, or on the first, and a repleader on the second: Held, that the first cognizance, omitting to shew that the plaintiff refused or neglected to pay the penalty, was not framed according to the custom, and was bad; that the plea in bar to the second being wholly silent as to the age of the steers when distrained, but only when turned out, was bad in substance; the second cognizance being therefore unexceptionable, to which the plaintiff's plea in bar was bad, the defendant was entitled to retain the verdict, the fact of having gone to trial, and a verdict obtained on that issue, would not give validity to the plea which was before bad in substance. *Clears* v. *Stevens*, 8 Taunt. 413, s. c. 2 B. Mo. 464.

Although the rule that a new trial will not be

granted where trifling damages have been recovered, may not invariably extend to actions of replevin; yet the Court, judging the rule salutary, refused to disturb a verdict in replevin where small damages only had been given. *Brown* v. *Ray*, 3 Law J. C.P. 2, s. c. 9 B. Mo. 583.

Where, on an avowry and cognizance under the 50 Geo. 3, c. 47, the plaintiffs were nonsuited,—it was holden, that the defendant was not entitled to a writ of inquiry of damages, the act only giving treble costs. *Gotobed* v. *Wool*, 6 M. & S. 129.

By an adjudication of the quarter sessions under an inclosure act for the parish of T, the *locus in quo*, parcel of a large waste, was found to be in the parish of G, in which K had a manor; over the *locus in quo*, B, who had a manor in the adjoining parish of T, had immemorially exercised acts of ownership: K had also exercised acts of ownership over it occasionally, but they were less decisive than those exercised by B: in the act of parliament for the inclosure of T, there was an enumeration of B's claims in respect of property in T, but no mention of G, nor of any claim by B in respect of property in G.

In an action of replevin, in which there was conflicting evidence as to the boundary of B's manor, the judge left it to the jury to say, whether the soil of the *locus in quo* was in K or B, without calling their attention to the question, whether or not the parishes and manors were conterminous; the jury found in favour of K: Held, that the judge had left the case properly to the jury, and that the circumstance of there being in the inclosure act for T no mention of B's having any claim in respect of property in the adjoining parish of G, was sufficient to warrant the jury in the inference that B's manor did not extend beyond T. *Lester* v. *Kemp*, 2 Bing. 30, s. c. 9 B. Mo. 85.

### (F) JUDGMENT.

In a replevin suit a rule to reply, instead of a rule to plead in bar, is a nullity, and judgment may be signed. Taking out a summons on which no order is afterwards made, does not waive the irregularity. *Ward* v. *Hindlass*, 1 Law J. K.B. 28.

After judgment in an action on a replevin bond, the Court will not set aside the execution on an objection to the proceedings, which might have been taken previous to judgment. *Short* v. *Hubbard*, 2 Bing. 445, s. c. 9 B. Mo. 667, s. c. 10 B. Mo. 107.

If in replevin, where it is the defendant's record, the plaintiff does not appear by himself or his counsel, he will be nonsuited. *Symes* v. *Larby*, 2 C. & P. 358. [Best]

### (G) COSTS.

A tenant brought an action of replevin against the bailiff, a nominal defendant, who levied a distress for rent on his premises in the year 1821. During the years 1821, 1222, and 1823, the pleadings were altered and amended continually by both parties. The cause was at length set down for trial, in the sittings after Michaelmas term 1823. On 17th February 1824, the attornies for the bailiff, who were the attornies for the landlord, informed the attorney for the tenant, that the bailiff died in August 1822: The Court would not interfere to make the attornies, or the landlord, pay the costs incurred since the death of the bailiff. *Cuff* v. *Castor*, 2 Law J. K.B. 170.

Where defendants in replevin pleaded several avowries and cognizances, the object of which was to try a question of title, but one of them alleged generally, that the plaintiff held, as a yearly tenant to them under a demise, at a yearly rent payable quarterly, and that because two quarters' rent was in arrear, they well avowed the taking, &c.: Held, that they were entitled to double costs under the statute 11 Geo. 2, c. 19, s. 22; and the Prothonotary, on the taxation of such costs, may allow for successful searches made in registers and other public books, for the purpose of proving a pedigree. *Johnson* v. *Lawson*, 3 Law J. C.P. 23, s. c. 2 Bing. 341.

Under the 11 Geo. 2, c. 19, if a verdict be found for a defendant in replevin, upon an averring generally as landlord, he is entitled to double costs, though the replevin be brought solely for the purpose of trying the title to the premises. *Stanland* v. *Ludlam*, 4 B. & C. 889, s. c. 7 D. & R. 484.

In an action on the case against the sheriff for taking insufficient pledges in replevin, the plaintiff, who had taken an assignment of the replevin bond, is not entitled to recover costs incurred by him in suing such sureties without effect, unless he had given previous notice to the sheriff of his intention to do so. *Baker* v. *Garratt*, 3 Law J. C.P. 145, s. c. 3 Bing. 56, s. c. 10 B. Mo. 324.

Where, in an action of replevin, the plaintiff obtained a verdict, and afterwards directed satisfaction to be entered on the roll, the Court would not cause such entry to be vacated on the application of the plaintiff's attorney, on the ground that the plaintiff and defendant had combined together to deprive such attorney of his costs. *Abbott* v. *Rice*, 3 Law J. C.P. 202, s. c. 3 Bing. 132, s. c. 10 B. Mo. 489.

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## REQUESTS, COURT OF.

(A) JURISDICTION.
(a) *In general.*
(b) *Residence.*
(B) JUDGMENT.
(C) COSTS.
(D) FEES.

### (A) JURISDICTION.

#### (a) *In general.*

The jurisdiction of a Court of Requests can only be determined by the statute which creates it, and not by reference to rules applicable to County Courts, or decisions given in respect of other Courts of Requests established by different acts of parliament. *Bennett* v. *Shrapnell*, 5 Law J. K.B. 103.

There is no rule of law which prevents a Court of Requests from taking cognizance of claims greater than the amount of 40s. if the plaintiff waives the excess, unless there be a provision, in the statute constituting such court, which prevents it. *Barnes* v. *Winkler*, 2 C. & P. 345. [Abbott]

Where the plaintiff sued the defendant, who resided within the jurisdiction of the London Court of Requests, in a superior court for 6*l.*, and upon judgment by default the jury reduced it to 5*l.*: the Court stayed the proceedings on payment of the da-

mages without costs, on the ground that he might have been sued under the 39 & 40 Geo. 3, c. 104. *Fleming* v. *Davis*, 5 D. & R. 371.

Interest due on a bond is not within the London Court of Conscience Act. *Aylwyn* v. *Thilsey*, 6 Law J. C.P. 12.

The borough court of Plymouth has not jurisdiction over debts to a less amount than forty shillings, and the county court process does not run into that borough. The inhabitants may therefore sue in the Court of King's Bench for debts amounting to a less sum than forty shillings. *Nile* v. *Riley*, 2 Law J. K.B. 154.

When an act of parliament, which establishes a court of local jurisdiction for the recovery of debts, has a clause prohibiting the commencing of actions in any other courts, and enabling the defendant to plead that act in bar, he must plead the act, or give it in evidence, under the general issue. After verdict, the Court will not assist him. *Anstes* v. *Liley*, 6 Law J. K.B. 123, s. c. 1 M. & R. 564.

(*b*) *Residence.*

Persons will be considered as householders when they have places of business in a town, and are accustomed to resort to them daily, within the meaning of the acts of parliament respecting Courts of Requests, although they reside with their families in houses at some distance from the town, and their places of business are inhabited by the junior partners or clerks. *Rex* v. *Hall*, 1 Law J. K.B. 20, s. c. 1 B. & C. 123, s. c. 2 D. & R. 241.

A party cannot proceed, under the Southwark Court of Requests Act, 22 Geo. 3, c. 47, unless he, as well as the defendant, reside within its jurisdiction. *Dillamore* v. *Capon*, 1 Bing. 388, s. c. 8 B. Mo. 429.

A defendant, by occupying a warehouse in the city of Bath, though he does not personally reside there, is entitled to be sued within the local jurisdiction, for a debt under 10*l*. Therefore, an action of assumpsit, (under 10*l*.) for use and occupation, may be brought in the Court of Requests in that city, if the cause of action arise within its jurisdiction. *Axon* v. *Dallimore*, 3 D. & R. 51.

A person who has only a counting-house in the city of London, and resides in Surrey, is not within the meaning of the 39 & 40 Geo. 3, c. 104. *Kemsett* v. *West*, 5 D. & R. 626.

It seems that the delivery of goods, ordered by a party who resides at a distance, at a waggon or coach-office, appointed by him, to be conveyed in the manner he dictates, is not such a constructive delivery and completion of the contract, as will take the debt thereby contracted out of the jurisdiction of the Court of Requests wherein the buyer resides. *Bennett* v. *Shrapnell*, 5 Law J. K.B. 103.

(B) JUDGMENT.

A writ of false judgment does not lie to the Court of Common Pleas from a court of conscience; when, therefore, such a writ was brought under the Southwark Court of Requests Acts, 46 Geo. 3, c. 87, and 4 Geo. 4, c. 123, the former court directed it to be sent back by a writ of *procedendo*. *Scott* v. *Bye*, 3 Law J. C.P. 30, s. c. 2 Bing. 344, s. c. 9 B. Mo. 649.

A writ of *accedas ad curiam* does not lie to the Court of Common Pleas from the Sheffield Court of Requests. *Tingle* v. *Roston*, 3 Law J. C.P. 100, s. c. 2 Bing. 463, s. c. 10 B. Mo. 171: s. P. *Bates* v. *Turner*, 3 Law J. C.P. 57, s. c. 10 B. Mo. 32.

There is nothing conclusive in a judgment of a court for the recovery of debts under 40*s*.; and proof that the plaintiff sued there for the debt he now seeks to recover, and that his complaint was dismissed on merits—is proper for the consideration of the jury. *Barnes* v. *Winkler*, 2 C. & P. 345. [Abbott]

(C) COSTS.

The plaintiff having sued the defendant for 22*l*. 10*s*., for work and labour, the latter pleaded a set-off amounting to 16*l*. 16*s*. 11*d*., but refused to give the plaintiff the particulars until after the commencement of the action: Held, that the defendant was not entitled to enter a suggestion on the roll to deprive the plaintiff of his costs, under the Bath Court of Requests Act, 45 Geo. 3, c. 67, although a verdict was found for the latter for less than 10*l*., and subject to an application by the defendant as to the disallowance of costs. *Cottle* v. *Langman*, 3 Law J. C.P. 26.

The Middlesex Court of Requests Act, 23 Geo. 2, c. 33, s. 19, extends to cases in which the plaintiff's demand, though originally exceeding 40*s*., had been reduced below that sum by payments on account before the commencement of the action; and, in such cases, the defendant is entitled to enter a suggestion on the roll to obtain double costs. *Chadwick* v. *Bunning*, 4 Law J. K.B. 323, s. c. 5 B. & C. 532, s. c. 8 D. & R. 155.

The plaintiff proved a debt of 26*l*. The defendant had pleaded the Statute of Limitations. To take the case out of that statute, the plaintiff put in evidence a letter from the defendant, in which he stated that he did not owe more than 3*l*.; for which sum the jury gave a verdict. The Court allowed a suggestion to be entered on the roll, under the London Court of Conscience Act, in order to deprive the plaintiff of his costs. *Shaddick* v. *Bennett*, 4 Law J. K.B. 38, s. c. 4 B. & B. 769, s. c. 7 D. & R. 229.

The defendant having pleaded a tender as to part, which he paid into court, and *non assumpsit* as to the residue, and the plaintiff having taken the money out of court, proceeded to trial; and the plea of tender was found for the defendant, and the balance proved on the *non assumpsit* was under 40*s*.: Held, that the defendant could not enter a suggestion on the roll, to deprive the plaintiff of his costs, under the London Court of Requests Act, 39 & 40 Geo. 3, c. 104. *Waistell* v. *Atkinson*, 4 Law J. C.P. 40, s. c. 3 Bing. 289.

A party seeking to deprive a plaintiff of his costs under a Court of Requests Act, must do it promptly; therefore, where a defendant, who might have applied in Easter term, deferred his application until Trinity term,—it was holden, that he came too late. *Hippesley* v. *Laying*, 4 B. & C. 863, s. c. 7 D. & R. 265.

The office of Register and Clerk of a Court of Requests is not within the meaning of the 9 Ann. c. 20, s. 5, so that although the defendant has judgment in his favour on an information in the nature of a *quo warranto*, he is not entitled to his costs. *Rex* v. *Hall*, 1 Law J. K.B. 88, s. c. 1 B. & C. 237, s. c. 2 D. & R. 341.

Where an action was brought in the Court of

King's Bench for money had and received, against the receiver of an estate, to recover money received by him for rent, for the purpose of trying the title to the estate: it was held to be within the meaning of the London Court of Conscience Act, (39 & 40 Geo. 3, c. 104, s. 13); and that although the plaintiff recovered less than *5l.*, he was entitled to costs. *Drew* v. *Fletcher*, 1 B. & C. 283.

It is no longer obligatory on a plaintiff to resort to the Southwark Court of Requests for a debt under *5l.*, the defendant residing within the jurisdiction of the Court; the act which deprived the plaintiff of costs in such a case, (46 Geo. 3, c 87,) has been repealed—(4 Geo. 4, c. 124). *Holbourn* v. *Clowser*, 5 Law J. K.B. 193.

### (D) Fees.

It seems that the Prothonotary of the Court of Requests, Whitechapel, is not authorised in receiving of a plaintiff suitor, at one payment, all the fee necessary to bring his cause to issue, before the suit is at issue. But the Court will not dismis the Prothonotary of the Court of Requests, for receiving of a suitor, at one payment, all the fees necessary to bring his cause to issue, before the cause is at issue, though it is a high misprision. *In re Farmer*, 3 D. & R. 602.

## RESCUE.

The taking of gunpowder, seized under the act, 12 Geo. 3, c. 61, out of the legal custody of those who have made the seizure, although there be no actual breach of the peace committed, is sufficient to sustain an indictment for a rescue. *Rex* v. *Beauchamp*, 5 Law J. M.C. 66.

## RETAINER.

[See Evidence, and Executor and Administrator.]

The devisee of real estate, being the *cestui que trust* of a bond, in which the devisee is obligor, may retain, out of the real estate devised to him, the amount of his specialty debt against the other specialty creditors. *Loomes* v. *Stotherd*, 1 Law J. Chanc. 220, s. c. 1 S. & S. 458.

## REVENUE LAWS.

The revenue laws of a foreign country are not available in a British court. *James* v. *Catherwood*, 3 D. & R. 190.

The provisions contained in the 27 Geo. 3, c. 13, s. 3, do not apply to temporary allowances on foreign wines; but by the 27 Geo. 3. c. 31, such temporary allowances may be claimed, although the wines were exported more than three years after importation. *Whitmore* v. *Papillon*, 2 Chit. 628.

Candles one-eighth made are within the meaning of the statute 11 Geo. 1, c. 30, s. 30.

A condemnation of goods seized by the officers of the Customs, and condemned for want of claim, was set aside, with liberty to the defendant to enter and perfect his claim thereto, upon payment of the costs occasioned to the Crown by proceeding to condemnation. *The Attorney General* v. *Cullen*, 8 Price, 668.

When the same penalty is applicable, it is an immaterial distinction whether the goods are prohibited absolutely or *sub modo*. *Rex* v. *Whitaker*, 1 Hag. 152.

Condemnation for breach of revenue laws by exportation of logwood from Jamaica, though described and used as dunnage. *Reward*, *Selkrig*, 2 Dods. 265.

Revenue cases are usually transmitted in a very incommodious form from the Vice Admiralty courts. *Generous*, 2 Dods. 322.

## REVERSION AND REVERSIONER.

A reversion after an estate for life, is assets for the payment of specialty debts, and immediately saleable. *Tyndale* v. *Warre*, 1 Jac. 212.

An estate sold in the Master's office, may be purchased by the reversioner. *Williams* v. *Atterborough*, 1 Turn. 76.

A deed is indispensably necessary to pass the reversion of a tenancy from year to year. *Bromley* v. *Wade*, M'Clel. 664.

Pulling down an old party wall, and building one longer and higher, the substituted wall encroaching but the breadth of half a brick, is yet, in point of law, an injury of such a permanent nature as to give a right of action to the reversioner. *Harding* v. *Harrison*, 5 Law J. K.B. 249.

*Quære*, Whether, in action for an injury to the reversionary interest of the plaintiff, a tenancy can be proved orally, where it appears that the premises are in the possession of a tenant who holds them under a written agreement which is not produced. *Strother* v. *Barr*, 6 Law J. C.P. 245, s. c. 5 Bing. 136, s. c. 2 M. & P. 207.

## REVIEW.

Principles on which a commission of review is granted or refused. *Dew* v. *Clark*, 6 Law J. Chanc. 180.

## REVIVOR, BILL OF.

[See Practice, in Equity.]

## RIGHT, WRIT OF.

The statute 24 Geo. 2. c. 48, s. 3, enacts, that in a writ of right the demandant shall adjourn the tenant's essoign to the *third* return. Therefore, where, in such an action, the demandant adjourned the essoign to the *second* instead of the *third* return, and a rule was entered with the clerk of the essoigns, that, unless the demandant adjourned it to the *third* return, a *non pros.* would be entered by the tenant; and a *ne recipiatur* was afterwards entered, and judgment of *non pros.* signed by the latter; and a writ of *grand cape* was issued by the demandant after the time of signing judgment: The Court held it irregular, and ordered it to be set aside. *Rawlin*,

*dem.; Bowly, ten.*, 6 Law J. C.P. 1, s.c. 1 M. & P. 2.

After an amendment had been made under a judge's order, the Court discharged the order, upon the ground that the amendment was too material to be sanctioned in a writ of right. *Tooth* v. *Boddington*, 1 Bing. 208, s. c. 8 B. Mo. 42.

A writ of summons may be made conformable to the writ of entry, although five returns have elapsed from the teste of the former writ. *Anon.* 5 Law J. C.P. 2.

The Prothonotary may allow costs on an interlocutory proceeding in a real action; for instance, a writ of entry. *Denman* v. *Bull*, 3 Law J. C.P. 53, s. c. 2 Bing. 387.

The Court will not grant a trial at bar in a writ of right, although the cause embraces questions as to value and difficulty, unless the specific difficulties be presented to them at the time of the application. *Angell* v. *Angell*, 4 Law J. C.P. 116, s. c. 3 Bing. 327.

The Court will not suffer a writ of right to be tried in an issuable term, in the absence of an affidavit, stating special circumstances. *Tooth* v. *Bagwell*, 2 C. & P. 187.

To the precept for summoning four knights to elect a grand assize in a writ of right, the sheriff returned that he had summoned four lawful knights of his county; to wit, E P, esq., D S, esq., S H, esq., and T A, esq.: Held, that such return was not traversable, although it was objected that they were not lawful knights; they may be challenged before they are sworn, and such challenge may be demurred to after it is entered on the record. *Angell* v. *Angell*, 4 Law J. C.P. 109, s. c. 3 Bing. 393, s. c. 2 C. & P. 187.

Where, in a writ of right, one of the knights, who had been duly summoned, was sworn by his medical adviser to be so ill that he could not attend, and that it was not likely he could do so for some time, the Court ordered his name to be discharged from the panel, and that another *venire* should be issued, commanding the sheriff to summon a new knight in his stead, and a *habeas corpora* granted to compel the attendance of the three other knights and twelve recognitors, as forming the grand assize. *Tooth* v. *Bagwell*, 4 Law J. C.P. 83, s. c. 3 Bing. 373, s. c. 2 C. & P. 187.

Although in a writ of right, the tenant tender the demi-mark before trial, he must begin by proving his own title; and cannot first call on the demandant to shew the seisin of his ancestor.

On a writ of right, the demi-mark may be tendered, either at the joining of the mise, or at the swearing of the grand assize; and if it has been done at the former, it is too late at the time of trial for the demandant to take the objection. *Tooth* v. *Bagwell*, 4 Law J. C.P. 174, s. c. 2 C. & P. 271.

Writ of entry sur abatement of the six messuages, six mills, &c. Plea, that R S devised the said messuages, mills, &c., and parcel of the land, to T, who devised them to S. wife of R D C, who levied a fine to the tenant. The plea concluded with a verification, and a prayer of the messuages, &c., and land in the count. The fine set out in the plea described the premises as four messuages, one cloth mill, &c.; and the statement of the fine ended with a *prout patet per recordum:*

Held, that the plea was not double;

That the prayer of judgment for the messuages and land in the count did not vitiate the plea, notwithstanding the commencement of the plea applied only to the messuages and parcel of the land;

That it was not necessary for the plea to conclude with a *prout patet*, that allegation being introduced before the conclusion; and

That the premises in the fine were sufficiently identified with those in the introductory part of the plea. *Rowles* v. *Lusty*, 6 Law J. C.P. 39, s. c. 4 Bing. 428, s. c. 1 M. & P. 102.

## RIOT AND RIOT ACT.

An information lies against all persons who even countenance a riot. *Rex* v. *Hunt*, 1 Ken. 108.

A plaintiff, who has obtained a verdict in an action on the Riot Act, 1 Geo. 1, c. 5, is entitled to costs. *Witham* v. *Hill*, 2 Ken. 474, s. c. 2 Wils. 91.

## RIVER.

[See BRIDGE, FISHERY, NUISANCE, and WATERCOURSE.]

An embankment had been made across a creek into which the sea flowed, and a road had existed along it so far back that no one could tell whether there had been a public navigation in the creek or not: The Court held, that, in favour of existing rights, they would presume, that the navigation (if there ever had been any) had been legally extinguished, which, they said, might happen in four ways—by act of parliament; by a writ of *ad quod damnum*, and inquisition thereon; by the commissioners of sewers; or, by natural causes, as the receding of the sea, or the accumulation of silt, &c. *Rex* v. *Montague*, 4 Law J. K.B. 21, s. c. 4 B. & C. 598, s. c. 6 D. & R. 616.

*Semble*, That the trustees of a river which has been made navigable by act of parliament, are not to be considered as occupiers of the soil of that river, unless it has been specifically vested in them by that act. *Rex* v. *the Trustees of the river Weaver*, 5 Law J. M.C. 102, s. c. 7 B. & C. 70.

## ROBBERY.

To obtain a man's money by intimidating him with a threat of an accusation of an unnatural crime, is robbery, whether the prosecutor be guilty of the crime or not. *Rex* v. *Gardner*, 1 C. & P. 479. [Littledale]

In order to render a party guilty of highway robbery, the force used must be either before or at the time of the taking, and must be of such a nature as to shew that it was intended to overpower the party robbed, and prevent his resisting, and not merely to obtain possession of the property stolen. *Rex* v. *Gnosil*, 1 C. & P. 304. [Garrow]

If a gang of poachers attack a gamekeeper and leave him senseless on the ground, and one of them return and steal his money, &c., that one only can be convicted of the robbery, as it was not in pur-

suance of any common intent. *Rex* v. *Hawkins*, 3 C. & P. 392. [Park]

A had set wires in which game was caught; B, a gamekeeper, found them, and took the game and wires for the use of the lord of the manor; A demanded them with menaces, and B gave them up: The jury found that A acted under a *bona fide* impression that the game and wires were his property: Held, no robbery. *Rex* v. *Hall*, 3 C. & P. 409. [B. Vaughan]

A stick held to be an "offensive weapon within the statute 7 Geo 2, c. 21," though not of extraordinary size, and though it might in general be used as a walking-stick. *Rex* v. *Johnson*, 1 R. & R. C.C.R. 492.

[See now, 4 Geo. 4, c. 54, s. 5, which repeals the former statute, and does not require that the assault should have been made with any weapon. 2 Law J. Stat. 110.]

Where a man was in waiting on the outside of a house for the purpose of receiving stolen goods from his confederate, he was holden to be a principal. *Rex* v. *Owen*, 1 R. & M. C.C.R. 96.

## ROGATIO TESTIUM.

[See WILL.]

## SALE.

[See VENDOR AND PURCHASER.]

## SALE, BILL OF.

A executes to B a bill of sale, dated the 11th of May, by which, in consideration of 350*l.*, he grants all his goods, chattels and effects to B; and in it there are, a clause stating that symbolical possession had been delivered, and a proviso, that the instrument shall be void, if A pays the 350*l.* to B on or before the 29th of September following: A remains in the visible possession of the property till his death, on the 30th of September: Held, that the bill of sale was void as against the creditors of A. —— v. *Cramphorne*, 3 Law J. Chanc. 223, s. c. 6 Law J. Chanc. 91.

## SALVAGE.

A rescue from mutineers, does not subject the ship to salvage. *Governor Raffles*, 2 Dods. 14.

Salvage is not payable to a king's ship for rescuing a convict vessel from the possession of the convicts and mutinous soldiers on board. *Francis and Eliza*, 2 Dods. 115.

A vessel which was the property of an allied sovereign, re-captured from the enemy, was restored free from salvage and expense. *Alexander*, 2 Dods. 37.

Stipulation by treaty, "that free ships should make free goods," does not warrant such a certain conclusion, "that enemies' ships should make enemies' goods," as to induce the Court to decree salvage for the re-capture of property, otherwise neutral, on board British ships. *Cygnet*, 2 Dods. 299.

Where a British vessel was captured by an American privateer, and re-captured by the former, on giving or undertaking to pay a certain sum of money, the Court ordered salvage to be given to the master of the ship. *London*, 2 Dods. 74.

Although the enemy had given salvage, yet the Court of Admiralty gave the crew a remuneration, for their exertions in bringing home the vessel and cargo. *Sir Peter*, 2 Dods. 73.

Where part of a crew belonging to a vessel, go on board a ship found in distress, and bring her into harbour, they have no exclusive claim to the salvage due for her preservation; and therefore the other part of the crew, which remained in their own vessel, if equally ready to go, are entitled to the same reward as if they had actually gone. *Baltimore*, 2 Dods. 122.

Definition of a saloor, as distinguishable from the crew of a vessel. *Neptune*, 1 Hag. 236.

The notion that salvors impair their title to remuneration by quitting the ship, is ill-founded. *Eleanora Charlotta*, 1 Hag. 156.

By the law of England, king's ships are entitled to a salvage remuneration for services rendered to merchant vessels in distress. *Ann*, 1 Hag. 150.

The East India Company are not exempt from the payment of salvage to a ship in their employ, for services rendered to a ship belonging to them. *Waterloo, Birch*, 2 Dods. 433.

The Court of Admiralty has no power of remunerating the mere preservation of life. *Aid*, 1 Hag. 83.

Principle of remuneration in salvage cases. *Mary Ann*, 1 Hag. 158.

In a case which is not precisely a case of derelict, but is as nearly so as possible, the Court will give as large a remuneration as it would do if it had been a case of derelict. *Elliotta*, 2 Dods. 75.

Additional remuneration allowed for effective salvage services by a steam-boat. *Raikes*, 1 Hag. 246.

The act 1 & 2 Geo. 4, c. 75, was made for the benefit of salvors alone, and therefore the words "other reasonable charges and expenses," in s. 38, are limited to expenses directly arising upon the property necessary for the payment of the salvage, and not to all acts of salvage or services rendered to the cargo *Jonge Nicolas*, 1 Hag. 201.

Decree, under 1 & 2 Geo. 4, c. 75, s. 38, to sell so much of the cargo of a vessel, duty free, as would suffice to defray the proportion of a sum of 100*l.* to be paid to the reeve of a lord of a manor, (who had taken possession of a wreck stranded within the manor, and left dry at low water, and had deposited the cargo in his own warehouse, under the control of the officers of the Customs and Excise,) and the expenses on all sides chargeable on the cargo: the said expenses being referred to the register and merchants to report thereon.

A reference to the registrar and merchants for a further report of the expenses of sale, and other charges and expenses, incurred subsequent to the first report, directed by the surrogate and not objected to. *Augusta* or *Eugénie*, 1 Hag. 21.

## SAMPLE.

[See CONTRACT.]

## SAVING BANK.

A saving bank had been established by the defendant, consisting of 130 members, each of whom paid a weekly subscription. The deposits were weekly disposed of by way of lottery. The defendant absconded after receiving from the subscribers their deposits. Held, not to be "an agency" or "keeping for safe custody," within the 52 Geo. 3, c. 63. The indictment charged the prisoner with embezzling the total amount paid in by the prosecutrix, whereas it appeared that she never had more than one weekly payment in her hands at a time: Held, a fatal variance. *Box* v. *Mason*, 1 D. & R. N.P.C. 22.

## SCHEDULE.

[See INSOLVENT, and PERJURY.]

Where a schedule written on paper was returned, with a commission of partition, the plaintiff's clerk in court was allowed to engross it on parchment, and to file the engrossment with the return. *Jones* v. *Totty*, 2 S. & S. 219.

## SCHOOL-MASTER.

A child at school, for whom payment had been made quarterly, was sent home for illness four days after the commencement of a quarter, and did not return: Held, that the master was entitled to a whole quarter's schooling, although there was no express contract for a quarter's notice or a quarter's pay, and although the school was a day-school, at which the child was the only boarder. *Collins* v. *Price*, 6 Law J. C.P. 244, s. c. 5 Bing. 132.

## SCIRE FACIAS.

[See BAIL.]

Where an elegit is not awarded within a year and a day after judgment has been obtained, a *scire facias* is necessary. *Rutland* v. *Newnham*, 2 Chit. 384.

A *scire facias* cannot be excepted to, in the absence of the summons which contains the irregularities complained of. *Moco* v. *Whiting*, 1 Ken. 373.

In an action of debt on bond conditioned for the performance of covenants, and payment of costs in Chancery, the defendant, after suffering judgment by default, filed a bill for an injunction: Held, that although the plaintiffs delayed executing a writ of inquiry more than a year after interlocutory judgment was signed, it was not necessary to revive such judgment by *scire facias* before execution, as the defendant, by filing the injunction, had endeavoured to occasion delay to the plaintiff. *Powis* v. *Powis*, 6 B. Mo. 517.

Where a Sunday is an intermediate day on a rule to appear to a *scire facias quare executionem non*, it is not to be reckoned as one of the four days which the plaintiff in error is entitled to have. *Goodwin* v. *Lugar*, 6 M. & S. 133.

To a writ of *scire facias*, against terre-tenants, the parties sued cannot plead in abatement, that another was terre-tenant. *Hall* v. *Woodcock*, 2 Ken. 19, s. c. 1 Burr. 359.

A declaration in *scire facias* on a recognizance of bail, by assignees of the original plaintiff become bankrupt, only stated their having been chosen assignees, and that *on behalf of plaintiff as assignees aforesaid &c.*:—On demurrer it was holden, that having pleaded over, the defendants could not avail themselves of the objection that no title in the plaintiff's assignment was shewn. But if the declaration had been demurred to specially, it would have been bad. *Fletcher* v. *Pogson*, 3 B. & C. 192, s. c. 5 D. & R. 1.

To a *scire facias* on a judgment, the Court will not suffer the defendant to plead—1st, payment; 2d, that the judgment was fraudulent; and, lastly, that the judgment was on a warrant of attorney fraudulently obtained; since he must elect which plea he will avail himself of. *Shaw* v. *Alvanley*, 2 Bing. 325, s. c. 9 B. Mo. 694.

To a *scire facias*, on a forfeited recognizance for a breach of the peace, the defendant may plead he has not been guilty of the assaults. But if the evidence proves that he has committed them, verdict will be given for the Crown. *Rex* v. *Wiblin*, 2 C. & P. 10. [Abbott]

## SEA SHORE.

A commission issued out of Chancery, to inquire whether certain lands on the sea shore in the defendant's manors of North Cotes, in the county of Lincoln, were the property of the Crown. The inquisition found, that 453 acres of land were in times past covered with the sea, but are now, and have been for several years past, not covered by the sea except at high tides. The plea was, that this land, from time immemorial, by the imperceptible accretion of sand and soil, being gradually in process of time deposited by the flux and reflux of the waves of the sea against the extremity of the demesne lands of the manor, had settled and become parcel of the manor: upon which issue was taken. The evidence was, that at the end of a month no increase could be perceived, but that in the course of 26 or 27 years, according to one witness, the land had increased, on an average, about five yards in each year; and had, according to another witness, gathered a quarter of a mile in breadth in the course of 55 or 56 years: The Court held, that this evidence supported the plea, and the defendant had a verdict. *Rex* v. *Lord Yarborough*, 2 Law J. K.B. 215, s. c. 3 B &. C. 91, s. c. 4 D. & R. 693.

By deed of lease and release in 1773, the lord of the manor bargained and sold to A all those sea-grounds, oyster-layings, shores and fisheries, called &c., to extend from the south at low-water mark, and to the north at high-water mark, about 800 acres, with liberty to A and his heirs for ever to fish, dredge, and lay oysters thereon, and carry away the same; saving to the grantor and his heirs all fish royal, and all wrecks of the sea, *flotsam, jetsam and lagan*, within the said manors, and all

other manorial rights. After the making of the deed, the sea had imperceptibly and gradually encroached upon the land, and consequently the high and low-water mark had varied in the same degree: Held, that so much of the soil of the shore, as from time to time lay between high and low-water mark, passed to the grantee. *Scratton* v. *Brown*, 4 B. & C. 485, s. c. 6 D. & R. 536.

Where the sea shore is encroaching, the owner of one part of the land may protect himself by raising a sufficient defence, though the effect of that may be to render it more necessary for his neighbour to do the same by reason of its increasing the force of the water in that direction. *Rex* v. *the Commissioners of Sewers for Bognor*, 6 Law J. K.B. 338.

## SEA WALLS.

[See CORPORATION.]

## SEAS.

[See NAVIGATION LAWS.]

In the time of peace, the right of visitation and search on the high seas does not exist. *Le Louis*, 2 Dods. 243.

## SEDUCTION.

An action for seduction cannot be supported, unless the daughter be the father's servant; although he receive part of her wages, and she is under age, yet if she be not his servant, he cannot maintain the action. *Carr* v. *Clarke*, 2 Chit. 260.

It is no legal objection to an action for the seduction of a female servant, that she is a married woman. *Harper* v. *Lufkin*, 6 Law J. K.B. 23, s. c. 7 B. & C. 387, s. c. 1 M. & R. 166.

In an action for seducing the plaintiff's niece and servant, proof that she occasionally assisted in the household work is sufficient to constitute the relation of master and servant, and is not rebutted by the fact of her having, when of age, 500*l.* which is applicable to her support during her minority: Held also, that the proof of loss of service was established, by shewing, that, after the girl's abandonment, she was in such a state of mind that she could not be left, from an apprehension that she might injure her person. *Manvell* v. *Thomson*, 2 C. & P. 363. [Abbott]

In an action of seduction, witnesses cannot be examined on the part of the plaintiff as to the general good character of the daughter on the point of modesty, except in answer to evidence advanced on the other side, impeaching her chastity. *Bate* v. *Hill*, 1 C. & P. 100. [Park]

In an action for seducing the plaintiff's daughter, three persons swore that they had had criminal connexion with her, and the jury found a verdict for the plaintiff for 1*s.* only,—the Court refused to grant a new trial, although the testimony of those persons was contradicted by affidavit. *Simpson* v. *Dickens*, 5 Law J. C.P. 109.

## SEQUESTRATION AND SEQUESTRATOR.

The Court will grant a sequestration against a party in custody, for a contempt in not producing papers. *Trigg* v. *Trigg*, 1 S. & S. 274: s. p. *Detillin* v. *Gale*, 1 S. & S. 275, n.

A party, by refusing to put in his examination to interrogatories before the Master, is liable to a sequestration. *Lupton* v. *Hescott*, 1 S. & S. 274.

To ground a sequestration, the warden's certificate of a prisoner's being in his custody for contempt for non-payment of taxed costs, is sufficient even in the absence of any affidavit of demand and refusal to pay. *Phillips* v. *Stevenson*, 11 Price, 473.

A promissory note, given as security for money had and received, is sufficient to support a sequestration in Scotland, though it be on an improper stamp.

Where, after a sequestration in Scotland, a commission of bankruptcy issued upon an act of bankruptcy committed prior to the sequestration,—it was holden, that the sequestration had the priority. *Ex parte Geddes*, 1 G. & J. 414.

A trader residing, and carrying on his trade, in Scotland, contracted a debt in England. He was discharged from all his debts, by a sequestration issued in Scotland, under 54 Geo. 3, c. 137: The Court held, that he was discharged as well from the debts contracted in England, as from those contracted in Scotland. *Sidaway* v. *Hay*, 2 Law J. K.B. 215, s. c. 3 B. & C. 12, s c. 4 D. & R. 658.

A defendant being in the custody of the warden of the Fleet, under process from the Court of Common Pleas, and detained upon an attachment from the Court of Chancery, must, previous to a sequestration, be brought up by *habeas corpus* to the bar of the latter court, and turned over to the warden of the Fleet. *Const* v. *Barr*, 2 S. & S. 542.

A writ of sequestration need not be published before the *levari facias*, on which it has issued, is returnable.

It is not necessary that a copy of such writ, for the purpose of publication, should be fixed upon the church door, if that is not the ordinary mode of publication in the diocese where it has issued. *Bennett* v. *Apperley*, 5 Law J. K.B. 276, s. c. 6 B. & C. 630.

The Court has no jurisdiction to order, upon motion, a person not a party to the cause, to pay into court the arrears of an annuity granted by him to a defendant, against whom a sequestration has issued for want of a sufficient answer, unless the grantee has, by his conduct, waived the objection to the jurisdiction. But he may, notwithstanding, and without applying for the leave of the Court, obtain from the grantee a release of the annuity. *Johnson* v. *Chippindall*, 2 Sim. 55.

Persons who are sequestrators, under the authority of the Court of Chancery, but have no interest in the premises, cannot take an attornment to themselves as sequestrators. *Cornish* v. *Searell*, 6 Law J. K.B. 255, s. c. 8 B. & C. 471.

A sequestrator of tithes during a vacancy is subject to the jurisdiction of the Court of Chancery.

If he is himself an occupier, he must account for the fair value. *Birch* v. *Bygrave*, 6 Mad. 158.

It is not necessary that the examination of a sequestrator, in the Master's office, should be signed by counsel. *Keene* v. *Price*, 1 S. & S. 98.

## SESSIONS.

(A) In general.
(B) Jurisdiction.
(C) Appeals.

### (A) In general.

Although by the statute 54 Geo. 3, c. 84, the Michaelmas Quarter Sessions are directed to be held in the first week after the 11th of October, yet, it seems, as that act is merely directory, that the time of holding the Quarter Sessions need not be in strict conformity with its provisions. *Rex v. the Justices of Leicester*, 5 Law J. M.C. 95, s. c. 7 B. & C. 6.

On motion for a *certiorari* to remove an order made at a general quarter sessions upon the surveyors of the highways, the Court quashed the order, on the ground that it should have been made at a special sessions. *Rex v. the Justices of Derbyshire*, 2 Ken. 299.

If an order of sessions, under a turnpike act, for entering upon private soil to dig for materials to repair, &c. does not shew that the provisions of the statute have in every respect been complied with, it will be quashed. *Rex v. Manning*, 2 Ken. 561, s. c. 2 Burr. 1122.

If the sessions only submits one question to the Court, it will only answer that question, and will not consider any other questions. *Rex v. Guildford*, 2 Chit. 284.

But, if a case be ordered by the Court of Quarter Sessions for the opinion of the Court above; and it appear, that, if the vote of an interested magistrate were withdrawn, the majority would have been against granting the case, the Court above will not receive the case. *Rex v. the Justices of Monmouthshire*, 6 Law J. M.C. 87, s. c. 8 B. & C. 137.

The Court of King's Bench will not enter into a discussion of the facts upon which the sessions have arrived at a conclusion upon a question of mere fact. And though they should think the sessions have arrived at a wrong conclusion upon the question of fact, they will confirm the sessions order. *Rex v. St. Columb Minor*, 6 Law J. M.C. 18.

Where the Court of Quarter Sessions, after a case has been fully heard, both upon the law and upon the merits, have given their decision, but have afterwards, on the solicitation of counsel, been induced to permit a special case to be submitted to the Court above, but it is discovered that the writ of *certiorari* has been taken away, the Court of King's Bench will not issue a mandamus to hear and determine upon the merits.

But *quære*, whether such a mandamus would not be granted, should the case appear to have been but partially heard, and decided under an arrangement that it should be put into the form of a special case. *Rex v. the Justices of Worcestershire*, 5 Law J. M.C. 64.

The Court will not issue a peremptory mandamus to enrol an order of sessions, in respect to which there is an allegation of fraud; but will enjoin the inferior court to hear and determine upon the merits of the question. *Rex v. the Justices of Suffolk*, 5 Law J. M.C. 27, s. c. 6 B. & C. 110, s. c. 9 D. & R. 111.

### (B) Jurisdiction.

A Court of Quarter Sessions has no jurisdiction over an indictment for gaming. *Rex v. Frederick*, 2 Ken. 161.

The Sessions have no jurisdiction over an indictment for perjury at common law; therefore such an indictment removed from the sessions by *certiorari* into the King's Bench, cannot be tried by a judge at Nisi Prius. *Rex v. Haynes*, 1 R. & M. 298. [Gaselee]

### (C) Appeals.

The 10th of Anne, after incorporating the city of Norwich, and the hamlets of the same, empowered guardians to ascertain what sum would be needful for the maintenance and employment of the poor thereof, and what proportion each parish, town or hamlet should pay, and to certify the same to justices, who were to issue their warrants to compel the churchwardens and overseers of the poor of every parish to raise and assess the amount on the respective inhabitants, and all and every the occupiers of the lands, houses, &c. in the respective parishes, &c. And it was further provided, that if any person or persons, or parish, &c. should find him, her, or themselves, to be unequally taxed or assessed, he, she, or they, or such parish, might appeal at the sessions held next after such assessment made and demanded. The guardians under this act certified to the justices, that a certain sum was needful to be raised for the maintenance of, &c. and required that that sum might be assessed and levied on every parish, among others the hamlet of L; whereupon the justices issued their warrant to the collectors for the said hamlet to assess, &c. which they accordingly did. The hamlet of L, finding itself unequally assessed, appealed to the next sessions in the name of the churchwardens and overseers, which the sessions refused to hear, &c.: Held, under the clause in the act, "that if any person or persons, or parish, &c. shall find him, her, or themselves to be unequally assessed, he, she, or they, or such parish, may appeal,"—that it gives an appeal not only to any individual who may be aggrieved, but also to any parish, precinct, or place; therefore the churchwardens and overseers might appeal, by considering the certificate and warrant thereon, as in law an assessment made and demanded upon the parish. *Rex v. the Justices of Norwich*, 3 D. & R. 42.

Where the period allowed for an appeal against an order of filiation has elapsed, it cannot be enforced under 18 Eliz. c. 3, but the justices of the peace may proceed under the 49 Geo. 3, c. 68, s. 3, by commitment for three months. *Ex parte Addis*, 2 D. & R. 167, s. c. 1 B. & C. 87.

Where the publication of a poor-rate was only on the day preceding the sessions: Held, that an appeal against the rate need not be entered until the next sessions but one after the publication of such rate. *Rex v. the Inhabitants of Hendon*, 2 D. & R. 249.

The Court will not interfere to regulate the practice of the Court of Quarter Sessions, unless shewn to be extremely wrong or unjust; therefore, where an appellant parish gave notice, before Michaelmas Sessions, that they would at the sessions, enter and respite, and try their appeal with effect at the following sessions, and in the meantime a negotiation had taken place with the respondents, as to the set-

tlement of the pauper, but without any determination, it was held to be necessary to give a fresh notice of appeal for the following sessions, to entitle the appellants to be heard. *Rex* v. *the Justices of Essex*, 2 Chit. 385.

The respite of an appeal from one sessions to another, because the bench are divided in opinion on the merits, does not render a new notice of trial essential. *Rex* v. *the Justices of Buckinghamshire*, 6 D. & R. 142.

*Semble*—That the practice of entering an appeal against a rate, and adjourning it to the next sessions, as a matter of course, without notice to the other party, is not in strict conformity with the statute 17 Geo. 2, c. 38, s. 4.

But the Court of King's Bench will not disturb the practice; or, at least, will not allow a party to be precluded from having his appeal heard after he has acted in conformity with the practice. *Rex* v. *the Justices of Wilts*, 6 Law J. M.C. 97, s. c. 8 B. & C. 380, s. c. 2 M. & R. 401.

If the justices at the sessions, being equally divided in opinion, quash the proceedings instead of adjourning them, the Court of King's Bench will not grant a mandamus to compel them to re-hear the appeal, although their judgment might be erroneous. *Rex* v. *the Justices of Monmouthshire*, 4 B. & C. 844, s. c. 7 D. & R. 334.

The Court will not grant a mandamus to justices to re-hear an appeal, on the ground that their decision proceeded from a mistaken view of their jurisdiction. *Rex* v. *the Justices of Farringdon*, 4 D. & R. 735.

Where the practice of the sessions required an appellant to do that which he thought he had no right to comply with,—the Court refused a mandamus to the sessions, directing them to re-hear the appeal, on the ground that they had no authority to interfere with the practice of the sessions. *Rex* v. *the Justices of Suffolk*, 6 M. & S. 57.

A mandamus not grantable to dismiss an appeal. *Rex* v. *the Justices of Wilts*, 2 Chit. 257.

An appeal against a poor-rate was entered at the Midsummer sessions, and after being respited until the Michaelmas sessions, and then until the Epiphany sessions, the respondents gave notice that they would not oppose the appeal, which was accordingly allowed: Held, that the appellant was entitled to costs, under the 17 Geo. 2, c. 38, s. 4. *Rex* v. *Cawston*, 4 D. & R. 445.

If the sessions quash an appeal generally, the appellant, on the trial of another appeal, may shew the distinct ground upon which the former order was quashed. *Rex* v. *the Inhabitants of Wheelock*, 5 B. & C. 511.

Objections to the form or mode of rating cannot be made by a party proceeded against in an action of debt, if such party might have appealed. *Cortis* v. *Kent Waterworks*, 5 Law J. M.C. 106, s. c. 7 B. & C. 316.

On the hearing of an appeal against a poor rate, the sessions have no jurisdiction to quash the rate for a defect appearing on the face of the rate itself, unless that defect be specified in the notice as a cause of appeal. *Rex* v. *Bromyard*, 6 Law J. M.C. 100, s. c. 8 B. & C. 240, s. c. 2 M. & P. 230.

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## SET-OFF.

(A) WHERE ALLOWED, IN GENERAL.
(B) PARTNERS.
(C) AGENTS, INSURANCE BROKERS, AND UNDERWRITERS.
(D) COSTS AND JUDGMENTS.
(E) PLEADINGS AND EVIDENCE.

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### (A) WHERE ALLOWED, IN GENERAL.

A banker, who has advanced money to the testator, by discounting his note for 1000*l.* renewable at the end of three months, and debiting the testator with the discount, cannot, in an action brought by the executor, set off such note before it is due, upon allowing a rebate of interest; but he may set off a bill accepted by testator, payable at his banking-house, and discounted by him, although the testator died before the bill became due, the banker not having received intelligence of the testator's death until the day the bill became due, and after he had so written it off. *Rogerson* v. *Ladbrooke*, 1 Law J. C.P. 6, s. c. 1 Bing. 93, s. c. 7 B. Mo. 412.

A person having obtained several very valuable articles without paying for them, the tradesmen, on hearing that he was reputed to be a swindler, went to his house, gained admission, and broke open an inner door, and took away part of the goods. He brought an action of trespass, the jury gave him a verdict, and the Court refused to reduce the damages, by allowing the tradesmen to set off against it the amount of the debt due to them. *Hawkins* v. *Bayne*, 1 Law J. K.B. 167.

A, an auctioneer, sued B for the price of goods sold by him as such: Held, that B might set off a debt due to him from the principal vendor. *Jarvis* v. *Chapple*, 2 Chit. 387.

Where the plaintiff obtained a verdict, and sued out execution against the goods of the defendant, the Court would not allow the sum levied to be impounded in the hands of the sheriff, although the defendant had commenced an action against the plaintiff as acceptor of a bill of exchange for a larger sum, and which bill was then in the defendant's possession, as the sum levied and bill could not be considered as mutual debts, so as to form the subject matter of a set-off. *Williams* v. *Cooke*, 3 Law J. C.P. 143, s. c. 10 B. Mo. 321.

If a boy who is about to be apprenticed, go to his master on trial, and stay several months without entering into any agreement, assisting his master in his business, such master, in an action by the boy's father for money lent, is not entitled to charge for board and lodging, which therefore is not the subject of a set-off. *Wilkins* v. *Wells*, 2 C. & P. 231. [Gurney]

A joint creditor by simple contract may proceed against a clear residue of the assets of a deceased partner, the survivor being insolvent; and may set off against a debt to the deceased, from the survivor and himself as his surety, a debt to the survivor from the deceased, which was agreed to be applied in liquidation of the debt secured. *Cheetham* v. *Crook*, 1 M'Clel. & Y. 307.

A being indebted to B in a sum of 1000*l.* executed a bond to him for securing that amount and interest. B subsequently died, having made his will, and ap-

pointed C and D his executors and residuary legatees: an apportionment of B's residuary estate being made, the bond is allotted to C as part of his share: C being the steward of A, and having a running account with him, enters the bond in that account. C dies intestate, leaving a widow, who takes out administration to his estate, and also administration *de bonis non* to B; and, as such last-mentioned administratrix, she files a bill as a specialty creditor against the representatives of A: Held, that, in this suit, the representatives of A could not make a set-off against the demand, in respect of sums which they alleged to have been omitted, or improperly charged in the account of C, but must file a cross bill.

There can be no set-off, either at law or in equity, where either of the debts is a debt *in auter droit*. *Gale* v. *Luttrell*, 1 Y. & J. 180.

A was employed as storekeeper by B and C, who were joint adventurers in a mine, and he was authorized to draw bills on B for money laid out on account of the mining company; the bills were discounted by a banker, and the payment of them was guaranteed to him by B and C. B having been arrested, A, in order to provide funds to procure B's discharge, drew on B a bill, purporting to be on account of the mining company, the banker discounted the bill, and paid the amount to B, C was afterwards compelled to take up the same in consequence of his guarantie. In an action brought by A against B and C for his salary, it was held, that C could not set-off the amount of the bill. *Jones* v. *Fleming*, 7 B. & C. 217.

(B) PARTNERS.

To constitute a set-off between partners, the balance must be finally struck. Therefore, where in an action for the use and occupation of stables, it appeared that the plaintiff and defendant had formerly been connected in a stage-coach concern, and that weekly accounts had been delivered by the plaintiff to the defendant, which disclosed that the plaintiff received the profits for the purpose of dividing them, and which stated the sum due to the defendant for the week, were holden not to be evidence of a matter of set-off. *Fromont* v. *Coupland*, 1 C. & P. 275. [Best]

Money, the property of two partners, misapplied by a person at the instance of one of the partners, and with his concurrence, cannot be set off in an action against the two by that person. *Jones* v. *Fleming*, 6 Law J. K.B. 113, s. c. 7 B. & C. 217.

When a man is sued by or on behalf of two partners, he cannot set off an old debt due to him from those two, in conjunction with a third partner, who afterwards retired. *M'Gillivray* v. *Simson*, 5 Law J. K.B. 53, s. c. 9 D. & R. 35.

(C) AGENTS, INSURANCE BROKERS, AND UNDERWRITERS.

In a case where a broker settles a loss with an underwriter, and his name is erased from the policy and adjustment, and the broker within a month is declared a bankrupt, the underwriter cannot set off against the assured a balance due to him from the broker at the time of such adjustment. *Todd* v. *Reed*, 3 Stark. 16. [Abbott]

Where a broker (though known to be such) sells in his own name, with an implied authority from his principal to do so, it seems that the buyer may set off against the price, a demand which he has upon the broker. *Wynen* v. *Brown*, 4 Law J. K.B. 203.

Although an undertaking by a broker, in consideration of the brokerage, to sell goods and pay over the proceeds to his principal, without deducting therefrom the sums of money due to him, is not binding; yet, if he also agrees not to set off a debt due from a prior firm, which by a previous letter the principals had agreed to pay him, they having the funds of that firm, the letter and agreement may be set off against each other. *M'Gillivray* v. *Simson*, 2 C. & P. 320. [Abbott]

B, being indebted to A, gave him money to effect an insurance as a security, A took the insurance in his own name, and soon afterwards died. The executors received the money from the insurance-office, and sued B for the debt, who was not allowed to set off the amount obtained from the insurance-office. *White* v. *Gomperts*, 1 Law J. K.B. 32.

The defendant, an insurance-broker, being sued by the assignees of a bankrupt underwriter, for premiums due to the bankrupt for subscribing certain policies, claimed to set off against this demand a loss that had happened on goods on which the bankrupt had underwritten a policy effected in the name of the defendant: Held, that although the goods were not the property of the defendant, and the insurance was effected by him by order of his principals, yet, as the policy was in the defendant's own name, and he had a lien on it for money due to him from his principals to a greater amount than the set-off claimed, he was entitled to the set-off. *Davies* v. *Wilkinson*, 6 Law J. C.P. 12, s. c. 4 Bing. 573, s. c. 1 M. & P. 502.

(D) COSTS AND JUDGMENTS.

Where there have been two actions between the same parties, the Court of King's Bench will not set off the costs in the one against the costs in the other. *Felton* v. *Easthope*, 1 Law J. K.B. 58.

Where an arbitrator awarded a verdict to be entered for the plaintiff in an action of trespass, brought by him against the defendants, with 40*s.* damages, and found that 100*l.* was owing from the plaintiff to the defendants, for goods sold and delivered, which he directed to be paid within two months after the date of the award, and the plaintiff's costs were taxed on the action brought by him at 102*l.*—the Court would not allow the defendants to set off the sum awarded to them against such costs, the time allowed for the payment of that sum not having expired when the application was made. *Young* v. *Gye*, 3 Law J. C.P. 108, s. c. 10 B. Mo. 198.

In pursuance of a judge's order, the defendant was to go to trial on the terms of paying a certain sum, and the costs incurred up to the date of the order. The plaintiff having proceeded to trial before the costs were paid, and the defendant having recovered a verdict: It was holden, that the payment of the costs was a condition precedent, which ought to be performed before the defendant could have the benefit of the order, and that therefore he could not set off these costs against those afterwards carried against him on the postea. *Aspinall* v. *Stamp*, 4 D. & R. 716, s. c. 3 B. & C. 108.

A person filed a bill in equity which was dis-

missed with costs. He then brought an action for the same cause and obtained a judgment. Subject to the lien of the attorney, the costs in equity may be set off against the judgment. *Harrison* v. *Bainbridge*, 2 Law J. K.B. 171, s. c. 2 B. & C. 800, s. c. 4 D. & R. 363.

Costs of a bill in equity may be set off against a verdict at law, notwithstanding the lien of the attorney for his costs. *Webber* v. *Nicholls*, 5 Law J. C.P. 19, s. c. 4 Bing. 17.

Where an estate was pledged with a solicitor, as security for his costs, and he filed a bill for foreclosure, and the client filed a cross bill, alleging that the costs demanded had been occasioned by negligence and want of skill; a demurrer to the bill was overruled, on the ground of equitable set-off. *Piggott* v. *Williams*, 6 Mad. 95.

A is nonsuited in an action against B, and B has the costs taxed: B, in the mean time, having filed a bill of discovery against A, has been ordered to pay the costs of it; A becomes insolvent. Under these circumstances, a court of equity will not enable B to set off the costs, which he has to receive at law, against the costs of the bill of discovery. *Wright* v. *Mudie*, 1 Law J. Chanc. 136, s. c. 1 S. & S. 266.

A debtor, who is entitled to costs on a suit for the administration of assets, will be compelled to set them off *pro tanto*, against the debt due from him. *Harmer* v. *Harris*, 1 Russ. 155.

A judgment debt due from B and others, in an action of trespass, in which B was chiefly concerned, and bound to indemnify his co-defendants, was set off against a judgment debt due to B from the plaintiff. *Bourne* v. *Bennett*, 4 Bing. 423.

### (E) PLEADINGS AND EVIDENCE.

A set-off must be pleaded to an action of covenant; therefore, where *non est factum* had been pleaded, and a notice of set-off given: Held, that the defendant could not avail himself of it. *Oldershaw* v. *Thompson*, 2 Chit. 388.

A set-off must always be pleaded where there are other pleas besides the general issue: but if the general issue be the only plea, a notice of set-off will suffice. *Webber* v. *Venn*, 2 C. & P. 310, s. c. 1 R. & M. 413. [Abbott]

A defendant cannot avail himself of a cross demand, unless he has pleaded or given notice of set-off. *Forthergill* v. *Jones*, 1 C. & P.133. [Hullock]

A set-off is pleadable to an action on a bond for payment of an annuity. *Collins* v. *Collins*, 2 Ken. 530, s. c. 2 Burr. 820.

A plea of set-off to debt on bond conditioned for replacing stock, cannot be sustained: therefore, where the defendant obtained a verdict on such a plea, the Court ordered judgment to be entered up for the plaintiff. *Gillingham* v. *Wasket*, 13 Price, 434, s. c. M'Clel. 198.

To a declaration for goods sold and delivered, the defendant pleaded, that the goods were sold to him, with the knowledge of the plaintiff, by another person, who was the agent of the plaintiff; and that the plaintiff was not known to the defendant as the proprietor thereof, but that the defendant bought them as the goods of that other person, who was indebted to him, and thereupon he was entitled to set-off according to the form of the statute: The Court held the plea to be good on general demurrer; but they said it would have been bad on special demurrer, for concluding with a set-off according to the form of the statute. *Carr* v. *Hinchcliff*, 4 Law J. K.B. 5, s. c. 4 B. & C. 547, s. c. 7 D. & R. 42.

To an action, of *indebitatus assumpsit*, it is no good plea to say that the plaintiff is indebted to the defendant in more money than the defendant is indebted to the plaintiff. The plea should run in the usual form, that "the plaintiff is indebted to the defendant in so much; which sum exceeds the damages sustained by the plaintiff by reason of the non-performance of the said promises and undertakings." *Clermont* v. *Tullidge*, 6 Law J. K.B. 243.

It is a settled rule, that a sum of money given under an agreement by way of penalty cannot be pleaded as a matter of set-off.

Therefore, in an agreement for the performance of several articles, wherein the parties bound themselves "in the penal sum of 500*l*. to be recoverable as and by way of liquidated damages," it was held, that a plea of set-off, in respect of this 500*l*. alleged to have accrued from a breach of the agreement, was bad, as it was in the nature of a penalty, and not of liquidated damages. *Davis* v. *Penton*, 5 Law J. K.B. 112, s. c. 6 B. & C. 216.

It seems that a man is not bound by an undertaking to waive the benefit of a set-off, if the form of action in which he is sued admits the right of set-off.

Therefore, where a man is sued in assumpsit, and he pleads a set-off, his plea is not answered by a replication, that he agreed to pay ready money; or, that he agreed not to set off a previous debt. *M'Gillivray* v. *Simson*, 5 Law J. K.B. 53, s. c. 9 D. & R. 35.

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## SETTLEMENT, MARRIAGE.

(A) VALIDITY OF.
(B) CONSTRUCTION.

### (A) VALIDITY OF.

By one set of marriage articles, the real estate of an infant, being the intended wife, is settled; by other articles of the same date, the husband settles his estate, creating a charge on it in favour of the wife: though the wife should afterwards defeat her settlement, the estate of the husband remains bound by his settlement.

A settlement of the wife's chattel real, made during her infancy, is binding on her. *Trollope* v. *Lenton*, 2 Law J. Chanc. 3, s. c. 1 S. & S. 477.

Before marriage, a husband executes a bond to trustees, the condition of which binds him to settle the property of the wife on her and her issue, in such manner as the trustees, in their discretion, shall think proper. After the marriage, a settlement is made, by which part of the property is to be applied in payment of his debts, and for his furtherance in life,—another part is settled on the wife for life, remainder to the issue of the marriage, and, in case there should not be any such issue, to the husband absolutely;—and a third part of the property is given to the wife for life, and, after her decease, in case there was no issue of the marriage, as she should appoint: Held, that this settlement was not according to the condition of the bond, and

did not bind the rights of the wife. *Webb* v. *Kelly*, 3 Law J. Chanc. 172.

A voluntary settlement of personal property, made by persons who are not indebted at that time, is good against a subsequent *bonâ fide* vendee. *Jones* v. *Croucher*, 1 S. & S. 315.

A limitation by the settlor in a marriage settlement, in favour of the issue of a second marriage, was holden good against a subsequent purchaser for valuable consideration. *Thomas* v. *Clayton*, 6 M. & S. 67, n.

Where a marriage settlement contained a limitation to brothers, after other limitations to the use of the first and other sons of the settlor in tail male: It was holden not to be valid against a purchaser for valuable consideration. *Johnson* v. *Legard*, 6 M. & S. 60.

Where a deed of marriage settlement is drawn up as between the intended husband and wife and their respective fathers, and the father of the wife secures to the father of the husband a sum of money as the portion of the wife, according to a provision of the deed, but neither he nor his daughter execute the deed, and it is executed only by the intended husband and his father, it is binding upon and as between the parties who execute, and creates efficient rights for the objects of the settlement. *M'Neill* v. *Cahill*, 2 Bligh, 228.

(B) CONSTRUCTION.

[See *White* v. *Kearney*, 6 Law J. Chanc. 22, s. c. 3 Russ. 208.]

In a marriage settlement, reciting that the father of the wife had agreed to make a further provision for his daughter, equal to his younger child or children, he covenanted to give or secure to the trusts of the settlement, as large a share of his property as he should give to any of his other younger children, to take effect on the death of the survivor of himself and his then wife; and that, if he died intestate, or omitted to make the provision before covenanted for, there should be paid to the trustees of the settlement as great a share of his property as any younger child should in that event become entitled to: Held, that those interested under the settlement were entitled to a further provision, equal only to that which any younger child took upon the death of the covenantor, and without reference to advancements made by the covenantor during his life. *Willis* v. *Black*, 2 Law J. Chanc. 131, s. c. 1 S. & S. 525.

By a marriage settlement, the husband assigned to trustees 4000*l.* upon trust, (among other things,) in case the wife died in his lifetime, to transfer and re-assign the money to him, his executors, and administrators, to and for the use of him and any child or children of the marriage: Held, that, upon the death of the wife in the lifetime of the husband, these words give him the fund for life, with remainder to the children of the marriage. *Chambers* v. *Atkyns*, 1 Law J. Chanc. 208, s. c. 1 S. & S. 382.

Where, by a marriage settlement, certain lands (subject to a charge of 1500*l.* secured by a term of one thousand years,) were limited to the use of the husband for life, sans waste, with limitation to two trustees and their heirs during his life, in trust to support contingent remainders; remainder to the use of the wife for life, sans waste, remainder to the children of the marriage; and, for default of such issue, to the right heirs of the survivor of husband and wife in fee: and it was provided, that the husband and wife, during their joint lives, or the life of the survivor, might charge the estate to the extent of 2000*l.*, and that the trustees might sell the lands by the direction and with the approbation of the husband and wife, or survivor of them; and the husband died, and the wife afterwards married a second, and she, with his consent, created a term of one thousand years, and charged the estate with 2000*l.* borrowed by way of annuity, and levied a fine to J G in fee, which, by a deed to lead the uses, was declared to be "upon trust to secure the regular payment of the annuity, and for corroborating and strengthening the said term on the trusts before mentioned:" Held, that this fine did not operate to extinguish the power of the wife to consent to a sale of the estates under the power contained in the original settlement, so as to prevent an exercise of such power of sale by the trustees appointed by that indenture. *Tyrrell* v. *Marsh*, 3 Law J. C.P. 138, s. c. 3 Bing. 31, s. c. 10 B. Mo. 305.

By the settlement on the marriage of A B with C D, portions were to be raised for the younger children of A B by C D, or any future wife, but not to be paid until after the decease of A B, C D, or such future wife, though no estate was given to such future wife; and power was given to A B to appoint the interest of the portions to be raised for the children's maintenance; and, on his default, the same power was given to the trustees, and the maintenance was directed to be paid on the first quarter-day after the decease of the survivor of A B, C D, or such future wife. A B died, leaving his second wife surviving, and by his will, which was not duly attested, directed the maintenance to be raised from the time of his death, and gave other benefits to his eldest son: Held, that the trustees had no power to allow maintenance during the second wife's lifetime, but that the eldest son should be put to his election, as he had other benefits under the will, and was the only party who could be benefited by withholding the maintenance. *Hume* v. *Rundell*, 2 S. & S. 174.

A son, who, when he attained twenty-one, was a younger child, but, by the subsequent death of his elder brother in the lifetime of his parents, became an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions which are directed to vest in younger sons at twenty-one, though not payable till after the death of the parents; there being enough in the settlements by which the portions were provided to shew that the character of younger children was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable. *Windham* v. *Graham*, 1 Russ. 331.

Construction of an ambiguous marriage settlement, as to whether a child takes a vested interest in certain sums upon attaining twenty-one in the lifetime of the mother; or whether the interest is contingent upon the event of the child surviving the mother. *Fitzgerald* v. *Field*, 4 Law J. Chanc. 170, s. c. 1 Russ. 430.

Under a settlement, the husband was tenant for life, remainder to trustees, to preserve, &c., remainder to the wife for life, remainder to trustees, &c., remainder to the children of the mar-

riage, remainder to the survivor of husband and wife in fee; afterwards, there being no issue, husband and wife by lease and release conveyed the lands in fee to a mortgagee, with a covenant to levy a fine *cum ceo, &c.* to enure to the mortgagee during the lives of the mortgagors and the survivor, remainder to the uses, estates, &c. limited by the settlement in favour of the children, &c., to the end that all and every of such uses might be corroborated, &c.; the fine was accordingly levied, and, the mortgage having been paid off, the mortgagee reconveyed the premises to the trustees to hold to the uses of the original settlement: Held, first, that the fine and the deed to lead &c. were to be taken as one assurance, and that the legal effect of the former was limited by the lawful intention of the parties, apparent on the face of the deed, viz. to give merely a charge by way of security to the mortgagee on the parties' own interests, and that the interest of the mortgagee depended on the estoppel, which was extinguished by the reconveyance. Secondly, that if the fine had determined the life estate, the contingent remainders were supported by the remainders to trustees, without an actual entry. Thirdly, that, on the death of the wife without issue, the husband became entitled, in virtue of the original settlement, to the fee, and which he might dispose of by will. *Davies* v. *Bush*, 1 M'Clel. & Y. 58.

A being, under the marriage settlement of her father and mother, tenant in tail in remainder of certain lands, expectant on the failure of male issue of her only brother, there is made on her marriage a settlement containing a covenant, by which, after reciting that it was possible that she might, under and by virtue of the limitations contained in the former settlement, eventually become entitled to a certain estate, or a part of certain lands, it is agreed, that, in case she shall in her lifetime become entitled to any such estate as aforesaid, the same shall be conveyed to the uses and for the trusts therein mentioned; the brother afterwards suffers a recovery, and dies intestate without issue, whereupon the fee-simple of one-fourth part of the lands comprised and referred to in the settlement descends upon her as one of his co-heiresses: Held, that the covenant does not affect the fee-simple so coming to her by descent. *Taylour* v. *Dickenson*, 1 Russ. 521.

By a marriage settlement, an estate is conveyed to trustees to the use of the husband for life; remainder to the wife for life; remainder to the use of all the children of the marriage in tail as tenants in common; remainder, if there should be a failure of issue of the body or bodies of any such child or children, then, as to the part or share, or parts or shares of such children whose issue should so fail, to the use of the remaining and other children of the marriage in tail as tenants in common; and, in case there should be a failure of issue of the bodies of all such children but one, or if there should be but one such child, then to the use of such only remaining or only child, and the heirs of his or her body lawfully issuing, and for default of such issue, remainder to the heirs of the settlor: Held, that cross-remainders were not limited between the children as to the accruing shares. *Edwards* v. *Alliston*, 6 Law J. Chanc. 30.

It is declared by a marriage settlement, that a trustee is to lay out a sum of money, which the husband had agreed to settle, in the purchase of any public stocks or funds, or annuities for the life of the intended wife in his own name, in trust for her, and that he is, during her life, to pay to her the dividends, and other produce of the stock or annuity so to be purchased, to her separate use during her life: Held, that the wife is entitled absolutely to a sum of 3 per cent. stock purchased with the money, and not merely to a life-interest in it. *Smith* v. *King*, 1 Russ. 363.

By a marriage settlement, certain stocks, the property of the lady, are assigned to trustees, upon certain trusts, for the benefit of the intended wife and husband, during their joint lives; and if the wife should survive the husband, having children by him, upon trust for her during her life, and after the death both of her and her husband, upon trust for all her children by her then intended or any future husband, as she should appoint; and, in default of appointment, upon trust for the children of the then intended marriage; and it was provided, that, if the lady should survive her intended husband, and there should be no children of that marriage who should acquire a vested interest in the property, the stocks should be upon trust for her, and assigned to her: the lady having outlived her husband, and there being no child of that marriage who had acquired a vested interest—It was held, that the lady was entitled to the stocks absolutely, without regard to the possibility of there being children of a future marriage. *Hanson* v. *Coal*, 4 Law J. Chanc. 45.

Settlement in trust for the separate use of a married woman for life, but so as not to anticipate, with remainder as she should appoint by will; and in default of appointment, to A.

On the death of her husband, the restraint on anticipation ceases, and therefore she is entitled, with the concurrence of A, to a transfer of the fund. *Barton* v. *Briscoe*, 1 Jac. 603.

By a marriage settlement, stock, the property of the husband, is settled upon the wife for life to her separate use, and, after her death, on the husband, if he should survive her; but, if he should die in her lifetime, then upon trust for such persons as he should by deed or will appoint, and, in default of appointment, to his executors and administrators; the husband died in the wife's lifetime, without exercising his power: Held, that these words did not vest the stock in the executor of the husband, but that it formed, subject to the wife's life-interest therein, part of the husband's residuary estate. *Collier* v. *Squire*, 5 Law J. Chanc. 186.

When lands are given to A for life, remainder to his sons in tail male, &c., remainder to M for life, with other remainders over, and certain powers are annexed to all the life estates, and the uses thus created are subject to a power of revocation; then, if in the exercise of this power of revocation, the limitation to M, and all the limitations subsequent to it are revoked, and new uses to S for life &c. are substituted in their place, the prior limitations to A and his sons remaining undisturbed; and if, in this deed of revocation and new appointment, clauses are contained, giving nearly the same powers of jointuring, &c. to the tenants for life, as were given by the first settlement, and expressed in nearly the same words as the corresponding clauses in that

settlement, and including, expressly by name, A as well as S; such clauses, so expressed, will not give A a double power of jointuring, &c., but will be construed as merely intended to declare the intention of the settlor, that the powers, which were annexed by the first deed to the estates, created by and still subsisting under it, shall continue in full force. *Wigsell* v. *Smith*, 1 Law J. Chanc. 121, s. c. 1 S. & S. 121.

Where a settlement contained a limitation to the use of the first son of A B upon C D his intended wife to be begotten, and for default of such issue, then to the use of the second, &c. severally and successively, &c., and of the several heirs male of their several and respective bodies; and for default of such issue, in case C D should be *enceinte* by C F, to the use of G H until C D should be delivered, in trust for after-born children; and if there should be a son or sons, to the use of such after-born son and sons, severally and successively, &c.; and the heirs male of the body and bodies of such after-born son and sons: Held, that the elder son of A B the settlor, took an estate in tail. *Galley* v. *Barrington*, 2 Bing. 387, s. c. 10 B. Mo. 21.

Under a settlement and recovery, lands were limited to the use of A for life, and after his decease to the use of B, and his heirs, during the life of A, to support contingent remainders; remainder to the use of C for life; remainder to the same B and his heirs, during the life of C, to support contingent remainders; remainder to the first and other sons of C, in tail male; remainder to the use of D for life, and if she should marry, and her husband should survive her, to her husband for his life; and, after the determination of those estates, to the said B and his heirs (without saying, during the life of D), to support and preserve contingent remainders; remainder to the first and other sons of D, in tail; remainder to the use of E for her life, and, if she should marry, and her husband should survive her, to her husband, for his life, and, after the determination of those estates, to the said B and his heirs (without saying, during the life of E), to support contingent remainders; remainder to the first and other sons of E, in tail male: Held, that under the limitation to B and his heirs, after the limitations of estates for life to D and E, the trustee took the fee, and that E took only an equitable estate. *Colmore* v. *Tyndall*, 2 Y. & J. 605.

By the marriage settlement of A, a term of years is limited to trustees, upon trust to raise 16,000*l.* to be paid to all and every, or such one or more, exclusively of the other or others, of the child or children of the marriage, or to all and every, and such one or more, exclusively of the other or others, of the issue, born in the lifetime of A, of any such child or children, in such shares and proportions as A should by deed or will appoint; and, in default of appointment, to the children in equal shares: A, by his will, after devising certain real estates to his first and other sons, in strict settlement, and reciting that he was, by the marriage settlement, authorized to appoint the sum of 16,000*l.* unto all or any one or more of his child or children, and grandchild or grandchildren, appointed 4000*l.* to each of his children, other than the child who should, under the preceding limitations, be entitled, as tenant for life, to the rents and profits of the devised premises: and as to the residue, if any, of the 16,000*l.*, he appointed the same unto such grandchild of his body as should, by the regular course of events, become entitled as tenant in tail in possession of the devised premises: A died, leaving three sons, the eldest of whom was tenant for life of the devised estates, and no grandchild: Held, that, inasmuch as there might have been a grandchild born in A's lifetime, and as such grandchild would have been among the objects of the power, the appointment of the residue of the 16,000*l.* to a grandchild, who, in the events that had happened, was not an object of the power, did not raise a case of election against the children, and that they were entitled to have the appointment of that residue declared invalid, and yet to retain all the benefits given them by the will. *Bulmer* v. *Hoare*, 3 Law J. Chanc. 227.

Agreed, in marriage articles, that a portion shall be paid, and a settlement made, but that payment is to be withheld, unless the settlement be made within a limited time. Afterwards, the marriage settlement not being proceeded with: Held, that the latter clause could only be intended to hasten the marriage settlement, and that the right to the portion was independent of its execution. *Kendrick* v. *Winter*, 2 Ken. 96, Chanc.

A term of years having been limited to trustees, for the purpose of raising a sum of money for the maintenance and education of the younger children of A, in such shares and proportions, and such manner and form, as A should direct, and in default of any direction, to be applied for the benefit of such children equally, the same to be paid to or for them respectively until their respective portions, provided for them out of other property, should be payable and paid. A by his will appointed a certain portion for the plaintiff, to be vested in her at the age of twenty-one years, or on marriage, and directed that a certain part of the interests and dividends thereof should be applied towards her maintenance and education, but did not make any appointment or give any directions relative to the sum of money raisable for that purpose under the said term: Held, upon the construction of the settlements, that the plaintiff was entitled to have her share of the money provided by the term raised for her benefit, until the period when her portion should become payable; that it is not improbable that it should be the intention of parents to provide a larger fund for the education of children than the mere income of their future portions; the portions of younger children of great families being seldom large, although they have universally the same expensive education as the eldest child. *Augusta* v. *John Earl Poulett*, 6 Madd. 167.

Under a marriage contract in 1735, lands subject to the limitations of an entail, in 1708 are re-signed by the husband, being heir in possession, and destined upon new infeftment to the husband, and the heirs male of the marriage, which failing, to the heirs male of the body of the husband in any future marriage; which failing, to the *heirs female* of the said spouses, and the heirs male to be procreated of their bodies, the eldest daughter or heir female, and the heirs male descending of her, always excluding the rest, and succeeding without division. To fulfil the obligations of this contract, the husband made up tithes, and was infeft in 1736. A daughter was

the only issue of the marriage. This daughter (being married,) by contract, in which her husband joined, and which was carried into effect under a decree arbitral in 1759, accepted a sum of money in full satisfaction of all right of succession which "they have, or in any event may have, to the lands subject to the marriage contract, and of the provisions to children of the marriage in any portion, &c. whatever, which the daughter or her husband might claim on the decease of the father," and they accordingly quit claim, and discharge the father from all demands; and renounce and overgive to him, his heirs and assignees "all right, claim of succession, or other right which the daughter and her husband have, or in any event may have, under the provisions of the marriage contract." In the same year, 1759, a disposition was executed by the father in favour of himself and the heirs male of his body, whom failing, to his brother, &c. The daughter died in 1768, leaving a son, J R. The father died in 1774; in 1806 J R was served heir to his mother, and brought an action to reduce the disposition of 1759, and all subsequent conveyances of the lands subject to the marriage contract of 1759. J R dying in 1811, the appellant, Mrs. Majendie, became pursuer in the action, as the sister of J R and heir of provision, under the destination of the marriage contract: Held, 1st, that she was heir female within the meaning of the terms of the destination; 2nd, that the entail of 1708 was barred, both by positive and negative prescription; 3rd, that the daughter had power to contract with the father, and renounce and discharge the right under the marriage contract as a *jus credita* vested in her; the effect of which discharge, is to bar the right of all other heirs of the marriage. *Majendie* v. *Carruthers*, 2 Bligh, 692, 693.

In a deed of settlement, creating a jointure, the question must be decided by the intention expressed in the deed. The meaning is to be collected from the words immediately applicable to the point, from the context, and from *all parts of the settlement*.

In those instances where Irish estates only are charged, the situation and conduct of the parties, and the language of the instrument of contract may shew that they meant English currency. *Lansdowne* v. *Lansdowne*, 2 Bligh 88—93.

Settlement of premises to T S and his heirs, to the use of W T and his heirs, until a marriage between R T and E G; then to the use of W T for the life of R T, with several limitations over on the death of R T in favour of his wife and children, with a term for 300 years in T S, to commence on the death of R T, for securing a rent charged to the wife of T S, and to determine on the performance of that trust, and subject to the foregoing, to W T and his heirs. W T died before the marriage of R T, who was his heir-at-law, leaving a will and executors: Held, that the executors did not take any interest in the premises, and that R T took a fee in them, subject to the term for 300 years. *Trevelyan* v. *Trevelyan*, 6 Law J. C.P. 114, s. c. 3 Bing. 610.

## SETTLEMENT OF THE POOR.

[See Poor.]

## SEWERS.

The commissioners of sewers cannot maintain an action of trespass against the commissioners of a harbour, for breaking down a wall or drain erected by the former, as the authority to be exercised by them in behalf of the public, does not vest in them such a property or possessory interest as will enable them to maintain such an action. *The Duke of Newcastle* v. *Clarke*, 8 Taunt. 662.

The power of commissioners of sewers is not confined to navigable streams, nor, it should seem, to streams immediately necessary or useful in navigation, but they may decree the abatement or removal of a nuisance in a stream that serves merely as a water-course.

Where, therefore, a wear, described as appurtenant to a common sewer, was heightened and enhanced, so as to obstruct the passage of the waters, and to cause the overflowing of lands adjacent: The Court held that the commissioners had jurisdiction to order the wear to be abated to its former level. *Rex* v. *the Commissioners of Sewers in Nottingham*, 5 Law J. M.C. 92.

Although the commissioners of sewers make a decree, it is not conclusive against a person assessed for the payment of a rate, residing within the district over which they have jurisdiction; but such person may give in evidence in an action of trespass, brought by him against one of the collectors of the rates, for taking his goods to pay such rate, that he derived no benefit from the sewers, in respect of which the assessment was made; and such evidence having been rejected at Nisi Prius, the Court granted a new trial. *Stafford* v. *Hanston*, 5 B. Mo. 608.

By a very high tide, great damage was done. The person, opposite whose land the wall was destroyed, repaired it, and moved for a *mandamus*, commanding the commissioners of sewers to rate the whole level to repay him. But, on its appearing that the wall had been previously out of repair, the Court held, that although it might be considered that the damage was done by an extraordinary tide, yet the complainant was not entitled to be refunded what he had expended. *Rex* v. *the Commissioners of Sewers in Essex*, 1 Law J. K.B. 169, s. c. 1 B. & C. 477, s. c. 2 D. & R. 700.

Where it is provided by a local act of parliament, that for the more effectual and better execution of the statute within a limited district, (which was before within the jurisdiction of the general commissioners of sewers,) that the works, drains, sewers, &c. shall be subject only to the control, &c. and jurisdiction of local commissioners, the act does not exempt the inhabitants of the district from their liability to serve on the juries at the sessions of sewers, unless an express provision to that effect be inserted. *Ex parte Owst*, 9 Price, 117.

A precept to the sheriff under 23 H. 8, c. 5, s. 3, to summon a jury, must direct him to summon *de corpore comitatus*: a direction to summon from a particular district within the county is bad. *Berkett* v. *Crozier*, 1 M. & M. 119. [Tenterden]

The jury, who are summoned by the sheriff to make the presentment before commissioners of sewers, should come from the body of the county, and not from the district over which the commissioners have jurisdiction, and where the precept to the

sheriff was to summon "good and lawful men of your county, *and resident within the Tower Hamlets*," that being the district over which the Commissioners had jurisdiction,—it was held bad: and a presentment made by that jury and all the subsequent proceedings founded on it, declared to be void. *Berkett* v. *Crosier*, 3 C. & P. 63. [Tenterden]

A jury, impanelled to inquire and present at a Court of Commissioners of Sewers, presented, that A was benefited by the sewers; and he received a summons to shew cause why he should not pay; he neglected to traverse the presentment, and a distress was levied for the amount of the rate: Held, at Nisi Prius, that these facts were a justification in an action of trespass for taking the distress, as the presentment, if duly made, and not traversed, justified the Commissioners in issuing the warrant of distress.

The presentment need not contain the name of every person benefited; if it find "all Fore-street" to be benefited, that is enough to include every one having a house there; and any one so having a house might traverse such presentment, he stating in his traverse, that his property is so situated, and that he is aggrieved by the presentment.

The warrant of distress need not recite the presentment.

The defendant is not entitled to recover his treble damages, under the stat. 23 Hen. 8, c. 5, s. 12, in case of a verdict in his favour, or a nonsuit, unless he claims them on the record. *Warren* v. *Dix*, 3 C. & P. 71.

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## SHERIFF.

(A) PRIVILEGES.
(B) DUTIES AND LIABILITIES.
(*a*) *Generally.*
(*b*) *Return of Writs.*
(C) FEES.
(D) PLEADINGS AND EVIDENCE IN ACTIONS AGAINST.

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### (A) PRIVILEGES.

Where a sheriff levies under the 48 Geo. 3, c. 141, he is not entitled to notice previous to bringing an action against him for an irregularity in the levy. *Copland* v. *Powell*, 2 Law J. C.P. 22, s. c. 1 Bing. 369, s. c. 9 B. Mo. 400.

When the defendant is a sheriff, the affidavit to change the venue may be made by the under-sheriff. *Anon.* 2 Law J. K.B. 80.

An action will not lie at the suit of the sheriff against overseers of a parish, for taking goods under a warrant of distress for poor rates, where he has allowed the defendant, notwithstanding the execution, to continue to be the ostensible owner of the property. *Spicer* v. *Tidy*, 1 Law J. K.B. 10.

### (B) DUTIES AND LIABILITIES.

#### (*a*) *Generally.*

Where the sheriff, under a *fi. fa.*, levied and sold a vessel, the joint property of two defendants; and after satisfying the plaintiff's demands and expenses of the levy, a surplus remainded in his hands, and the defendants disputing their interest in the property, the sheriff refused to pay over such surplus unless the one to whom it was paid would indemnify him against the claims of the other, which they both refused to do: The Court would not interfere, nor allow the sheriff to pay the money into court to remain there until an indemnity was given to the satisfaction of the Prothonotary. *Hartley* v. *Stead*, 2 Law J. C.P. 42, s. c. 8 B. Mo. 466.

The Court will not make a rule absolute in the first instance, for an attachment against an under-sheriff, on the death of the sheriff during the year, under the 3 Geo. 1, c. 15, s. 8. *Anon.* 2 Chit. 389.

Nor will the Court grant an attachment against a sheriff for not selling under a *venditioni exponas*, where he had returned, he could not sell for want of purchasers. *Anon.* 2 Chit. 390.

*Semble*, that under process of execution, whether against the person or goods of a defendant, the sheriff is *bound* to take the person or the goods, though the writ and the judgment misname the defendant, and of which misnomer the defendant might have taken advantage by plea in abatement.

At all events, he would be *justified* in acting under the writ.

And if he *do* act against the person or the goods of the real, though misnamed, defendant, he cannot afterwards recall his act, and take advantage of the defendant's misnomer. *Reeves* v. *Slater*, 6 Law J. K.B. 77, s. c. 7 B. & C. 486, s. c. 1 M. & R. 265.

A sheriff's officer, having arrested A, took five shillings from him, with a promise to pay the remainder of what was usual at a certain day, and permitted him to go at large, without taking a bail bond, or the plaintiff's assent: Held, that he could not be surrendered in discharge of his bail; and the Court refused to set aside an attachment which had issued against the sheriff for not returning the writ, nor would they relieve him, by permitting him to put in and justify bail. *Collins* v. *Snuggs*, 6 B. Mo. 111.

If the sheriff be served with two distinct rules to bring in the body, he is liable to two several writs of attachment, on non-compliance with such rules. *Constable* v. *Bristow*, 8 B. Mo. 162.

Previous to the service of the body rule, exception must be entered as to the bail. *Rex* v. *Sheriff of Middlesex*, 7 D. & R. 264.

Ruling the sheriff to bring in the body, is an election to proceed against him, and cannot afterwards be abandoned, so as to enable plaintiff to proceed upon the bail-bond. *Blackford* v. *Hawkins*, 1 Law J. C.P. 22, s. c. 1 Bing. 181, s. c. 7 B. Mo. 500.

Where the defendant has had a week's time to put in bail by a judge's order, an attachment cannot be moved against the sheriff for not bringing in the body until such order be discharged. *Rowe* v. *Harvey*, 5 Law J. C.P. 30.

The Court will not grant an attachment against the sheriff for not bringing in the body, unless the plaintiff's affidavit allege that he has searched to ascertain that no bail has been put in. *Anon.* 2 Ken. 467.

A sheriff will be considered a trespasser, if he knowingly arrest a man by a wrong name; but taking a bail-bond renders him liable to an attachment, if bail above be not perfected. *Box* v. *Sheriff of Middlesex*, 2 Chit. 357.

On motion, the Court of King's Bench will not compel a sheriff, or his deputy, who neglects to enter a plaint in replevin in the county court for damage feasant, to do so. *Ex parte Boyle*, 2 D. & R. 13.

Where the sheriff levied and payed over the amount of the debt to the defendant after an act of bankruptcy by the debtor, and was sued in trover by the assignees, of which action he had given the defendant notice, and offered to defend on his behalf if he would furnish him with means, and on his refusal so to do suffered judgment to go by default: It was holden, 1st, that after such notice he was not bound to defend; and, 2d, that in order to entitle him to recover back the money so paid, he must shew the validity of the debtor's bankruptcy. *Austen* v. *Ward*, 1 R. & M. 116, s. c. 1 C. & P. 307. [Abbott]

The whole property of a bankrupt vests in his assignees, by relation, from the time of the act of bankruptcy: and, if goods be taken in execution after an act of bankruptcy committed, the sheriff is liable, notwithstanding he had no notice of the fact. *Price* v. *Helyar*, 6 Law J. C.P. 132, s. c. 4 Bing. 597, s. c. 1 M. & P. 541.

No action lies against the sheriff for taking insufficient sureties, if he takes as a surety a person who appears to the world to be a person of responsibility. *Scott* v. *Waithman*, 3 Stark. 168. [Abbott]

If the sheriff take the goods of one man under an execution against the goods of another person, and restore them before a suit commence, yet an action of *trover* can be maintained against him. And if any of the goods are damaged by the omission of some act which the owner would have done if the sheriff had not seized the goods, the sheriff is liable to answer in damages for that injury. *Robinson* v. *Walker*, 2 Law J. K.B. 144.

An action of trover does not lie against a sheriff for taking goods in execution which have been lent on hire. *Pain* v. *Whittaker*, 1 R. & M. 99. [Abbott]

An action by the owner of goods, let for an unexpired term, against the sheriff, for taking them under an execution against the party who hired them, is not maintainable, if it appear that the sheriff has not sold. And it is in such case the duty of the party letting to give notice to the sheriff, of the limited nature of the hirer's interest. *Duffill* v. *Spottiswoode*, 3 C. & P. 435. [Best]

If a sheriff act fairly and impartially between two contending judgment creditors, he will not be compelled to support the case of either; but if he shew any favour or partiality, or give any aid to one, and withhold it from the other, he will be bound by the rights or disabilities of the party whom he so aids, and must stand or fall with him. *Warmot* v. *Young*, 4 Law J. K.B. 293, s. c. 5 B. & C. 660, s. c. 8 D. & R. 442.

A sheriff neglected to arrest a defendant till after the writ was returnable. In an action against him for breach of his duty, no special damages were proved, and the plaintiff recovered nominal damages only: The Court held the verdict maintainable, and that the jury might presume that damages had been sustained. *Barker* v. *Green*, 2 Law J. C.P. 3, s. c. 2 Bing. 371, s. c. 9 B. Mo. 584.

Where parties, without the knowledge of the sheriff, authorise his officer to do acts beyond his duty, or not within the ordinary scope of his authority, they make him their officer; and the sheriff is not answerable.

Accordingly, where a sheriff's officer had seized under a *fi. fa.* goods of a trader, more than sufficient to satisfy the levy, and the trader having become bankrupt, and assignees chosen before the goods were sold, the assignees authorized the officer to deliver the whole of the goods to A B, and to receive from him a certain sum as the full value of the goods, which he did accordingly, and out of that money satisfied the execution creditor, but never paid over the residue to the assignees: Held, that they could not sue the sheriff for this money, the officer not having derived his authority to sell the whole of the goods from the sheriff, but from the plaintiff, the assignees. *Cook* v. *Palmer*, 5 Law J. K.B. 234, s. c. 6 B. & C. 739.

Trespass will not lie against the sheriff for the act of his bailiff in taking the goods of A under a warrant from the sheriff against the goods of B in execution of a judgment of the county court: the sheriff is a constituent part of that court. *Tinsley* v. *Nassau*, 1 M. & M. 52, s. c. 2 C. & P. 82. [Best]

The new sheriff is not answerable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him by indenture. *Davidson* v. *Seymour*, 1 M. & M. 34. [Abbott]

If the sheriff does not, previous to removing goods taken in execution, pay the landlord one year's rent, under the 8 Anne, c. 14, he is liable: and the action need not be brought against the parties at whose instance it issued. *Duck* v. *Braddyll*, M'Clel. 217, s. c. 455.

Where, on the assignment of certain land, it was agreed that the party agreeing to take the assignment, should, from the time of taking possession until the completion of the purchase, pay 100*l.*: It was holden not to be a rent; and therefore, that the sheriff, under an execution, was not justified in deducting the same out of the execution. *Saunders* v. *Musgrave*, 5 Law J. K.B. 192, s. c. 2 C. & P. 294.

### (*b*) *Return of Writs.*

A sheriff having received a writ against a person residing in a local jurisdiction, within his bailiwick, directed his precept to the bailiff of that jurisdiction, directing him to execute the process. The sheriff was ruled to return the writ, and he returned that the office of the *custos brevium* had been searched without finding the writ returned: a rule granted for it. *Anon.* 1 Law J. K.B. 160.

The Court of Exchequer ordered, that sheriffs or their under-sheriffs, in future, shall return all writs and processes issuing out of the king's remembrancer's office of this court, against the king's debtors, *within seven days from the return day*: that such sheriffs or under-sheriffs may be apposed on such writs, &c. at least four days before the last day of the term in which they are returnable: that such under-sheriffs shall, at least one clear day before such apposal, attend before the sworn clerk to whose division such writs, &c. shall belong, to be examined touching the returns thereto, on pain of the sheriff or sheriffs making default being taken into custody for a contempt. *Reg. Gen.* H. T. 1 & 2 Geo. 4, 9 Price, 86.

A, B and C being defendants, A and B were ar-

rested and bailed, and the plaintiff took an assignment of the bail bonds, and as to C the sheriff returned *non est inventus*, under these circumstances the Court discharged the rule to bring in the body. *Anon.* 2 Chit. 391.

The plaintiff assigned to a trustee certain sums of money, in trust for a third person, one of which was due from the defendant, and under which he was arrested; and whilst he was in custody of the sheriff, the plaintiff gave the latter notice that he had assigned the debt due from the defendant to him, and afterwards authorized the sheriff to discharge the defendant out of custody, the debt and costs being satisfied; and the trustee afterwards produced the assignment from the plaintiff to him, at the sheriff's office, and ordered the sheriff not to discharge the defendant: but he did so; and on being ruled to return the writ, returned that he took the defendant, and safely kept him in custody, until the plaintiff discharged him, whereupon he was permitted to go at large: Held, that the plaintiff could not under these circumstances rule the sheriff to bring in the body—his remedy being (if any) by an action for an escape: Held also, that if the party, to whom the debt was assigned, intended to render him responsible, he should have offered to indemnify him at the time he gave him notice of the assignment. *Hookham* v. *Monckton*, 6 B. Mo. 497.

A sheriff having arrested a defendant under a *capias*, two days after the return of the writ, and then returned *capi corpus*, the plaintiff caused an attachment to be issued against him. The Court allowed him to amend his return, and set aside the attachment, on payment of costs. *Benton* v. *Benton*, 6 Law J. C.P. 58.

Where goods had been taken by a sheriff into his possession, under a *fi. fa.*, and he was served with notice by a person claiming under an assignment not to sell the goods which he had taken, and threatening an action against him if he did so, and the plaintiff refused to indemnify him: he applied to the Court for time to make his return, until the right to the goods should be determined between the parties, or an indemnity given. The Court granted a rule to shew cause, but the Court afterwards discharged it, giving the sheriff ten days to make his return. *Etchells* v. *Lovatt*, 9 Price, 54.

An affidavit stating that a commission of bankruptcy has issued, and that the sheriff is fearful that an act of bankruptcy has been committed, will be sufficient to induce the Court to enlarge the rule to return the writ. *Anon.* 2 Chit. 204.

Where a sheriff under a writ of *fi. fa.* has returned a levy, he cannot afterwards return, to the *venditioni exponas*, that he has not sold the goods, and detains the money for another plaintiff, under a prior writ of execution. But on motion the Court will quash such a return, and will not, after such proceeding, permit the sheriff to amend his return, therefore the Court discharged an order to shew cause, why the sheriff should not be allowed to amend such a return as being made too late, with costs, but they refused a motion made instanter, for an attachment against the sheriff as premature. *Rowe* v. *Tapp*, 9 Price, 317.

Where a plaintiff withdrew his execution under a consent from the defendant that there should be a fresh levy if the debt were not paid within a given time; and the defendant's goods having been seized under an execution at the suit of another plaintiff, the first plaintiff placed his warrant in the hands of the second plaintiff's officer, who, the defendant having become a bankrupt, left in the possession of his assignees, all the effects remaining, after satisfying the second plaintiff's execution, to the exclusion of the first plaintiff. The Court, though the effects were sufficient to satify both executions, would not compel the sheriff to return the first plaintiff's writ till he should have been indemnified, and the Prothonotary should have decided which of the parties should indemnify him. *Burr* v. *Freethy*, 1 Bing. 71, s. c. 7 B. Mo. 368.

Where the plaintiff's attorney, on directing a sheriff's officer to levy on the goods of a trader under a writ of *fieri facias*, told the officer, that he might with safety put the defendant's mother, or any one else he pleased, in possession, and suffer the business to be carried on as usual under the defendant's direction; and the officer acted accordingly, and left his warrant in the charge of one of the defendant's shopmen, and the business was transacted as usual for nearly three months from the time the warrant was so left; and the defendant became a bankrupt, and his assignees indemnified the sheriff in returning *nulla bona* to the writ so issued previously to the bankruptcy; and the jury found that it was sued out merely for the purpose of protecting the property against other creditors: the Court refused to disturb the verdict. *Doker* v. *Hasler*, 3 Law J. C.P. 109, s. c. 2 Bing. 479, s. c. 1 R. & M. 198.

Where the attorney of a judgment creditor delivered to the sheriff a writ of *fieri facias*, with directions by letter not to execute it till the return, unless another execution should come in in the meantime, and afterwards sent in an *alias*, accompanied with the same directions; and the sheriff, upon another execution coming in, executed both writs on the same day, giving precedence to the last execution, and satisfying that wholly first, out of the money levied, and then paid over the remainder, in part satifaction of the execution first delivered, and returned that payment, and *nulla bona* as to the residue: It was holden, that the plaintiff could not maintain an action against the sheriff for a false return. *Pringle* v. *Isaac*, 11 Price, 445.

In case against the sheriff for not selling the residue of goods which he returned that he had seized, but not sold, after a *venditioni exponas;* it appeared that the original debtor, before judgment, became bankrupt, and that the plaintiff had notice of his insolvency at the time of issuing the execution: Held, that the sheriff was not bound by the return, as he would still have been liable to the assignees. *Brydges* v. *Walford*, 6 M. & S. 42.

Where the plaintiff assented to the sheriff's quitting possession, under an execution, upon the claim of rent and taxes, which were said to exceed the value of the goods seized: It was holden, that the sheriff was not liable to an action for a false return, although the claim for rent was altogether unfounded. *Stuart* v. *Whittaker*, 2 C. & P. 100, s. c. 1 R. & M. 310. [Abbott]

In an action against sheriffs for a false return of *nulla bona* to a *fi. fa.*, if the plaintiff shew the

debtor to be possessed of certain goods, it is no defence for the sheriff to shew a prior execution to an amount of greater value, if to that execution the sheriff also returned *nulla bona*; nor, if the sheriff has the proceeds of the goods in his hands, is it any defence to shew that the *fi. fa.*, on the return of which the action is brought, was delivered at the sheriff's office, at a quarter past five o'clock on the day on which it is returnable. *Towne* v. *Crowder*, 2 C. & P. 355. [Best]

Where the rule to return a writ expires in vacation, an attachment may be moved for on the first day of the following term. *Smith* v. *Blyth*, 9 Price, 255.

If the sheriff's return be true in fact, but wrong in law, the proper course is, to move to quash the return, and not to bring an action for a false return. *Giles* v. *Rex*, 11 Price, 594.

Where the sheriff returned, that the defendant could not be removed from his house without danger to his life, and that his illness continued until after the return of the writ; and, on that account, the custody of the defendant was relinquished: the Court, on motion for an attachment, allowed the sheriff to amend his return, upon payment of costs. *Baker* v. *Davenport*, 8 D. & R. 606.

Applications for enlarging the returns to writs, at the instance of the sheriff, made for his own benefit, will be refused, with costs. *Rex* v. *Cooke*, 1 M'Clel. & Y. 196.

Where goods taken in execution have been found, by a jury summoned by the sheriff for that purpose, not to belong to the defendant, the sheriff must make his return at his peril. *Anon.* 3 Law J. K.B. 174.

In an action against a sheriff for a false return to a *fi. fa.*, the declaration alleged that on the 28th January the writ was delivered to the defendant, who, at and after the return of the said writ was sheriff: Held, although it appeared that the writ was returnable on the 12th of February, and that the defendant's shrievalty expired on the 7th of the same month, that it was immaterial to allege that the defendant was sheriff at the return of the writ, it being clear that the sheriff may make his return after he has ceased to be sheriff. *Jervis* v. *Sidney*, 3 D. & R. 483.

*Nulla bona* is a good return where the defendant's goods have been divested by bankruptcy. *Coppingdale* v. *Budgen*, 2 Ken. 542, s. c. 2 Burr. 814.

An action for a false return does not lie against a sheriff for returning to a *fi. fa.* for 301*l.* that he has only been able to levy 13*l.*, if the plaintiff accepts the 13*l.*, as he thereby waives his claim against the sheriff. *Beynon* v. *Garrat*, 1 C. & P. 154. [Abbott]

## (C) FEES.

A sheriff, who levies under a *levari facias* for a crown debt, is not entitled to poundage under the 29 Eliz. c. 4. *Stephens* v. *Rothwell*, 6 B. Mo. 338, s. c. 3 B. & B. 393.

In an execution upon a judgment of *non pros.*, the sheriff is not entitled to poundage. *Anon.* 2 Chit. 353.

Where the sheriff retained out of the proceeds of a sale under an execution, the expenses occasioned by keeping possession of the goods, under an injunction out of Chancery: Held, that this was an indirect taking of more than the poundage allowed by 29 Eliz. c. 4, and that he thereby incurred the penalties of that statute. *Buckle* v. *Bewes*, 3 Law J. K.B. 105, s. c. 3 B. & C. 688, s. c. 5 D. & R. 495.

Under the 43 Geo. 3. c. 46, authorising the plaintiff to levy poundage fees, and the expenses of execution, over and above the sum recovered by the judgment; the expenses of levying are to be included. Till the period when the statutes were dated, they had reference to the first day of the session in which they were passed; and there is no statute of 29 Eliz. *Ramsey* v. *Tufnel*, 3 Law J. C.P. 259, s. c. 2 Bing. 255, s. c. 9 B. Mo. 425.

The poundage payable on debts due to the Crown, in pursuance of the 3 Geo. 1. c. 15, is only applicable to cases between party and party; therefore, where a sheriff was put to extra trouble and expense at the request of the prosecutor, in executing a writ of *habere facias possessionem* under an extent, he is entitled to such expenses on the taxation of costs. *Capp* v. *Johnson*, 7 B. Mo. 518.

Poundage is not payable to the clerk of the dockets, on money paid into court by the sheriff, under the 43 Geo. 3, c. 46, s. 2. *Hunn* v. *Brine*, 6 B. Mo. 124.

Since, on the taxation of costs, the Master will not allow caption fees, the sheriff's officer may maintain an action against the plaintiff's attorney for such fee, notwithstanding the provisions of the 23 Hen. 6, c. 9. *Townsend* v. *Carpenter*, 2 C. & P. 118, s. c. 1 R. & M. 314. [Abbott]

A sheriff's officer, employed in that character by the party or his attorney, may recover a compensation for his work and labour.

If an attorney employs a sheriff's officer, he is liable to pay such a compensation, and cannot refer the officer to the party in the action. *Foster* v. *Bleiblock*, 4 Law J. K.B. 170, s. c. 5 B. & C. 329, s. c. 8 D. & R. 48.

The Court will interfere in a summary manner to punish a sheriff's officer for extortion, by directing him to pay back the money, and ordering him to be fined and imprisoned until the money is paid. *Ex parte Radford*, 1 Law J. K.B. 33.

The sheriff when selling under a writ of *fi. fa.* is bound at his peril to take but his reasonable extra expenses; and if he take more than is afterwards allowed in taxation, he will be compelled to pay the costs of the rule to make him refund. *King* v. *Milne*, 1 Law J. K.B. 108.

Where a sheriff, under a pretended lien for poundage, retained the surplus levied under an extent for many years, and, even after the Court had decided his claim unfounded, continued to keep the question before the Court: he was ultimately ordered to pay the amount over with interest, and the costs of that application. *Rex* v. *Villers*, 11 Price, 575.

If a sheriff part with the possession of goods, taken by him in execution, he loses his lien thereon for his poundage, and cannot afterwards retake them. *Goode* v. *Langley*, 5 Law J. K.B. 353, s. c. 7 B. & C. 25.

## (D) PLEADINGS AND EVIDENCE IN ACTIONS AGAINST.

A declaration against a sheriff for a false return to a *ca. sa.*, need not aver that the sheriff had notice from the plaintiff, that the defendant was within his

bailiwick. *Dean and Chapter of Hereford* v. *Macknamara*, 5 D. & R. 95.

In an action for *a false return* by a sheriff to a writ of *fieri facias*, the part of the allegation respecting the judgment, which sets out the term in which the judgment was recovered, may, if it be incorrect, be rejected as surplusage, for it is only the inducement to the action. *Stoddart* v. *Palmer*, 2 Law J. K.B. 204, s. c. 3 B. & C. 2, s. c. 4 D. & R. 624.

Where an action is brought against a sheriff's officer to recover penalties for extortion, under the stat. 32 Geo. 2, c. 28, time will not be given to amend the declaration, by the insertion of new counts under the 28 Hen. 8, c. 9. *Wright* v. *Ager*, 5 B. Mo. 330.

The assistant to a sheriff's officer is a competent witness in an action against the sheriff for negligently executing the writ, though the assistant actually executed the writ, and is not released. *Clark* v. *Lucas*, 1 R. & M. 32, s. c. 1 C. & P. 156. [Abbott]

In an action against the sheriff, the officer who had given him security is not a competent witness for the defence, even though the officer is indemnified by the execution creditor, and does not employ the attorney. *Whitehouse* v. *Atkinson*, 3 C. & P. 344. [Tenterden]

The party who was defendant in a suit, cannot, in an action against the sheriff for a false return to a *fi. fa.* issued in that suit, be called as a witness for the defendant, to shew circumstances from which the jury might infer that no debt was actually due by him. *Davis* v. *Crowder*, 3 C. & P. 169. [Park]

In an action against the sheriff for taking insufficient sureties in replevin, the production of the bond, as notice to the defendants, is sufficient evidence against them, without calling the subscribing witness to prove its validity. *Scott* v. *Waithman*, 3 Stark. 168. [Abbott]

The relative situation of a sheriff and his officer is so far recognized by the Court, as to admit of a request of the latter being deemed equivalent to a request of the former, and supports an allegation of a request by the sheriff. *Evans* v. *Sweet*, 3 Law J. C.P. 264, s. c. 2 Bing. 271, s. c. 9 B. Mo. 609.

Where a paper written by the under-sheriff, in the course of his office, is given in evidence to charge the sheriff—*semble*, that the statement therein made as to the authority under which the sheriff acted, is to be taken as well founded, so as to render it unnecessary for the sheriff to give his authority in evidence. *Haines* v. *Hayton*, 6 Law J. K.B. 231.

Where an action was brought against a sheriff for not arresting a defendant, proof of the indorsement of the bailiff's name, by a clerk in the sheriff's office, was holden to be sufficient proof of the sheriff's authority to appoint a bailiff, without calling the officer himself. *Francis* v. *Neave*, 6 B. Mo. 120, s. c. 3 B. & B. 26.

Proof of a warrant granted by the under-sheriff, under the seal of his office, is in general presumptive evidence, that the under-sheriff has acted by the authority of the sheriff; and calls upon the latter to produce his own authority for granting the warrant, or to shew that the under-sheriff acted without authority.

Accordingly, in an action of trover against a sheriff for goods taken in execution, evidence of the warrant granted by the under-sheriff under seal of his office, was held to be presumptive evidence to charge the sheriff, without proving the writ. *Gibbins* v. *Phillips*, 6 Law J. K.B. 209, s. c. 7 B. & C. 529.

In trover by the assignees of a bankrupt, for goods taken by the sheriff under an execution, it appeared that the goods were taken at or about the time of year at which the sheriffs are changed; and it was proved, that a witness, after the present cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned. This form of return was signed by the defendant as sheriff: Held, to be sufficient evidence that he was the sheriff who executed the writ: and that if the writ, when produced at the trial, has his name erased, and the name of the previous sheriff substituted, it will be a question for the jury, whether that substitution was made to correct a mistake, or to defeat the plaintiff.

A declaration against a sheriff on the 8 Anne, c. 14, for taking goods seized under an execution, without first paying half a year's rent, stated, that the sheriff *by virtue of, and under pretence of a certain writ of our said lord the King, before the King himself before that time sued forth, &c., took the goods &c.*—the writ under which the goods were seized having issued from the Common Pleas: It was holden to be a fatal variance. *Sheldon* v. *Whittaker*, 4 Law J. K.B. 28, 4 B. & C. 657, s. c. 7 D. & R. 123, s. c. 1 R. & M. 266.

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## SHIP AND SHIPPING.

[See ADMIRALTY, INSURANCE, NAVIGATION LAWS, PRIZE and SALVAGE.]

(A) PROPERTY IN SHIPS.
- (*a*) *Sale.*
- (*b*) *Mortgage.*
- (*c*) *Forfeiture.*
- (*d*) *Apparel and Appurtenances.*

(B) OWNERS.
- (*a*) *Rights.*
- (*b*) *Liabilities.*

(C) MASTERS AND COMMANDERS.

(D) SEAMEN.
- (*a*) *Contracts.*
- (*b*) *Wages.*
- (*c*) *Punishment.*
- (*d*) *Discharge.*

(E) PILOTS.

(F) PASSENGERS.

(G) CHARTER-PARTY.

(H) DEMURRAGE.

(I) FREIGHT.

(K) BILL OF LADING.

(L) LOSSES AND INJURIES.
- (*a*) *To other Vessels.*
- (*b*) *Average.*

(M) SHIP BROKERS.

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## (A) PROPERTY IN SHIPS.

### (a) *Sale.*

The 34 Geo. 3, c. 68, s. 15, applies to an executory contract for the sale of a ship; which therefore is void, if the agreement be not indorsed on the certificate of registry. *Mortimer* v. *Fleming*, 4 B. & C. 120, s. c. 6 D. & R. 176.

Dodds agreed to sell to Kain a ship, and signed and delivered to him an instrument describing her as copper-bolted, and containing an inventory of her stores, under which he wrote, "Sold, the withinmentioned ship to G. J. Kain,"—"W. Dodds;" but it did not recite the registry of the ship, or mention the price to be paid. Dodds afterwards executed the usual bill of sale, which did not state that the ship was copper-bolted.

Kain sold her with a warranty that she was copper-bolted, but in fact she was not; and the vendee obtained a verdict against him for large damages.

The Court held, that Kain could not maintain an action against the executors of Dodds, for a breach of warranty, because the first instrument was void under 34 Geo. 3, c. 68, s. 14, because it did not contain a recital of the certificate of the registry. *Kain* v. *Old*, 2 Law J. K.B. 102, s. c. 2 B. & C. 627, s. c. 4 D. & R. 52.

The owner of a ship mortgaged her, whilst on her outward voyage, to the plaintiffs. He directed the consignees at New Orleans to advance what was necessary for her; and they having learned that he had become bankrupt, and having previously made large advances for him, caused an attachment to be issued, and the ship was sold for one-fourth of her value in pursuance of an order made by the district court at Louisiana, although the judge of that court had previously ordered that six months time should be allowed for the owner's counsel to communicate with him: Held, that the sale was fraudulent, and that the plaintiffs as mortgagees were entitled to recover the ship in an action of trover on her arrival in this country. *Bland* v. *Lynam*, 5 Law J. C.P. 87.

Proceeds of a ship and cargo sold abroad, and transmitted to the Admiralty registry of England—payment decreed. *Lady Banks*, 1 Hag. 306.

The master of a vessel having abandoned where there was no necessity, the cargo not being damaged nor perishable, and the ship and cargo having been sold at the instance of the captain, under an order of the Vice Admiralty at the Mauritius; the owners of the cargo brought an action against the shipowners for wrongfully selling the cargo, instead of conveying it to its port of destination, and recovered a verdict for the value of the cargo, and then brought an action for money had and received against the vendees: Held, 1st, That under such a sale the purchasers had obtained no property. 2nd, That the plaintiffs having brought an action against the owners, and recovered to the extent of the value of cargo, &c., but no judgment entered up, was no bar to their recovery against the defendants for the value of the goods bought by them, and which they sold, and received the proceeds; and lastly, that their right of action was not affected by their having made a demand of the proceeds from the Vice Admiralty Court, which had not been complied with. *Morris* v. *Robinson*, 3 B. & C. 196, s. c. 5 D. & R. 34.

A bottomry bond holder permitted to have a priority of lien upon the proceeds of the ship, to secure the reimbursement of his advances to the crew. *Kammerhavie*, 1 Hag. 63.

### (b) *Mortgage.*

By the mortgage of a ship, accruing freight passes to the mortgagee, notwithstanding 6 Geo. 4, c. 110, s. 45, which enacts, that the mortgagee shall not be deemed owner, except for the purpose of making a transfer.

The owner of a ship mortgaged her whilst at sea, and afterwards became bankrupt. The agents of the mortgagee took possession of her on her homeward voyage; and, after her arrival in port, received monies on account of freight, and paid disbursements—viz. port charges and seamen's wages, exceeding the amount of the freight received: Held, that the assignees of the bankrupt could not maintain an action for money had and received, to recover the amount of the freight from the agents of the mortgagee, they having paid a larger sum on account of charges on the ship, and which the bankrupt as owner was bound to discharge. *Dean* v. *M'Gie*, 5 Law J. C.P. 44, s. c. 4 Bing. 45.

A person who holds a mortgage upon a ship, and who is registered as the owner, is not, on that account alone, liable for repairs done to the ship. His assent, express or implied, must be shewn. *Briggs* v. *Wilkinson*, 5 Law J. K.B. 349, s. c. 7 B. & C. 30.

### (c) *Forfeiture.*

Goods imported in a British ship not manned and navigated according to law, are not liable to forfeiture, if the imperfect manning of the ship was a matter of uncontrollable necessity. *Pelican*, 2 Dods. 194.

A second seizure not barred by an abandonment of the first. *Woodbridge*, 1 Hag. 74.

### (d) *Apparel and Appurtenances.*

*Quære*—Whether the boat of a ship is comprised within the "apparel and appurtenances" thereof.

In an action of trover for "a smack, with the apparel and appurtenances thereunto belonging," the plaintiff cannot recover separately for the boat, or for sails and cordage. *Shannon* v. *Owen*, 6 Law J. K.B. 61, s. c. 1 M. & R. 392.

## (B) OWNERS.

### (a) *Rights.*

The Court of Admiralty will not interfere to give possession of a ship's register to a person whose title to be considered as registered owner is subject to doubt. *Frances of Leith*, 2 Dods. 420.

Upon the sale of a ship, in a suit for wages, by Admiralty process issuing after the seizure of the same vessel by the sheriff under a writ of *fieri facias*: Held, that the claim of the sheriff to the surplus proceeds, in discharge of his execution, was good as against the late owner of the ship. *Flora*, 1 Hag. 298.

The Court of Admiralty has authority to arrest and detain a ship, upon the application of a part-owner who dissents from her intended employment, untill security be given by the other part-owners to the full value of his share.

Objections to the immediate payment of the entire amount of the stipulation, upon the loss of the ship—overruled. *Apollo*, 1 Hag. 306.

A bail bond given in favour of a dissentient part-owner of a vessel, contemplates only the safe return thereof, or the payment of the stipulated sum. *Apollo*, 1 Hag. 312.

(*b*) *Liabilities.*

The liability for the requisite equipments of a vessel depends entirely on the fact, to whom the credit was given, and not upon that of legal ownership. *Baker* v. *Buckle*, 7 B. Mo. 349.

Where a party purchases a share in a ship under a bill of sale, which is void for want of conformity with the provisions of the Registry Act, he is not liable to pay for goods supplied for her use, unless credit be given to him individually, or he has held himself out as owner, or made an express promise to pay, or received profits from the use or employment of the ship. *Harrington* v. *Fry*, 3 Law J. C.P. 244, s. c. 2 Bing. 179.

Ship-owners are liable to the freighters for negligence of the captain, although the latter had entered into a charter-party, and was himself a part-owner. *Leslie* v. *Wilson*, 6 B. Mo. 415, s. c. 3 B. & B. 171.

An agreement between the owner and the master of a vessel, in which the latter is made to fill an equivocal character, partly master, and partly charterer, (receiving part of the freight,) will not discharge the owner from his liability to the shipper, although the shipper have a knowledge of that agreement before he ships his goods. *Colvin* v. *Newbery*, 6 Law J. K.B. 239, s. c. 8 B. & C. 166.

To render the registered owner of a ship liable for repairs, it must be proved that they were actually performed on his credit. Legal ownership is *primâ facie* evidence of liability, which may be rebutted by proof of the beneficial interest having been parted with, and of the legal owners having ceased to interfere with the management of the ship. *Jennings* v. *Griffiths*, 1 R. & M. 42. [Abbott]

The liability for the repairs of a vessel, *primâ facie*, rests on the registered owner, in the absence of proof that credit has not been given to the owners; therefore a deed of defeasance, making void an absolute bill of sale, upon payment of a certain sum of money, is admissible for the defendants to shew the purposes of their ownership; the bill of sale being duly entered on the registry, without mention of the defeasance. *Cox* v. *Reid*, 1 C. & P. 602, s. c. 1 R. & M. 199. [Best]

Where one of two joint owners of a ship, by private agreement, parted with all his interest in his share to the other, to be paid for by bills at different dates, but his name remained on the register by way of collateral security for the payment of the bills: Held, that although he had never, after the agreement, interfered in the concerns or management of the ship, still he was liable for repairs done to the ship subsequent to such agreement. *Dowson* v. *Leake*, 1 D. & R. N.P.C. 52. [Abbott]

In an action against ship-owners for damage sustained by the loss of goods laden on board their ship, their liability is limited to the value of the ship and freight; and under such circumstances, the value of the ship is to be calculated at the time of the loss, and not at the time of the commencement of the voyage; and where during a voyage, part of a cargo was destroyed by accident, and consequently no freight recoverable, the owners were holden not to be liable for the amount of freight, which might have been earned if the cargo had arrived in safety. *Cannan* v. *Meaburn*, 2 Law J. C.P. 60, s. c. 1 Bing. 465, s. c. 8 B. Mo. 127.

(C) MASTERS AND COMMANDERS.

The relation between the owner and commander of a vessel, as to the ordering and payment of necessaries and repairs, is exactly the same as between a master and servant generally; and consequently, the presumption of an implied authority of the commander to order repairs to be done on the credit of the owner, may be repudiated by circumstances, as where the commander promises to pay ready cash, and no mention is made of the owner's responsibility. *Gordon* v. *Hare*, 1 Law J. K.B. 70.

Where the captain of a vessel which had sustained considerable damage from bad weather, and was in a sinking state, sold the ship and cargo under the order of a Vice-Admiralty Court, and the jury, under the direction of the judge, found that the ship might have been repaired, or the goods transhipped and forwarded to the place of destination: Held that the owners were liable for his acts, though the bill of lading engaged only for conveyance, perils of the seas excepted. Nothing but extreme necessity will justify him in disposing of the cargo, and the Admiralty Court can give no authority for a sale. *Cannan* v. *Meaburn*, 1 Law J. C.P. 84, s. c. 1 Bing. 243, s. c. 8 B. Mo. 127.

The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity; and therefore, where in the course of a voyage from India the ship was wrecked off the Cape of Good Hope, and some indigo, which was part of the cargo, was saved, and the same was there sold by public auction, by the authority of the captain, acting *bonâ fide* according to the best of his judgment for the benefit of all persons concerned; but the jury found that there was no absolute necessity for the sale: Held, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, the original owners were held entitled to recover its value. *Freeman* v. *the East India Company*, 5 B. & A. 617.

Where the captain of a vessel delivered the cargo to the consignor's agents, and, finding that he could not procure payment of the freight in money, took a bill,—it was holden, that upon the bill being dishonoured the owners of the cargo might be sued for the freight; as the agent took the bill as the best thing he could do for all parties: but if it had appeared that he might have had his money, but chose to take the bill, a different rule would have obtained. *Strong* v. *Hart*, 2 C. & P. 55. [Abbott]

By the usage of trade, it seems that the master, and not the owner, of a ship is entitled to primage; —therefore, where there was an agreement between the master and owner of a ship, not mentioning primage—it was holden, that the former was entitled to it. *Charleton* v. *Cotesworth*, 1 R. & M. 175. [Abbott]

A master of a trading vessel who had deserted his convoy, was ordered, as a punishment, to be imprisoned by the Court for one month. *Rex* v. *Kitto*, 2 Dods. 57.

Of the continuance and termination of the master's authority. *Neptune*, 1 Hag. 238.

An hypothecation bond can only be given where money is not to be obtained on personal security.

Where several hypothecation bonds have been given, the last executed must be the first discharged. *Sydney Cove*, 2 Dods. 1.

## (D) SEAMEN.

### (a) *Contract.*

On an engagement to go "from London to Batavia, the East India *seas or elsewhere, and until the final arrival at any port or ports* in Europe:" Held, that upon the arrival of the ship at *Cowes* for orders, (as *precisely* agreed between the *owners* and *master*,) the seamen were not bound to proceed on a further voyage to Rotterdam. *George Horne*, 1 Hag. 370; and see *Countess of Harcourt*, 1 Hag. 248, *post* (*b*.)

The Court of Admiralty being a court of equity, does not consider the words "binding and conclusive" (2 Geo. 2, c. 36, s. 2,) as applicable to mariners' contracts of a special nature. *Minerva*, 1 Hag. 357.

Obligations of a mariner's contract. *Neptune*, 1 Hag. 236.

An informality in the mode of hiring will not disqualify the performer of work properly done for a claim to remuneration. *Jane and Matilda*, 1 Hag. 193.

### (b) *Wages.*

Limitation of the general maxim, that freight is the mother of wages. *Neptune*, 1 Hag. 232.

Legal power in a female sailor to earn wages in such capacity; claim substantiated against a bankrupt estate. *Jane and Matilda*, 1 Hag. 187.

Effect of wages earned on board another vessel not making the same homeward voyage as the one for which the engagement had been made. *Frederick*, 1 Hag. 223.

Claim for a gradation of wages sustained upon the facts; there being no specific rate of hiring inserted in the articles. *Porcupine*, 1 Hag. 378.

A sailor, who has agreed to serve as an able seaman at certain wages, can recover no more, though he be employed on board the ship as cuddy-servant, in the absence of an express assumpsit. *Dafter* v. *Cresswell*, 2 C. & P. 161, s. c. 7 D. & R. 650.

Claim of a *second* mate (who succeeded to the office of *chief*) to the rate of wages given to chief officers upon similar voyages, established.

An alteration in the ship's articles is not absolutely necessary to support his title. *Providence*, 1 Hag. 391.

Where part of a vessel had been saved by the exertions of the mariners,—held, that they were entitled to the payment of their wages, as far as the fragments of the materials would form a fund, though there was no freight earned by the owners. *Neptune*, 1 Hag. 227.

Hypothecation of a vessel is no ground for depriving the seaman of his right to wages, for he is entitled to them as long as a single plank of the ship remains. *Sidney Cove*, 2 Dods. 13.

The owner of a British ship cannot, by the sale of his ship to a foreigner in a distant part of the world, divest the seaman of his wages earned under a contract, entered into with himself in this country; and the Court of Admiralty will enforce the payment of wages so earned—*à fortiori*, if the transfer of the ship was merely colourable. *Batavia*, 2 Dods. 500.

By a clause in the ship's articles of a South Sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London. After serving 27 months, some of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship: Held, that if these seamen lost their wages under the articles, they could recover a reasonable compensation for their services, on the count for work and labour. *Hillyard* v. *Mount*, 3 C. & P. 93. [Tenterden]

In a divided voyage, in which cargoes are successively taken in and delivered at different ports, and freight thereby earned for the owners, the mariners are by the general law entitled to their wages up to the time of arrival at each port of delivery; and an attempt to extinguish their right, in case of the loss of the ship on the last part of such divided voyage, by inserting a covenant in the ship's articles that they shall not be entitled to any part of their wages unless the ship returns to the last port of discharge, will not be upheld by the Court of Admiralty. *Juliana*, 2 Dods. 504.

Forfeiture of wages is not incurred by occasional intemperance. *New Phœnix*, 1 Hag. 199.

An act of disobedience by a mate may amount to a forfeiture of his property: as, where he loaded with the captain at an intermediate port, and on their getting on shore refused to return with him, but remained there all night, and compelled the captain to go back to the ship in another boat;—it was holden, that this was such an act of disobedience as to warrant the captain to detain his property on board by way of forfeiture, and consequently that trover did not lie against the captain for so doing. *Weatherpen* v. *Leadler*, 8 B. Mo. 37.

Forfeiture of wages incurred by a mariner, who neglects or refuses to return to his ship, when commanded by the master, although previously absent with leave. *Bulmer*, 1 Hag. 163.

Resistance to a claim of seaman's wages on a plea of desertion, not sustained, upon a failure of proof by the owners as to the time of service. *George*, 1 Hag. 168.

A refusal, on the part of the master, to certify for the wages of his crew upon their quitting the ship, especially when coupled with equivocal expressions as to leave, is no decisive proof of a desertion. *Frederick*, 1 Hag. 211.

In an action for seamen's wages, brought on an agreement, containing a clause of forfeiture if they should disobey orders or neglect to do their duty: Held, that if such disobedience or neglect was the *consequence* of previous misconduct of the owners or captain, the seamen were still entitled to recover. *Train* v. *Bennett*, 1 M. & M. 32. [Tenterden]

A seaman who had engaged to serve on board a collier "from Shields to London, and back," quits the vessel at the port of London: Held, that he had not incurred a forfeiture of his wages, the master failing to supply him with provisions. *Castilia*, 1 Hag. 59.

On a contract "to Van Diemen's Land and elsewhere, and back to London:" Held, that a forfeiture of wages was not incurred by the refusal of a mariner

to work during a voyage to Rotterdam. *Countess of Harcourt*, 1 Hag. 248.

An agreement for wages, when founded on a special and extraordinary contract, cannot be enforced by the Admiralty Court, it having no jurisdiction over special agreements. *Sidney Cove*, 2 Dods. 11.

*Semble*, That wages due to a ship's surgeon are not recoverable in the Admiralty Court. *Lord Hobart*, 2 Dods. 101.

In a suit for wages, a party is not bound to set forth the ill treatment of the master in his original plea. *New Phœnix*, 1 Hag. 199.

A protest, on the ground of non-liability pending a question in the Court of Chancery, as to the ownership of the vessel under an assignment, (the parties having, in their answer to a bill in that court, admitted that they were the owners,) overruled. *St. John*, 1 Hag. 334.

An award of wages, under 59 Geo. 3, c. 58, upon a complaint made to a magistrate at Portsmouth, fifteen months after the mariner's discharge at Plymouth, the master of the ship being present before the magistrate and offering a defence to the claim, affirmed with costs; the Court deciding that any objection to the jurisdiction should have been made by way of protest before the magistrate. *Minerva*, 1 Hag. 54.

(c) *Punishment.*

In the punishment of a seaman for misconduct, previous acts *ejusdem generis* may be considered, and pleaded in justification. *Lowther Castle*, 1 Hag. 387.

The law of England is the proper authority for fixing the limits within which one British subject may inflict a corporal suffering upon another. Grounds of defence to a charge of unreasonable correction, 1 Hag. 272—4.

(d) *Discharge.*

A wrongful discharge enures to a reimbursement of necessary expenses. *Frederick*, 1 Hag. 219.

By the general rule, a master is not at liberty to discharge his crew in a foreign port without their own consent, but circumstances may vest in him an authority to do so, upon proper conditions. *Elizabeth*, 2 Dods. 403.

(E) PILOTS.

[See Stat. 6 Geo. 4, c. 125.]

An Irish trading vessel, with a general cargo on board, is not a coaster within the meaning of the 52 Geo. 3, c. 39, s. 2. *Davison* v. *Mekibben*, 6 B. Mo. 387, s. c. 3 B. & B. 112.

Where in an action for penalties under the 52 Geo. 3, c. 39, it appeared that the defendant's vessel was piloted into Standgate Creek, by a Cinque Port pilot, when he discharged him, and piloted himself above a mile in the port of Rochester, though with a signal for a Trinity House pilot flying: It was holden, that he thereby incurred the penalty given by the act. *Thornton* v. *Boland*, 2 Bing. 219.

By 6 Geo. 4, c. 125, s. 2 and 63, the owner or master of a vessel, navigating within certain prescribed limits, is bound to have a licensed pilot to conduct the same, except where she is merely changing her moorings, &c.; and, by section 55, is exempt from liability in respect of accidents arising from the misconduct or incapacity of such pilot.

But where a vessel, within those limits, stops short of the place where the first delivery of a part of her cargo is to be made, afterwards proceeding thither, for the purpose of making delivery, she will not be considered as merely "changing her moorings."

Thus, where a brig laden with wine and fruit, the wine being consigned to the London Docks, and the fruit to Coxe's Quay, which is higher up the river Thames, first put into the London Docks, but could not there discharge the wine, as the fruit was stowed above it, and afterwards sailed, under the conduct of a pilot duly licensed, to Coxe's Quay, but, on her way thither, ran foul of and sunk a barge,—it was held, that the owners of the brig were exempt from liability in respect of the injury done to the barge, under the act 6 Geo. 4, c. 125, s. 55. *M'Intosh* v. *Slade*, 5 Law J. K.B. 345, s. c. 6 B. & C. 657.

The owner of a ship, with a pilot on board, is not protected against liability in respect of damage done by running foul of another ship, unless he was compelled by law to have the pilot.

And accordingly, as the local act, 41 Geo. 3, c. 86, applicable to Newcastle-upon-Tyne, leaves it optional with British ships, on entering and leaving that port, to have a pilot or not—it was held, that the owner of such a ship was liable, although he had a pilot on board; the general act, 6 Geo. 4, c. 125, expressly excepting the port of Newcastle from its operation. *Dodds* v. *Embleton*, 5 Law J. K.B. 65, s. c. 9 D. & R. 27.

In an action for so negligently navigating a vessel that the plaintiff sustained an injury, proof that a pilot was on board at the period the event took place, does not preclude the jury from determining the question, whether the defendant's vessel was under the direction of the pilot at the time the accident happened. *Catts* v. *Herbert*, 3 Stark. 12. [Abbott]

Pilots are not entitled to charge as lay days the day on which they enter and on which they leave a place of quarantine, 52 Geo. 3, c. 3, s. 42. *Bee* v. *Wishart*, 2 Dods. 498.

(F) PASSENGERS.

By 43 Geo. 3, c. 56, a vessel leaving the United Kingdom with passengers for parts beyond the sea, is allowed to carry one passenger for every two tons of her burthen, according to the register.

The Court held, that when the vessel is *partly laden* with goods, and has passengers on board, the number of passengers is not to be reckoned according to the measured tonnage of the vessel, but still according to the register. *Bishop* v. *Mackintosh*, 2 Law J. K.B. 104, s. c. 2 B. & C. 556, s. c. 4 D. & R. 42. [But see 4 Geo. 4, c. 81.]

(G) CHARTER-PARTY.

*Quære*—Between parties to a charty-party, what will amount to a sufficient abandonment. *Heslop* v. *Jones*, 2 Chit. 550.

By a charter-party to government for — months, for transporting emigrants from this country to C and thenceforward, until notice of discharge, to be given after her return to D or I: Held, that the charter-party was general, and that the ship was

chartered for an indefinite period, and that the broker was only entitled to claim commission as for a voyage of that description, and not for a specific voyage outwards. *Holl* v. *Pincent*, 6 B. Mo. 228.

Where the charterer of a vessel was to keep her in repair, and be paid 200*l.* per month, and so in proportion for any longer period she might be employed,—it was holden, that the freighter was liable to such freight, for any detention on account of repairs occasioned by the perils of the sea. *Ripley* v. *Scaife*, 5 B. & C. 167, s. c. 7 D. & R. 818, s. c. 1 C. & P. 132.

The discharge of an outward bound cargo at a particular place, is not in general a condition precedent to the providing a return cargo. A freighter, who covenants to load a return cargo, must, if he objects to the ship's delay in proceeding to take it on board, make the objection before he loads the cargo, and within a reasonable time, and should not by any act take to the ship. *Olhsen* v. *Drummond*, 2 Chit. 705.

The owners of a ship chartered her on a voyage from Cadiz to Guyaquil, and the freighters agreed to provide a cargo for a homeward voyage, or pay a sum of money; with a proviso, that in the event of the *non-arrival* of another ship at Guyaquil, then they should not be bound to provide that cargo.

The latter-mentioned ship did not arrive at Guyaquil within the time allowed to the first vessel for running days, and she took another cargo; but the delay did not arise from any act of the freighters.

The Court held, that the word "non-arrival" meant non-arrival within such time as suited the purposes of the first-mentioned ship, and consequently, that the freighters were not liable to damages for not providing a homeward-bound cargo. *Soames* v. *Lonergan*, 2 Law J. K.B. 106, s. c. 2 B. & C. 564, s. c. 4 D. & R. 74.

Whether the master of a ship, who has entered into an agreement of charter-party, not under seal, in which the defendant agrees to pay him the freight in good bills, is justified in paying them to the owner of the ship, after notice by the master not to do so, has been questioned. *Atkinson* v. *Colesworth*, 1 C. & P. 339. [Abbott]

In suing for a breach of covenant on a charter-party, it must appear clearly that there exists a complete cause of action upon the deed, as the Court will not imply a covenant, where the intention is not apparent upon the instrument, that the party should be bound. *Smith* v. *Wilson*, 6 M. & S. 383.

The defendants entered into a charter-party, by which the cargo was to be sent alongside the ship at their expense, the captain rendering the usual and customary assistance with his boats and crew. Part of the cargo lying at a distance from the wharf, the captain applied to the defendants' agent for the assistance of labourers to bring it to the ship's side, which he refused, stating that he had got a copy of the charter-party, and that he would abide by it. The captain afterwards procured labourers: It was held, that the expenses so incurred by him might be recovered on the common counts for work and labour, independently of the charter-party, as it was necessary for the owner to ship the timber, the expense of sending which alongside was to be borne by the defendants. *Fletcher* v. *Gillespie*, 4 Law J. C.P. 202, s. c. 3 Bing. 635.

Assumpsit on a charter-party, "freight to be paid partly in cash, and partly by approved bill." The owner took, without apprising the defendants, a bill from the consignee of the cargo for part of the freight, which was dishonoured: Held, that the defendants were not discharged thereby from the amount of the bill. *Taylor* v. *Briggs*, 1 M. & M. 28. [Abbott]

In an action of covenant on charter-party, between ship-owners and freighters, the ship-owners having covenanted to take on board six pipes of brandy at H, and then proceed to F, and there take on board a complete cargo of fruit, or other goods, as the freighters might wish, and proceed to L or B, as might be ordered by the freighters, and there make a right and true delivery of the fruit, &c.; and the freighters covenanted to pay certain freight for the fruit and brandy, the freight of the brandy, &c. to be taken out in fruit at F, and guaranteed the ship a full cargo home: It was decided, that the covenant to take the brandy to F, was not a condition precedent, but a distinct and independent covenant. And, therefore, the owner, in an action of covenant on the charter-party against the freighters for not putting a full cargo of fruit on board at F, having averred general performance, on demurrer the declaration was held good. *Fothergill* v. *Walton*, 8 Taunt. 576.

By charter-party, the owner covenanted that the ship should be provided with tween decks for steerage passengers, and the charterers agreed to pay freight and port charges. The owner sent in an account to the charterers, in which the carpenter's and joiner's work was included, as well as the freight and port charges, and to which the charterers by letter assented: Held, that they were liable for the amount of the carpenter's bill, although the owner had declared only for the amounts of the freight and port charges due to him from the charterers. *Templer* v. *Lousada*, 5 Law J. C.P. 135.

Plaintiff, a ship-owner, agreed by charter-party with T, to take any goods on board which T should ship, and convey them from Van Diemen's Land to London; T covenanted to pay freight at the rate of 15*s.* per ton per month, ten days after the delivery of the cargo, and then consigned a cargo to defendants by a bill of lading, under which they or their assigns were to pay freight as per charter.

T being indebted to defendants, they, on the arrival of the ship in London, sued out a writ of *fi. fa.*, and took the cargo forcibly from the ship, exhibiting the sheriff's warrant to the captain: they did not sell under the *fi. fa.* but afterwards made affidavit at the Custom House that they landed the cargo as the importers.

Plaintiff having sued them in trespass for entering his ship and taking the cargo, and to a justification under the writ, having replied *de injuria absque residuo causæ*, and having new-assigned that the defendant took the goods for other purposes than those mentioned in the plea: Held, that it was competent to the judge to leave it to the jury to say, whether the goods were *bonâ fide* taken under the execution, or whether the execution was resorted to as a colour to enable the defendants to get possession of, and land the cargo as importers, without subjecting themselves to the claim or question that might have arisen if they had accepted them under the bill of lading. *Lucas* v. *Nicholls*, 4 Bing. 729. [*In error.*]

By mutual covenants in a charter-party it was agreed, on the part of the ship-owner, that he should provide a ship, which should proceed to Jamaica, and receive on board from the agents of the shipper a cargo to be provided by him according to his covenant after mentioned, and should sail with the June convoy, &c. provided the ship arrived out, and was ready to load sixty-five running days before the sailing of the convoy, which were to be accounted from the day of arrival, and being reported ready to receive goods, &c.; and on the part of the shipper, that he would provide 650 casks of produce in time for the ship to load the same and join the June convoy, provided she arrived out and was ready to load, and notice thereof given by the agents of the shipper, sixty-five running days before the sailing of the convoy, &c., and should pay &c.

It was further provided by the charter, that if any hurricane, insurrection, or invasion should happen, &c., that, upon notice, the obligation of the shipper under the charter-party should cease, &c.

In an action of covenant brought by the ship-owner upon this charter-party, the declaration, after reciting the substance of the indenture, stated that the ship arrived at Jamaica on the 27th of April, &c. and upon her arrival was seaworthy, &c. and ready to receive a cargo of &c., according to the charter-party, whereof notice was given to the agents of the freighter, and that the ship did, at &c. receive such cargo as his agents thought fit to load on board, &c. and delivered such cargo, &c. according to the charter-party. The declaration then assigned as a breach, that although no hurricane, &c. prevented &c., the freighter did not provide 650 casks of produce, &c., but &c. a much smaller quantity; that is to say, &c., being a very insufficient cargo, &c. contrary to the covenant, &c. whereby the ship-owner was prevented earning profit to the amount of 2500*l*.

The declaration then assigned as a further breach, that although no hurricane, &c., and although the ship arrived, &c. and was ready, &c. and notice, &c. sixty-five running days before the sailing of the June convoy, &c., the freighter did not provide a sufficient cargo to be laden, &c. in time sufficient for the ship to join the June convoy, &c., but detained the ship thirty days after the sailing, &c., whereby the ship-owner, lost the use, &c., was put to expense, &c. and prevented earning freight, &c. to a large amount, to wit, 2500*l*.

To this declaration the defendant pleaded eleven pleas, the substance of which, as applicable to the first breach was, that the ship did not arrive, or was not ready, or reported ready, to receive a cargo sixty-five running days before the June convoy was appointed to sail, or did actually sail, and that therefore the charter-party was void; and further, that the defendant sailed of his own accord with an insufficient cargo.

As applicable to the second breach, the substance of the eighth and eleventh pleas was, that the defendant did not detain the ship for any time after the sailing of the June convoy, in manner and form alleged.

To all the pleas, but the first, seventh, and ninth, the plaintiff demurred generally. On the first plea of *non est factum*, the plaintiff joined issue. The replication to the seventh plea was, that the ship was reported ready to load sixty-five days before the sailing of the June convoy. To the ninth plea, that the master sailed of his own accord with the short cargo, the plaintiff replied, that after notice of the ship being ready to load a reasonable time elapsed to deliver 650 casks of produce, &c. On the replications to the seventh and ninth pleas, the defendant joined issue.

Held, that the provision as to the sixty-five running days, was not a condition precedent to the obligation of the freighter to furnish a cargo of 650 casks of produce, but applied only to the obligation of the ship-owner, that the vessel in such case should sail with the June convoy; therefore, that it was not necessary, in the assignment of the first breach, to aver that the ship arrived out, and was ready to load sixty-five days before the sailing of the June convoy: Held also, that the substance of the assignment of the second breach was the failure to provide a cargo, and not the detention of the ship; and that the plea, by taking issue on an immaterial part admitted the material part. *Deffell* v. *Brockebank*, 3 Bligh, 561.

If one construction of a charter-party be much in favour of one of the parties, and an opposite construction equally in favour of the other, the evidence of the broker through whom it is entered into, as to what was said at the time of its execution, is of too dangerous a nature to be much relied on. *Taylor* v. *Briggs*, 2 C. & P. 525. [Abbott]

## (H) DEMURRAGE.

By a charter-party under seal, the freighter was at liberty "to keep the ship on demurrage, at her loading and delivery ports, ten days each, besides a certain number of days limited for her stay at the same, or as many of them as need should require;" the ship having been compelled to put into an intermediate port of her ports of loading and discharge, and the freighter having detained the vessel there ten days, and also fourteen days more than ten at the port of delivery; it was held, in an action on the charter-party, that the master could not recover on this covenant more than the ten days' demurrage, at 5*l*. per day at the port of L, the covenant not extending to the payment of demurrage beyond ten days at each of the ports of loading and discharge; and the Court held also, that a breach, averring that the plaintiff did not pay 5*l*. per day for demurrage, for the extra delay beyond ten days at the port of delay, and for the delay at B, as well as the demurrage for ten days' delay at the port of delivery, was bad. *Stevenson* v. *York*, 2 Chit. 570.

Where a charter-party contained a proviso "that the ship should lie at N Y for taking on board her cargo, and at L for delivering the same twenty running days in the whole, if not sooner discharged:" Held, that under this proviso, the ship might be detained twenty days at each place, *Stevenson* v. *York*, 2 Chit. 578.

If a freighter is to discharge within twelve running days after the vessel's arrival; and he is prevented from discharging at first by reason of other goods being placed above his, he must, when that obstruction is removed, discharge with all reasonable diligence; and he is not, as matter of right, entitled to the whole original number of days from the time when he is able to commence discharging. *Rogers* v. *Hunter*, 2 C. & P. 601, s. c. 1 M. & M. 63. [Tenterden]

The charterer of a ship having assigned his cargo to P, who placed it in defendant's hands to sell it, the defendant, by an agreement which stated those facts, undertook to pay plaintiff, the owner of the ship, freight and demurrage, if any were due, and in every respect to put himself in the place of the charterer.

Fifty running days were allowed by the charter-party for loading and unloading, and ten for demurrage, at 10*l.* a day. The ship having occupied ninety-five days in loading and unloading, several of which elapsed after the date of the defendant's agreement: Held, that he was liable in damages in respect of demurrage for the whole, and that a sufficient consideration appeared on the face of the agreement. *Benson* v. *Hippins*, 6 Law J. C.P. 64, s. c. 4 Bing. 455, s. c. 1 M. & P. 246, s. c. 3 C. & P. 186.

## (I) FREIGHT.

A charter-party, whereby the owners of a ship let her to freight by the month, for such time as she should be taken up in performing a voyage from L to P, the island of G, and from thence back to L, on the terms that the owners should receive, and the freighters should load and unload a cargo at G, as such outward and homeward voyage, is to be construed to mean two distinct voyages from L to G, and from thence back to L, and not as one entire voyage; and the vessel having unloaded a cargo at G and loaded another, but on her return to L with the cargo having been entirely lost: Held, that the owners were entitled to freight for the voyage to G. *M'Krell* v. *Simond*, 2 Chit. 666.

H, by a charter-party, dated the 1st of March, let to J a ship to freight, and by the terms of the charter-party, H was to carry an outbound cargo of goods (not prohibited by restraint of princes), from L to C in A, and to bring back from thence a cargo for J, J paying freight for the same; H cleared out on the 22nd of March from L with a cargo of salt, and on the 22d of May following arrived at C, where the importation of British goods was prohibited, by an order issued the 1st of March, the very day the charter-party was dated, and also a further order prohibiting the exportation of goods to E, so that H should unload the salt or bring back a cargo of rice: Held, that H could not recover for freight homewards, if it could be established in evidence that he knew of the prohibition at the time of the ship's clearance from L. The fact of H having such knowledge must necessarily depend upon the circumstances of the case. *Heslop* v. *Jones*, 2 Chit. 550.

The commander of a vessel entered into a charter-party, not under seal, in his own name, in which it was stipulated, that certain freight should be paid, but it was not said to whom. Freight was earned; and the commander gave notice to the charterer not to pay it to the owners; but he afterwards did pay the freight to them: the Court held, that the commander could not maintain an action against the charterer, for the freight, after that payment. *Atkinson* v. *Cotesworth*, 3 Law J. K.B. 104, s. c. 3 B. & C. 647, s. c. 5 D. & R. 552.

The owner has a lien on the goods mentioned in the bills of lading, to the extent of the freight stipulated for therein, as a security for his freight due on the charter-party. *Christie* v. *Lewis*, 5 B. Mo. 211, s. c. 2 B. & B. 410.

Where the defendants, indorsees of the bills of lading of a cargo wrecked on the coast of Holland, entered into an agreement by letter with the plaintiffs, who claimed a lien on the proceeds of the salvage on the part of the owner and captain, *pro rata* freight, that if they would remove all difficulties in respect of those claims, they would pay a certain sum, *pro rata* freight, and certain other sums: Held, that having entered into such agreement, with a full knowledge of all the circumstances under which the charter-party was executed, and the plaintiffs having assented to the terms of the letter, and performed their part, they could not afterwards refuse to perform their undertaking, upon the ground that the plaintiffs were in fact only agents for the owner and captain, and that their claims for freight were only colourable. The Court having no doubt of the plaintiff's right to recover, refused to turn the case into a special verdict. *Thornton* v. *Fairlie*, 8 Taunt. 354, s. c. 2 B. Mo. 397.

A charter-party commenced with general terms of demise, "granted and to freight her;" but by the subsequent provisions, the owner was to have the management and stowage of the cargo, to furnish the crew, and perform the general duties of the ship: Held, by three judges, (Dallas, C. J. *dissentiente*,) that he had not parted with possession of the vessel, and that the mere circumstance of his having entered into an agreement with the charterer, touching the mode in which he should be paid for freight, did not divest him of the lien on the cargo for freight, and it made no difference that he had delivered the homeward cargo, and received the freight due upon the bills of lading, which was different from that due upon the charter-party. *Christie* v. *Lewis*, 5 B. Mo. 211, s. c. 2 B. & B. 410.

The Court will not entertain a bill by a ship-owner against a freighter for an account of what is due in respect of freight, though the charter-party expressed that the freight was to be paid according to the quantity of the cargo, and it was charged, that in the bill of lading that quantity was stated entirely. *Long* v. *Young*, 2 Law J. Chanc. 139.

## (K) BILL OF LADING.

The consignee not being prepared to receive a cargo, and the ship-owners being desirous to unload the same and enter it with the Excise, enter it so erroneously that it is seised: Held, that the ship-owners are not liable to the consignees for the non-delivery of the cargo, as the bill of lading did not describe it with sufficient accuracy. *Shirwell* v. *Sheplock*, 2 Chit. 397.

It is the duty of the master of a ship, who has given a receipt for goods, never to sign a bill of lading until he is repossessed of that receipt. *Thompson* v. *Trail*, 2 C. & P. 334. [Abbott]

Where, by the bills of lading, goods were to be delivered to the defendant, and the "*net proceeds*" paid to the plaintiff or to his assigns: Held, that the "*net proceeds*" was the amount which remained after paying the freight and other charges. *Thompson* v. *Adam*, 5 B. Mo. 280, s. c. 2 B. & B. 450.

Where wines were shipped on board a vessel, and sustained damage by leakage, (the bill of lading containing, besides the usual clauses, these words, "contents unknown and free of leakage;")—in an action against the owner for the damage, it was left

to the jury to say, whether or not the leakage had been occasioned by the negligence of the defendant, and they gave a verdict for the plaintiff: The Court refused to set it aside, or grant a new trial. *Strahan* v. *M'Queen*, 6 Law J. C.P. 4.

The bursting of a pipe connected with the boiler of a steam-vessel, in consequence of its having been filled with water several hours before the time of the vessel's sailing, and of the action of frost upon it, is not within the exceptions of a bill of lading; but the owners are liable for damage occasioned thereby to the cargo. *Siordet* v. *Hall*, 6 Law J. C.P. 137, s. c. 4 Bing. 607, s. c. 1 M. & P. 561.

(L) LOSSES AND INJURIES.

(*a*) *To other Vessels.*

It is a rule in navigating vessels, that the ship sailing before the wind must give way to one that goes by it. Where, therefore, in an action on the case for running down the plaintiff's brig, it was proved that the defendants' vessel was sailing before the wind at the time of the accident, which happened at night, and that she had her *studding*-sails set in the Channel: the Court granted a new trial, in order to ascertain whether it was the custom to carry such sails; or whether, under the circumstances, the master of the defendants' vessel had kept a proper look out,—it being his duty to have made way for the plaintiff's brig, which might have been done by a slight alteration of the rudder of the defendants' vessel. *Jameson* v. *Drinkald*, 5 Law J. C.P. 30.

The rules for fixing or apportioning the loss occasioned by two ships running foul of each other, are as follows:—1st, It may happen without blame being imputable to either party, as where the loss is occasioned by a storm, or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree; 2dly, a misfortune of this kind may arise where both parties are to blame, where there has been a want of due diligence or of skill on both sides; in such a case the rule of law is, that the loss must be apportioned between them; 3dly, it may happen by the misconduct of the suffering party only, and then the rule is, that the sufferer must bear his own burden; 4th, it may have been the fault of the ship which run the other down, and in this case the injured party would be entitled to an entire compensation from the other. *Woodrop*, 2 Dods. 83.

The harpoons, lances, lines, and other fishing stores of a whale ship are not protected by the 53 Geo. 3, c. 159; but as "appurtenances" of the ship, are liable, up to their full amount, as well as the ship herself, towards satisfaction for any damage done by that whale-ship to any other ship. *Gale* v. *Laurie*, 4 Law J. K.B. 149, s. c. 5 B. & B. 157, s. c. 7 D. & R. 711: s. p. *Dundee*, 1 Hag. 109.

(*b*) *Average.*

General average is always to be made according to the laws of the country in which the port of delivery is situated, although it is made on things which would not be the subject of general average by the laws of Great Britain. *Simonds* v. *Loder*, 2 Law J. K.B. 159, s. c. 2 B. & C. 805, s. c. 4 D. & R. 375.

Provisions and stores furnished for the use of convicts, are not liable to contribute to general average, although the ship was chartered for the conveyance of the convicts from this country to New South Wales. *Brown* v. *Stapleton*, 5 Law J. C.P. 121, s. c. 4 Bing. 119.

The owner of a British ship may avail himself of a statement of average made at the port of delivery in a foreign country, according to the law thereof, so as to charge a British freighter of goods, under a charter made in Britain, with the expenses of *wages and provisions for the seamen*, incurred during the necessary detention of the ship at an intermediate port, although by the law of this country such expenses would not be recoverable as average. *Dalglish* v. *Davidson*, 5 D. & R. 6.

The cases of average in equity rest upon the same principle as contribution; there is no express contract, but equity distributes the loss equally. *Stirling* v. *Forester*, 3 Bligh, 590.

On the prisage of wines, it is immaterial whose wines are taken, all must contribute equally. So it is where goods are thrown overboard for the safety of the ship, the owners of the goods saved by that act must contribute proportionably to the loss. *Stirling* v. *Forester*, 3 Bligh, 590.

(M) SHIP BROKERS.

Ship brokers are not within the meaning of the statutes relating to the admission and regulation of brokers by the mayor and aldermen of London. *Gibbons* v. *Rule*, 5 Law J. C.P. 176, s. c. 4 Bing. 301.

Rate of brokerage upon the sale of prize goods generally.

The same commission allowed to a broker, under the particular circumstances of the case, upon the sale of prize goods under the direction of the East India Company. *Harregaard*, 1 Hag. 22.

Where ship brokers employed a stevedore, to whom they paid far less than the amount they charged the ship-owners, of which fact the ship-owners were cognizant,—it was holden, that such stevedore could not maintain an action against the brokers for the larger sums received by them as money had and received to his use. *Wilson* v. *Cohen*, 2 C. & P. 363. [Gaselee]

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## SIMONY.

The Ecclesiastical Court has jurisdiction over questions of simony. *Dobie* v. *Masters*, 2 Phill. 171.

The incumbent of a living was afflicted with a mortal disease, so that he was in extreme danger, and his life was thereby despaired of. The owner of the rectory contracted for the sale of the next presentation for a sum of money on the day of the death of the incumbent. Both the seller and the purchaser knew of the state of health of the incumbent, and believed that he could not long live. The clerk presented had no such knowledge: The Court held, that it was a simoniacal contract, and therefore void. *Fox* v. *Bishop of Chester*, 2 Law J. K.B. 109; s. c. 2 B. & C. 635, s. c. 4 D. & R. 93.

A bond recited that the patron of a rectory had, by an instrument of the same date, presented an incumbent, and that he had agreed to resign, upon request of the patron, or the owners of the advowson

for the time being, for the purpose of enabling him or them to present one of the two younger brothers of the patron, when capable of holding.

Held, (reversing the judgment of the Court of King's Bench and Exchequer Chamber,) that such a bond is simoniacal and void, on the ground that such an agreement is a benefit to the patron, and contrary to the statute 31 Eliz. c. 6, and, *sembla*, the common law.

Held also, that from the recitals of such a bond, it must be intended that such presentation was made in consideration of the agreement to resign, and that it is not necessary to allege that fact in pleading. *Fletcher* v. *Lord Sondes*, 1 Bligh, N.S. 144. [But see Stat. 7 & 8 Geo. 4, c. 25.]

## SINKING FUND.

[See STOCK.]

## SIX CLERKS.

The signature of the six clerks, is merely a certificate that the original papers were filed, and not an undertaking as to the correctness of office copies. *Browne* v. *Barnard*, 1 Jac. 57.

## SLANDER.

[See LIBEL.]

(A) ACTION FOR, WHEN MAINTAINABLE.
(B) SLANDER OF TITLE.
(C) PLEADINGS.
(D) EVIDENCE.
(E) DAMAGES.

### (A) ACTION FOR, WHEN MAINTAINABLE.

An action cannot be maintained for these words, "he has defrauded a mealman of a roan horse," without special damage. *Richardson* v. *Allen*, 2 Chit. 657.

Where in an action of slander, the plaintiff declared that he was a farmer and vender of corn, and alleged that the defendant said of him "that he was a rogue and swindling rascal, and that he had delivered to the defendant 100 bushels of oats, worse by sixpence a bushel than he bargained for:" Held, that these words were actionable, without proof of special damage, as they imputed fraud to the plaintiff in his business of a vender of corn. *Thomas* v. *Jackson*, 3 Law J. C.P. 182, s. c. 5 Bing. 104.

To say of a man "I think that the present business (meaning the death of his housekeeper) ought to have the most rigid inquiry, for he murdered his wife; that is, he gave her improper medicines which were the cause of her death," is actionable without proof of special damage. *Ford* v. *Primrose*, 3 Law J. K.B. 40, s. c. 5 D. & R. 287.

Words imputing insolvency to a person who carries on any business in which credit is of value, are actionable, though that person is not a trader, nor at all subject to the bankrupt laws. *Whittaker* v. *Bradley*, 4 Law J. K.B. 125, s. c. 7 D. & R. 649; s. c. as *Whittington* v. *Gladwin*, 5 B. & C. 180.

Where the defendant said, "The plaintiff is a rascal, and has cheated me out of 100*l*."; and, in the declaration, it was stated, that the words were spoken of the plaintiff in his character of an auctioneer and appraiser, and with an intent to injure him as such: Held sufficient after verdict, although it was objected that the words, as proved, were not actionable in themselves, and were not sufficiently stated in the declaration to have been spoken of the plaintiff in the way of his trade. *Bryant* v. *Loxton*, 4 Law J. C.P. 142.

"Mr. H.'s oath ought not to be taken, for he have been a forsworn man, and I can bring people to prove it; and them that know him will not set on a jury with him": Held to be not actionable, unless it appears that the words were spoken with reference to some previous conduct of the plaintiff as a jurymen, or to some oath taken by him in a judicial proceeding; and, for want of an averment that they were so spoken, judgment arrested. *Hall* v. *Weston*, 4 Law J. K.B. 204, s. c. 8 D. & R. 140.

An infant, for his own benefit, may carry on trade and business, and, by his *prochein ami*, may maintain an action for slanderous words in respect of such trade and business. *Wild* v. *Tomkinson*, 5 Law J. K.B. 265.

A conversation between the under-sheriff and an officer, concerning A B, whom the former was about to appoint as officer also, is confidential, and entitled to the same protection as communications relative to the character of servants, and therefore words spoken under such circumstances are not actionable in the absence of special damage. On the question of malice, any fact which tends to shew that the defendant spoke *bonâ fide*, is admissible, even under the general issue. *Sims* v. *Kinder*, 1 C. & P. 279. [Best]

Malice is the gist of the action for slander; but is of two kinds—malice in fact, and malice in law: the former denoting ill-will against a person; the latter meaning a wrongful act, done intentionally, without just cause or excuse. In common actions for slander, malice in law is to be inferred from the act of uttering or otherwise publishing the slander, that being a wrongful act, intentionally done, without just cause or excuse: but in actions for slander, *primâ facie* excusable on account of the cause or occasion of the publishing it, as in privileged communications respecting a servant's character, to a party requesting information, malice in fact must be proved. Therefore in an action for slander of the plaintiffs, in their trade as bankers, it being proved that J W met the defendant, and said, "I hear, you say Bromage & Sneath's (the plaintiffs') bank, at Monmouth, has stopped: Is it true?"—that defendant answered, "Yes, it is; I was told so; it was so reported at Crickhowell, and nobody would take their bills; and I came to town in consequence of it myself": and that G B had told the defendant "there was a run on the plaintiffs' bank at Monmouth": It was held, on motion for a new trial, that the judge ought, first, to have left it as a question to the jury, whether the defendant understood J W as asking for information, and whether he had uttered the words merely as honest advice to J W to regulate his conduct by accordingly; and if they

were of opinion for the defendant on that question, (which would make the case one of privileged communication, and not of common slander,)—then, secondly, whether the defendant, in so doing, was guilty of any malice in fact. *Bromage* v. *Prosser*, 3 Law J. K.B. 203, s. c. 4 B. & C. 247, s. c. 6 D. & R. 296, s. c. 1 C. & P. 475, s. c. 673.

The defendant obtained a warrant to search the house of the plaintiff for goods of the defendant suspected to have been stolen by the plaintiff. He accompanied the officer to execute the warrant; and in accompanying him, told the officer that the plaintiff HAD robbed him: It was held, that this was not a privileged communication; inasmuch as the speaking of the words was no part of the defendant's business when he accompanied the officer. *Dancaster* v. *Hewson*, 6 Law J. K.B. 311, s. c. 2 M. & R. 176.

### (B) Of Title.

[See Variance.]

The attorney of a party claiming title to premises put up for sale, is not liable to an action for slander of title, if he *bonâ fide*, though without authority, makes such objection to the seller's title, as his principal would have been authorized in making. *Watson* v. *Reynolds*, 1 M. & M. 1. [Littledale]

### (C) Pleadings.

A count in a declaration, in case for slander, that the defendants did maliciously *impose the crime of felony on the plaintiff*, by means whereof he sustained a damage, is good in law. *Blizard* v. *Kelly*, 2 Law J. K.B. 6, s. c. 2 B. & C. 283, s. c. 3 D. & R. 519.

Where, in an action for defamation, a rule for a new trial was made absolute, and the plaintiff had leave to amend one of the counts of the declaration, in order that the words laid therein might correspond with those proved at the trial, the Court allowed a new count to be added, to arrive at the justice of the case, in order to try the merits on the second trial. *Wyatt* v. *Cooks*, 3 Law J. C.P. 207.

In the inducement, in a declaration for slander, it was stated, that the plaintiff was treasurer and collector of certain tolls, and that the defendant spoke of and concerning him, as such treasurer and collector, certain words—thereby meaning, that the plaintiff, as such treasurer and collector, had been guilty of the act imputed to him. In every count, there was an innuendo applying the words to him as collector. At the trial, the plaintiff proved that he was treasurer, but not that he was collector: The Court held, that it was a fatal variance. *Sellers* v. *Till*, 4 Law J. K.B. 27, s. c. 4 B. & C. 655, s. c. 7 D. & R. 121.

Where a defendant pleaded a justification to an action for slandering the plaintiff, as a Justice of the Peace, of pocketing fines of prisoners who had been convicted by the plaintiff: Held, insufficient, because it did not state the names of the parties convicted, and of whom the fines had been received. *Newman* v. *Bailey*, 2 Chit. 665.

### (D) Evidence.

Evidence in an action for slander, not pertinent to the matter in issue, is not admissible. *Boldron* v. *Widdows*, 1 C. & P. 65. [Abbott]

When affirmative pleas of justification are put on the record with the general issue, the plaintiff may, if he pleases, not only prove the facts of the declaration, but may, before the defendant's case is gone into, go into any evidence which tends to destroy the effect of the justifications, by way of anticipating the defence, or, if he choose, content himself with proving the fact on the general issue, and then stop, leaving the defendant to make out his justification as he can, and afterwards go into evidence in reply as to the justifications;—but if he adopts the latter course, he is restricted to such evidence as goes exactly to answer the case proved by the defendant. *Pierpont* v. *Shapland*, 1 C. & P. 447. [Littledale]

In slander, for imputing felony, evidence of general good character is not admissible. *Cornwall* v *Richardson*, 1 R. & M. 305. [Abbott]

In an action for slander, charging a baker with using adulterated flour, the declaration averred, that several persons, naming them, had ceased to buy the bread on that ground: Held, that the customers must be called, and that what was said to a person who kept a shop at which the bread was sold, could not be received as evidence. *Tilk* v. *Parsons*, 2 C. & P. 201. [Best]

In an action for slander, the averments, by way of inducement, that the plaintiff had contracted to buy of one R B on credit, and, by way of special damage, that R B refused to deliver the goods contracted for, unless the plaintiff would procure due and proper securities for the punctual payment thereof; and that the plaintiff was forced and obliged to procure, for the payment &c. certain good and responsible persons, are sufficiently sustained by proof, that R B, with the knowledge of the plaintiff, made the contract merely as an agent, and that certain persons passed their word for the payment for the goods before the delivery thereof could be obtained. *Wild* v. *Tomkinson*, 5 Law J. K.B. 265.

In actions for words, not actionable in themselves, evidence of their truth may be given under the general issue, to disprove malice. *Watson* v. *Reynolds*, 1 M. & M. 1. [Littledale]

In a defamation suit, if there be a variance as to the testimony of the witnesses, two affirmative witnesses will be preferred to several negative witnesses. *Tocker* v. *Ayre*, 3 Phill. 539.

A declaration charged the speaking of the following words—"I will do my best to transport him, As he has been working for me some time, and has been robbing me ALL THE WHILE." The words proved to have been spoken were—"*He has* worked for me some time; and has been CONTINUALLY robbing me." It was held, that this was no variance. *Dancaster* v. *Hewson*, 6 Law J. K.B. 311, s. c. 2 M. & R. 176.

In an action for slander, the declaration stated, that the defendant said of the plaintiff to a person who was in the habit of supplying him with goods, "'Ware hawk; you must take care of yourself there; mind what you are about;" and the words proved to have been spoken were, "'Ware hawk; mind what you are about:" Held, that sufficient was proved to support the action. *Orpwood* v. *Barkes*, 5 Law J. C.P. 167, s. c. 4 Bing. 261.

An allegation in a declaration in slander, which states that "by reason of the premises, divers persons, to wit," &c., "who would otherwise have *retained and employed* the plaintiff, wholly *declined*

*and refused* so to do," is not supported by evidence which shews that other persons would have recommended the plaintiff, and that the persons named in the declaration would have employed him on such recommendation. *Sterry* v. *Foreman*, 2 C. & P. 592. [Best]

(E) DAMAGES.

An attorney brought an action for defamation. The defendant suffered judgment by default. At the execution of the writ of inquiry, counsel attended for both parties, but no evidence was given. The jury gave a verdict for 40*l*.—The Court would not set aside the inquiry on the ground of excessive damages. *Tripp* v. *Thomas*, 3 Law J. K.B. 42, s. c. 3 B. & C. 427, s. c. 1 C. & P. 477, s. c. 5 D. & R. 276.

## SLAVE-TRADE.

Slave-trading is not a crime by the universal law of nations.

It is not piracy to trade in slaves. *Le Louis*, 2 Dods. 246—8. [But see 5 Geo. 4, c. 113.]

The sentence of a Vice-admiralty Court, condemning a French ship for being employed in the slave-trade, and forcibly resisting the search of the king's cruizers, reversed. *Le Louis, Forest*, 2 Dods. 210.

Flag-officer entitled to share of bounty given for seizure of slaves. *Dolores, Carbonnell*, 2 Dods. 413.

On a sentence of condemnation of a Spanish ship engaged in the slave-trade, on the 12th of February, 1818, at Sierra Leone, restitution decreed on appeal. *San Juan*, 1 Hag. 266.

A slave, having escaped from a land of slavery, is free the moment he is on board a British man of war.

A British subject had slaves on a plantation in Florida, where slavery was recognized by the Spanish laws. A war broke out between England and Spain. A proclamation was issued by the Commander-in-chief, off America, that all persons would be received by him, who might wish to go into the army or navy of England, or to settle in English colonies. A number of slaves escaped from that plantation, and were received on board a ship in the British squadron: The Court held, that an action could not be maintained for the value of the slaves. *Forbes* v. *Sir A. J. Cochrane*, 2 Law J. K.B. 67, s. c. 2 B. & C. 448, s. c. 3 D. & R. 679.

## SMUGGLING.

*Quære*—Whether smuggling Bandana silk-handkerchiefs, is an offence within the meaning of 45 Geo. 3, c. 12, and 3 Geo. 4, c. 110, subjecting the party to be sent to serve in the navy. *Rex* v. *Rogers*, 3 D. & R. 607.

An information on the 45 Geo. 3, c. 121, for smuggling, after stating the offence so as to bring it within the statute, alleged that the said vessel or boat then having on board foreign spirits, by reason thereof the spirits and vessel became forfeited according to the form of the statute in that case made and provided—further stated, that the defendant being found on board the said vessel, charged, that thereby he had for the sum of, &c.; the Commissioners of Customs having, by virtue of the said statute elected to sue for the treble value of the said goods instead of the penalty: Held, on motion in arrest of judgment, that the information was good, the offence being clearly and plainly set out on the record. *Attorney General* v. *Rattenbury*, 9 Price, 397.

The Court quashed a conviction on the acts against smuggling, because it did not set forth in express terms, that it was proved on oath before the justice, that the person "was carrying and conveying" the brandy liable to forfeiture. *Ex parte Aldridge*, 2 B. & C. 600, s. c. 4 D. & R. 83.

Where a conviction stated, "C H was convicted of having been found on board a vessel subject to forfeiture, for hovering within the limits of a port of this kingdom, having certain contraband goods on board:" Held, that this was bad, first, for that it should have been stated that the vessel was hovering without lawful excuse; secondly, for that C H should have been described as a British subject. *Ex parte Hawkins*, 2 B. & C. 31, s. c. 3 D. & R. 209.

By the 6 Geo. 4, c. 108, s. 3, it was enacted, that vessels of a certain description found "in any part of the British or Irish channels, or elsewhere on the high seas, within 100 leagues of the coasts of the United Kingdom," having "in any manner attached thereto" casks of certain dimensions, "of the sort or description used, or intended to be used, or fit or adapted for the smuggling of spirits, (unless such casks are really necessary for the use of such vessel, or a part of her cargo, and included in the regular official documents of such vessel,)" the casks, vessel, &c., shall be forfeited. By s. 49, certain persons found to have been on board such vessels, liable to forfeiture, are subjected to certain punishments. A conviction stated that A B was convicted of having been found on board a vessel liable to forfeiture; "for that it was found in the British channel, having in a certain manner attached thereto, divers, to wit, twenty casks (of the dimensions mentioned in s. 3), and of the sort or description used, or intended to be used, for the smuggling of spirits, the said casks not being really necessary for the use of the vessel, and included in the regular official documents of the vessel:" Held, first, that the vessel being found in the British Channel, it was not necessary to allege that she was within 100 leagues of the coast; secondly, that the statements that the casks "in a certain manner" attached to the vessel was sufficient; thirdly, that it was not necessary to negative that the casks were part of the cargo, the conviction stating that they were not included in the official documents of the vessel; fourthly, that the allegation, that the casks were "of the sort or description used, or intended to be used, for the smuggling of spirits," being in the alternative, was bad. *Ex parte Pain*, 5 B. & C. 251.

A conviction under 11 Geo. 1, c. 30, s. 16, for knowingly harbouring, keeping, and concealing smuggled spirits, is not supported by evidence of finding the smuggled spirits concealed in the house of the party convicted, unless he was present at the time of finding, or some other direct proof be given of a guilty knowledge. *Ex parte Ransley*, 3 D. & R. 572.

## SODOMY.

A charge of making overtures to commit sodomy, is not an infamous crime within the 4 Geo. 4, c. 54, as that act only applies to crimes which incapacitate a man from being a witness. *Rex* v. *Hickman*, 1 R. & M. C.C.R. 34.

An indictment on the 4 Geo. 4, c. 54, for accusing A B with having committed the detestable crime, &c. cannot be supported if it state that the prisoner threatened to prosecute, &c.; the word in the act being *accuse*. But if the indictment use the word *accuse*, and the evidence prove a threat to *prosecute*, it is for the jury to say, whether that was not a threatening to *accuse*. *Rex* v. *Abgood*, 2 C. & P. 436. [Garrow]

Where an indictment on the 4 Geo. 4, for threatening to accuse A B of the crime of sodomy, did not shew who was threatened,—it was holden insufficient.

So, where an indictment on the 4 Geo. 4. charged the prisoner with demanding money, &c., without shewing from whom it was demanded,—it was holden insufficient. *Rex* v. *Dunkley*, 1 R. & M. C.C.R. 90.

## SOLICITOR.

[See ATTORNEY AND SOLICITOR.]

## SPARRING.

Public exhibitions of sparring matches are illegal, —*semble*. *Hunt* v. *Bell*, 1 Bing. 1.

## SPECIAL CASE.

The Court will compel the admission of certain facts by a defendant where necessary to raise a question in a special case. *Buckle* v. *Hollis*, 2 Chit. 398.

Where a plaintiff has obtained a verdict, with nominal damages, on a case reserved for the opinion of the Court, to be drawn up by the plaintiff, who subsequently refuses to do so, the case cannot be set down for argument, nor can the plaintiff be compelled to complete it, but the defendant may move to set aside the verdict and have a new trial. *Medley* v. *Smith*, 6 B. Mo. 53.

Where a plaintiff has obtained a verdict subject to a case for the opinion of the Court of Common Pleas, and the defendant, with a view of preventing the case from being argued, does not obtain the signature of a serjeant to such case; the Court will order the *postea* to be delivered to the plaintiff. *Jackson* v. *Hall*, 8 Taunt. 421, s. c. 2 B. Mo. 478.

If a case, arising out of the constitution of a deed of settlement, is sent from a court of equity to a court of law, the deed ought to form a part of the case, to enable a court of law to give a correct judgment. *Lansdowne* v. *Lansdowne*, 2 Bligh, 87.

If a special case be reserved, that case is evidence of the facts therein stated, if it be signed by the counsel on each side. *Van Wart* v. *Wolley*, 1 R. & M. 4. [Abbott]

## SPECIFIC PERFORMANCE.

[See VENDOR AND PURCHASER.]

(A) BILL FOR, WHERE SUSTAINABLE.
(B) PRACTICE.

### (A) BILL FOR, WHERE SUSTAINABLE.

[See INJUNCTION. *Atwood* v. *Braham*, 2 Russ. 186, and *Stevens* v. *Guppy*, 6 Law J. Chanc. 164, s. c. 3 Russ. 171.]

The Court will not interfere in cases of specific performance, unless it can give complete, and not merely a partial relief. *Agar* v. *Macklew*, 4 Law J. Chanc. 16, s. c. 2 S. & S. 418.

Courts of equity cannot decree the performance of one part of an agreement, leaving the other parts unperformed. *Wood* v. *Rowe*, 2 Bligh, 595.

*Quære*—Can a court of equity decree the performance of a written agreement, where the bill states that the written agreement was subsequently varied by parol, and prays, in the alternative, either that the agreement, with these variations, may be executed, or that it may be executed as it stands in writing? *Wright* v. *Howard*, 1 Law J. Chanc. 94. [See *Robinson* v. *Page*, 3 Russ. 114, *post* 491.]

If a contract is improvidently entered into by ignorant persons, the Court will not decree a specific performance. *Martin* v. *Mitchell*, 2 J. & W. 413.

To sustain a bill for a specific performance, a good title must be shewn before the commencement of the suit. *Lewin* v. *Guest*, 1 Russ. 325.

In decreeing a specific performance, a court of equity exercises a discretion, and will not exert its authority for that purpose, if, by so doing, injustice will be done. *Powell* v. *Lloyd*, 2 Y. & J. 372.

The Court will not decree a specific performance where false representations were made at the sale. *Beaumont* v. *Dukes*, 1 Jac. 422.

A bill for a specific performance against a purchaser cannot be entertained, unless the vendor has furnished him with title deeds, or has given a legal covenant for their production. *Barclay* v. *Raine*, 1 S. & S. 449.

A specific performance, at the instance of a purchaser of his reversionary interest from an expectant heir, will not be decreed in the absence of an adequacy of consideration. *Ryle* v. *Swindells*, M'Clel. 519.

A, being indebted to B, enters into a written agreement, that B may at any time while the money due to him remains unpaid, become the purchaser, for 450*l.*, of a house belonging to A, and that the money due to B from the latter shall be part payment of the price: this is a contract of sale, and not a mortgage to secure the debt; and B, having duly declared his option to become a purchaser, is entitled to have the agreement specifically performed. *Bunning* v. *Bunning*, 1 Law J. Chanc. 56.

A demises a house to B for a term of years at a certain rent; and the lease contains a proviso that B shall, at any time during the term, be enabled, upon giving a certain notice, to purchase the house at a price to be fixed by two surveyors to be named, the one by A, and the other by B, his executors, administrators, or assigns; A sells his reversion to

C, who buys it with notice of the proviso, and the lessee gives notice to C, that he is ready to purchase according to the proviso, and names a surveyor; C, however, refuses to sell, or to name a surveyor on his part: Held, that B cannot maintain a bill against C for the specific performance of the agreement in the proviso. *Agar* v. *Macklin*, 4 Law J. Chanc. 16, s. c. 2 S. & S. 418.

A purchases certain debts proved against a bankrupt estate, and then contracts with B to sell them to him at a fixed price: Held, that this is a contract of which a court of equity will decree a specific performance. *Adderley* v. *Dixon*, 2 Law J. Chanc. 102, s. c. 1 S. & S. 607.

A specific performance of an agreement to build houses, not under the third or fourth rate, was decreed generally, although the plaintiff had built a brewhouse on part of the land specified in the agreement, and which building had injured the lessor's property. *Gordon* v. *Smart*, 1 Law J. Chanc. 36, s. c. 1 S. & S. 66.

If a lessor delays making out a title, and giving up possession on the day specified in the agreement, the Court will not entertain a bill for a specific performance against the party who undertook to accept the lease. *Parker* v. *Frith*, 1 S. & S. 199, n.

If a bill for a specific performance of a purchase of government stock prays a delivery of the certificates, which would constitute the plaintiff the proprietor of the stock, it will hold in equity. *Doloret* v. *Rothschild*, 1 S. & S. 590.

The specific performance of an agreement, to purchase an annuity charged upon stock in the public funds, will be enforced. *Withy* v. *Cottle*, 1 Law J. Chanc. 5, s. c. 1 S. & S. 174.

*Semble*, That a specific performance cannot be enforced against husband and wife, who have a joint power of appointment by deed over the wife's estate, notwithstanding an agreement in writing to dispose of it. *Martin* v. *Mitchell*, 2 J. & W. 425.

Bill for specific performance dismissed with costs, where the agreement had been procured by the plaintiff under circumstances of great suspicion.

A, B and C, being jointly interested in certain property, A contracts with B to take a lease of the whole of it: and the contract expresses that B is to be bound by the contract, only so far as it is to be performed by him; but that A is to be answerable to B, even for what is to be done by C: Held,

That B will not be precluded from enforcing the contract against A, by the circumstance that C has taken proceedings in a Court of Equity, which deprive A of that possession and enjoyment of the property, the subject of the contract, which it was the purpose of the contract to give him: nor by the circumstance that B, A having declared his resolution not to perform the agreement, has supported C in some of the applications which he has made, tending to interfere with A's enjoyment and possession of the property. —— v. *Ogden*, 5 Law J. Chanc. 104.

It is no defence to a bill for specific performance, that the plaintiff has made inaccurate representations with respect to the property which was the subject of the contract, when those representations proceeded upon, and had reference to sources of information, which were open to all parties, and which would have enabled them to detect the alleged inaccuracies. *Harris* v. *Kemble*, 5 Law J. Chanc. 131, s. c. 1 Sim. 111.

A person who makes a contract as trustee for others, cannot sustain a suit for specific performance, without joining them along with him. If his *cestuis que trust* are the members of a numerous company; some of them, suing on behalf of themselves and all the other members, ought to join with him as co-plaintiffs. *Anon.* 3 Law J. Chanc. 99.

A bill for the specific performance of an agreement for a lease, entered into by the trustees of a numerous company, cannot be sustained, unless all the members join. *Douglas* v. *Horsfall*, 2 S. & S. 184.

Therefore, a bill by three members of a trading company, against one of the committee appointed for its management, is unavailable, since it ought to have been by all the partners as well as the other members of the committee. *Baldwin* v. *Lawrence*, 2 S. & S. 18.

If a person, not originally a party to an agreement, acts under it, and professes to render accounts and make payments according to its provisions, a bill for the performance of it may be maintained against him, even though the original agreement stipulated that it was not to extend to create any demand against him. *Cockell* v. *Whiting*, 3 Law J. Chanc. 6.

A court of equity will enforce the specific performance of a contract, though made with a plaintiff who represented himself as acting for another person, if there is no proof that that misrepresentation was a fraud upon or did an injury to the defendant. *Fellowes* v. *Lord Gwydyr*, 5 Law J. Chanc. 43, s. c. 1 Sim. 63.

Articles of agreement are executed between the crew of a vessel, of the one part, and the captain of the other part, containing a stipulation, that the seamen are not to have any demand against the owner of the ship: the owner subsequently acts under the agreement, and, in pursuance of it, makes payment to the seamen out of the proceeds of the cargo: Held, that the owner, by such conduct, becomes a party to the agreement, and that a bill for the performance of the agreement may be maintained against him. *Gosling* v. *Smith*, 3 Law J. Chanc. 5.

Where a notice was given by the vendor that if the contract was not completed within the time, he should consider its not being completed within the time as equivalent to a refusal to perform it, but he neither returned nor tendered the deposit which he had received, the Court, on a bill by the purchaser, decreed a specific performance. *Reynolds* v. *Nelson*, 6 Mad. 18.

The vendor's title being founded on the destruction of contingent remainders, is no answer to a bill for a specific performance. *Hasker* v. *Sutton*, 2 S. & S. 513.

There being a parol agreement for the purchase of a farm and farm-house, the possession of the farm by the purchaser will be held an act of part-performance, sufficient to authorize the Court to execute the contract, even though the house should have been occupied adversely to him.

Great delay in the completion of a contract is no defence to a purchaser who has himself been accessory to that delay.

Where a contract of purchase is made, and delay is occasioned by the purchaser, and during that delay

the legal estate descends to an infant heir, the purchaser cannot avail himself of that difficulty in the title to protect himself from specific performance.

*Quere*, Whether the descent of the legal estate to an infant heir, after the contract, will prevent the Court from decreeing specific performance, where there has been no improper delay on the part of the purchaser. *King* v. *Turner*, 3 Law J. Chanc. 58.

Two years after the defendant had given notice of his intention not to perform a contract for a lease, on the ground that the plaintiff had not fulfilled his part, the plaintiff filed a bill for a specific performance, but the Court dismissed it. *Heapy* v. *Hill*, 2 S. & S. 29.

Upon a bill, by a vendor, praying simply specific performance, upon which that relief cannot be given in consequence of the plaintiff not being able to make a good title, an account of rents will not be directed against the defendant, who entered into possession under the contract, though he has been nine years in occupation of the premises, and though he has stated by his answer, that he was willing to pay a fair rent during his occupation. *Williams* v. *Shaw*, 3 Law J. Chanc. 157.

Upon a bill, praying the performance of an agreement duly signed, but offering to the defendant the benefit of certain variations contained in an unsigned memorandum of a subsequent date, the Court will decree a specific performance of the agreement with those variations, if the defendant elects to take advantage of them; and if the defendant does not so elect, it will decree a specific performance of the original agreement. *Robinson* v. *Page*, 3 Russ. 114.

### (B) PRACTICE.

A bill for a specific performance should not be mixed up with a prayer for relief against other persons claiming an interest in the estate. *Mole* v. *Smith*, 1 Jac. 494.

In a suit for a specific performance of a contract for the purchase of freehold estates, several large sums of money had been paid on account by the defendant for the purchase-money, but a considerable sum was still due; he died when the cause was at issue, leaving his real and personal property to his children, who were infants, the plaintiff having only filed a bill against the executors: It was held, that although the devisees were infants, they were necessary parties; and in consequence of their not being brought before the Court, the suit was suspended until a supplemental bill should be filed against them for that purpose. *Townsend* v. *Champernowne*, 9 Price, 130.

Demurrer to a bill for specific performance, alleging an agreement in writing, to which, as set forth in the bill, no name was signed, but not alleging that the agreement was signed: Held, that the demurrer was bad, as the Court would intend, in favour of the bill against the demurrer, that a written agreement was an agreement signed. *Rist* v. *Hobson*, 2 Law J. Chanc. 86, s. c. 1 S. & S. 543.

Where, after a former cause heard for a specific performance, and a decree made, a bill in the nature of a supplemental bill had been filed, and afterwards moved to be taken off the file, and that the defendant might be at liberty to present a petition for a re-hearing: Held, 1st, that the Court could not on motion discuss the merits of the case, or consider any objections to the framing of the bill, which could only be raised by demurrer. And, 2dly, that the party was precluded from a re-hearing by the rule of November 1731, requiring the application to be made within six months after decree. *Bowyer* v. *Bright*, 13 Price, 316, s. c. M'Clel. 347.

Where the answer to a bill for specific performance raises other questions besides that of title, the Court will, upon the plaintiff's application, look into the answer, to see what is the nature and weight of the objections; and if it finds them clearly frivolous, it will make the usual order for a reference of the title. Where a life annuity is the subject of the sale, it is not a clearly frivolous objection, that the vendor could not, and did not, complete the sale at the time prescribed by the agreement. *Withey* v. *Cottle*, 1 Law J. Chanc. 117, s. c. 1 S. & S. 174.

A decree for a reference of title on a bill for specific performance, should contain a declaration that the contract ought to be specifically performed. *Mole* v. *Smith*, 1 Jac. 495.

If on a bill for a specific performance, any other objection, besides the question of title is raised by the answer, the order of reference as to the title cannot be made upon motion. *Gordon* v. *Ball*, 1 S. & S. 178.

Where, on a bill for a specific performance, the original decree directed an examination of title,—it was holden, that the Master would not take notice of any objection unconnected with the title. *Legrand* v. *Whitehead*, 1 Russ. 309.

On a bill for a specific performance, the pendency of an adverse suit is no ground for staying a report as to the sufficiency of the title. *Osbaldeston* v. *Askew*, 1 Russ. 160.

If on a bill for a specific performance by the vendor, a good title can be made before or when the cause comes on upon further directions, a specific performance will be decreed. *Paton* v. *Rogers*, 6 Mad. 256.

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## SPOLIATION.

A bill was filed by one executrix against her co-executrix, charging her with having secretly and improperly possessed herself of part of the testator's property during his lifetime; the defendant by her answer denied the accusation, and insisted, that the spoliation was committed by the plaintiff, but did not file a cross bill; if an issue is directed to try the fact, the issue must be—not merely whether the defendant possessed herself of any part of the testator's property in the manner alleged, but also, whether the plaintiff possessed herself of any part of it in like manner. *Lancaster* v. *Atkinson*, 2 Russ. 60.

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## SPRING-GUNS.

The defendant, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house: the plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot: Held, that the defendant was liable in damages

*Bird* v. *Holbrook*, 6 Law J. C.P. 146, s. c. 4 Bing. 628, s. c. 1 M. & P. 607.

## STABLE-KEEPER.

In an action for injuring a horse lent on hire, if it appear that the animal was the property of the plaintiff, but let by a stable-keeper to the defendant for a pecuniary recompense, the plaintiff is not bound to prove that he is licensed to let horses, in the absence of an authority on the subject. *Ware* v. *Juda*, 2 C. & P. 351. [Best]

## STAGE-COACH ACT.

The Court quashed a conviction on the stage-coach act, which directed the person to pay 6*l.* and *(blank)* shillings, or be confined until it was paid, because it left the matter in doubt. *Rex* v. *Payne*, 4 D. & R. 72.

## STAKEHOLDER.

[See GAMING, HORSE-RACE, WAGER.]

If a race be advertised to take place under certain conditions, the stakeholder cannot waive any of the conditions, without the consent of the whole of the subscribers. If the plaintiff's horse was disqualified as not coming within the description of horses that were to run, he cannot recover back his original share of the stake, if he was aware of the disqualification, and was guilty of a misrepresentation: *Weller* v. *Deakins*, 2 C. & P. 618. [Vaughan]

## STAMP.

(A) AFFIDAVITS.
(B) AGREEMENTS.
(C) APPRAISEMENTS.
(D) APPRENTICESHIP, INDENTURES OF.
(E) AWARDS.
(F) BANKERS' DRAFTS.
(G) BILLS OF EXCHANGE AND PROMISSORY NOTES.
(H) DEEDS.
(I) RECEIPTS.
(K) SURRENDERS.
(L) TIME OF AFFIXING.

### (A) AFFIDAVITS.

On a replevin bond, taken by the sheriff under the 11th Geo. 2, c. 19, s. 23, the following memorandum was written:—"W G maketh oath and saith, that the goods and chattels mentioned in and referred to by this bond, are of the full value of 49*l.* 16*s.* and no more, according to the best of this deponent's skill and judgment": Held, that an affidavit stamp was not necessary. *Dunn* v. *Lowe*, 5 Law J. C.P. 149, s. c. 4 Bing. 193.

### (B) AGREEMENTS.

Where the subject-matter of an agreement consists of a limited interest in that which is more than 20*l.* in value, but the value of the limited interest does not amount to 20*l.*, the agreement is not liable to stamp-duty under the 55 Geo. 3, c. 184. *Doe d. Morgan* v. *Amos*, 6 Law J. K.B. 226.

A mere acknowledgment, which does not bind the party signing it to do any more than he was otherwise bound to do by law, does not require an agreement stamp. Thus, an acknowledgment in these words—"I have in my hands three bills, which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, or return on demand," was held to require no stamp, because it did not bind the party to get the bills discounted; and the law would compel him to return them on demand.

So, an acknowledgment in these words—"I have received a bill, drawn by P upon H, bearing my indorsement and the indorsement of Sir P B, which I hold, as your attorney, to receive the value from the respective parties, or to make such other arrangement for your benefit as may appear to me, in my professional capacity, reasonable and proper"—was held to require no stamp. *Mullett* v. *Huckins*, 6 Law J. K.B. 176, s. c. 7 B. & C. 639, s. c. 1 M. & R. 522, s. c. 3 C. & P. 92; *Langdon* v. *Wilson*, 6 Law J. K.B. 177, s. c. 2 M. & R. 10.

Since the minutes or memorandums of agreements charged by the stamp acts are instruments between party and party, a note of a purchase made by a broker on account of his principal of what he has done, requires no stamp, though the purchase is above 20*l.* and not within the exemption of the act. *Jeffs* v. *Pebrer*, 1 C. & P. 341. [Littledale]

Where a witness deposed that the settled draft of a lease was the final agreement between the parties, for one of whom he acted as agent,—it was holden, that an unstamped memorandum, written afterwards by himself, but not signed by any body, was admissible in evidence, as a mere proposal to show that the settled draft was not the final agreement between the parties. *Hawkins* v. *Warre*, 3 B. & C. 690, s. c. 5 D. & R. 512.

Where a paper is used in evidence of an agreement directly, it must be stamped; but where it is used incidentally, it is not necessary that it should be stamped, hence it is evidence of an acknowledgment though not stamped. *Wheldon* v. *Matthews*, 2 Chit. 399.

"You will be pleased to receive the register of the brig *Gratitude*, which I inclose, and which I lodge in your hands as a security for the payment of all demands and charges on account of the said vessel, since she has been in this port, and which I hope will be satisfactory to you," is not receivable in evidence, in an action by the writer to recover possession of the register, without an agreement stamp. *Bowen* v. *Fox*, 6 Law J. K.B. 235, s. c. 2 M. & R. 167.

An agreement, that A will sell a ship to B; that part of the price shall be secured by mortgage of a ship; that A will procure the ship to be chartered on a voyage; that the earnings on the voyage shall be paid to A, as part of the price; and that at the end of the voyage the mortgage shall close; is an agreement for and relating to the sale of goods, and

requires no stamp. *Meering* v. *Duke*, 6 Law J. K.B. 211, s. c. 2 M. & R. 121.

The question of the sufficiency or insufficiency of a stamp, is to be decided by the legal effect of the instrument, and not merely the legal words which may be used by the parties.

Accordingly, where an instrument not under seal, used words of conveyance of the fee,—it was held to be an agreement only; and to be properly stamped as an agreement. *Rex* v. *Ridgewell*, 5 Law J. M.C. 67, s. c. 6 B. & C. 665.

A document by which A agrees to grant, and B to take, a lease of certain premises for a certain term, at a certain yearly rent, is to be considered merely as an agreement, not requiring a lease stamp, although no lease be prepared, and B occupies during the whole of the term under such document, and, pays the rent specified in it. *Phillips* v. *Hartley*, 3 C. & P. 121. [Best]

The alteration of an agreement, stipulating to give up the holding and occupation of a farm, by the addition of the words "house and premises," after that agreement has been completed, is not such an alteration as will render the affixing of a new stamp necessary; house and premises being included within the meaning of the term farm. *Doe d. Waters* v. *Houghton*, 6 Law J. K.B. 86, s. c. 1 M. & R. 208.

A paper containing an attornment, and stating that the person attorning is to hold upon terms to be afterwards agreed on, requires a stamp as an agreement stamp. *Cornish* v. *Searell*, 6 Law J. K.B. 255, s. c. 8 B. & C. 471.

The following instrument was signed by a broker, viz. "Received of the defendant 3*l.* for letting a house for a term of 7 years, the defendant to take the fixtures at a valuation if accepted as tenant; if not, then the 3*l.* to be returned": Held, that such instrument required a stamp, as the nature of the contract could not be ascertained without its production at the trial. *Wick* v. *Hodgson*, 5 Law J. C.P. 55.

An agreement, properly stamped, containing words of reference to another instrument for some of its provisions, is not on that account chargeable with an additional stamp, as if those provisions formed part of the agreement, and thus increased the number of words, under the 55 Geo. 3, c. 184, schedule, part 1, title "Agreement." *Attwood* v. *Small*, 6 Law J. K.B. 111, s. c. 7 B. & C. 390, s. c. 1 M. & R. 246, s. c. 3 C. & P. 208.

It is not settled, whether an agreement contained in a series of letters, with less than 1080 words, should have a 1*l.* 15*s.* or 1*l.* stamp. *Parkins* v. *Moravia*, 1 C. & P. 376. [Abbott]

Where an agreement is stamped on payment of a penalty, the receipt for the penalty indorsed on it is not to be reckoned in counting whether the agreement contains 1080 words, although without such a receipt the instrument could not be read.

On an objection that an agreement contains more than 1080 words, and therefore a 1*l.* stamp is insufficient, the party objecting must call a witness who can positively swear to the exact number of words. *Bowring* v. *Stevens*, 2 C. & P. 337. [Abbott]

In counting the words of any written instrument, with a view to the progressive stamp-duty, the figures must be turned, in counting, into the number of words which they represent.

And where an instrument gave the particulars, in figures, of the quantity contained in several closes of land, with a general heading of "A R P" to represent the words "Acres, Roods, Perches," as applicable to each close: It was held, that, in counting, those three words should be repeated with reference to the figures of each close, or as many of the words as would be necessary in reading, if there were no figures. *Dudley* v. *Robins*, 6 Law J. K.B. 38.

If, when a written agreement is put in, the opposite party object that it contains a greater number of words than the stamp is proper for, and call a witness who has counted the words in the counterpart; the judge will direct the officer of the court to count the words in the original. Figures are to be counted as words, but an indorsement on the back, and a page of the particulars of sale, containing mere repetition of the description of the property, which was described in another page of the same particulars, are not to be counted. *Dudley* v. *Robins*, 2 C. & P. 26. [Tenterden]

An agreement by an intended purchaser to relinquish to a third person the benefit of his contract with the vendor, does not require an *ad valorem* stamp on the amount of the purchase money. *Wilmot* v. *Wilkinson*, 5 Law J. K.B. 196, s. c. 6 B. & C. 506.

### (C) APPRAISEMENTS.

An appraisement, though in effect an award, need not be stamped with the stamp appropriated to the latter instrument. *Perkins* v. *Potts*, 2 Chit. 399.

### (D) APPRENTICESHIP, INDENTURES OF.

An indenture of apprenticeship, whereby a person is bound to two masters, to learn two different trades, serving one for a part of the time, and the other for the remainder, requires but one stamp. *Rex* v. *Louth*, 6 Law J. M.C. 107, s. c. 8 B. & C. 247, s. c. 2 M. & R. 273.

### (E) AWARDS.

An award of commissioners under an inclosure act awarding lands, partly in exchange for other lands, and partly for a sum of money, need not have an *ad valorem* stamp for the money part of the consideration. *Doe d. Lord Suffield* v. *Preston*, 6 Law J. K.B. 150, s. c. 7 B. & C. 392.

### (F) BANKERS' DRAFTS.

A cheque drawn at the place of residence of the drawer, a single house, must be dated from thence to be exempt from the stamp-duty under 55 Geo. 3, c. 184. *Waters* v. *Brogden*, 1 Y. & J. 457.

### (G) BILLS OF EXCHANGE AND PROMISSORY NOTES.

[See BILL OF EXCHANGE (L).]

Neither an order requiring one person to pay to another the proceeds of a shipment of twelve bales of goods, value about 2,000*l.* nor an instrument by the former, that he would pay over the net proceeds of the said bales, value as per invoice 1,640*l.* requires the stamp affixed to bills of exchange. *Jones* v. *Simpson*, 2 Law J. K.B. 22, s. c. 2 B. & C. 318, s. c. 3 D. & R. 545.

Where there was written on two unstamped slips of paper, "I O U 400*l.*" and "I O U 250*l.*," these memoranda were holden to be neither promissory

notes nor receipts, and therefore were held admissible in evidence, without being stamped, in an action of assumpsit for money lent. *Childer* v. *Boulnois*, 1 D. & R. N.P.C. 8. [Abbott]

(H) DEEDS.

A judgment was assigned, in trust to pay a debt out of the proceeds. The Court held, that a judgment was not properly within the meaning of 55 Geo. 3, c. 184, sch. part 1, title "Conveyance," so as to require an *ad valorem* stamp on the assignment, which ought to have borne the stamp of a common deed. *Warren* v. *Howe*, 2 Law J. K.B. 8, s. c. 2 B. & C. 281, s. c. 3 D. & R. 494.

A deed of assignment to trustees in trust to sell and pay, with a primary trust to pay the trustees, and then to discharge the debt owing to the other creditors, with a resulting trust as to the residue to the parties assigning, was held not to require an *ad valorem* duty within the 55 Geo. 3, c. 184, sch. p. 1, and, therefore, that a common deed-stamp was sufficient. *Coates* v. *Perry*, 6 B. Mo. 188, s. c. 3 B. & B. 48.

The *ad valorem* duty is only payable on the consideration passing from the lessee to the lessor. *Beane* v. *Mitchell*, 1 Law J. K.B. 25, s. c. 1 B. & C. 18.

An *ad valorem* stamp-duty is requisite on the assignment of a mortgage, if an additional sum be inserted therein. *Martin, dem.; Baxter, ten.; Grubb, vouchee*, 6 Law J. C.P. 242, s. c. 5 Bing. 160.

An indenture which covenants for the performance or the forbearance of a particular act, under a certain penalty, is not chargeable with the *ad valorem* duty on the sum secured as a penalty, but only with the duty of 1*l.* 15*s.* treated as a "bond not otherwise specifically charged," or a "deed not otherwise specifically charged," under the heads "Bond" and "Deed," by the 55 Geo. 3, c. 84. *Mounsey* v. *Stevenson*, 6 Law J. K.B. 119, s. c. 7 B. & C. 403.

An assignment, in consideration of money, from one partner to another, of his share of the partnership property in matters of contract, is not subject to the *ad valorem* duty. *Belcher* v. *Sikes*, 5 Law J. K.B. 93, s. c. 6 B. & C. 234.

The common indorsement, put on a deed of exchange after it is folded up, is not a part of the deed, or a matter indorsed thereon, within the meaning of the Stamp Act, so that the words contained in it should be reckoned with those of the deed, in fixing the amount of the duty to be paid. *Winder* v. *Fearon*, 4 Law J. K.B. 37, s.c. 4 B. & C. 663, s. c. 7 D. & R. 185.

An agreement under seal without words of demise being no lease, requires a 1*l.* 15*s.* stamp for a deed, "not otherwise charged," by 55 Geo. 3, c. 184. *Clayton* v. *Burtenshaw*, 5 B. & C. 41, s. c. 7 D. & R. 300.

(I) RECEIPTS.

An instrument in the form of a receipt, used for an indirect purpose, need not be stamped. *Brookes* v. *Davies*, 2 C. & P. 186. [Best]

Where a performer gave a receipt "in satisfaction of all his claims for the last season,"—it was holden, not to require the stamp of a receipt in full of all demands.

A receipt for 52*l.* 10*s.*, although it recites the payment of a previous 100*l.*, requires only a 1*s.* 6*d.* stamp. *Dibdin* v. *Morris*, 2 C. & P. 44. [Abbott]

"I O U 400*l.*" and "I O U 250*l.*," not receipts. *Childer* v. *Boulnois*, 1 D. & R. N.P.C. 8.

A written acknowledgment by a party, that so much money has been deposited in his hands, does not require a stamp under 48 Geo. 2, c. 49, and is, therefore, receivable in proof of a demand against that party, although no stamp be affixed to it.

Thus, the Court held the unstamped memorandum "Mr. T. has left in my hands 200*l.*," signed by the defendant, was properly received in evidence. *Tomkins* v. *Ashby*, 5 Law J. K.B. 246, s. c. 6 B. & C. 541.

*Semble*—An account stated may be given in evidence without being stamped. *Wellard* v. *Mee*, 1 Law J. C.P. 18, s. c. 1 Bing. 134.

(K) SURRENDERS.

Where A and B entered into an agreement, that the latter should give up the principal part of a farm to the former, who was to buy the stock thereon at a fair valuation, and A was to occupy half the house, half the stable, the barns, &c. and to deliver possession of the same on a specified day: Held, that it operated as a surrender of the farm, and therefore required a surrender-stamp under the 55 Geo. 3, c. 184, sch. p. 1, and that an agreement-stamp was unavailable. *Williams* v. *Sawyer*, 6 B. Mo. 266, s. c. 3 B. & B. 70.

(L) TIME OF AFFIXING.

An instrument which is liable to stamp-duty, under an act in force at the time of the execution, may be legally and effectually stamped afterwards, under a subsequent act, on payment of the duty which is payable by law at the time the instrument is presented to be stamped; provided, 1st, the stamp affixed be not less in amount than that which was payable under the former act; and, 2nd, not appropriated on the face of it for any other description of instrument. *Rex* v. *Dersen*, 5 Law J. K.B. 71.

Where an instrument has been stamped subsequent to the execution, it is admissible in evidence, though the receipt for the penalty has been erased, provided it be proved that such receipt had been indorsed on it; and it is not essential to prove the commissioners' signature to such a receipt. *Apothecaries' Company* v. *Fernyhough*, 2 C. & P. 438. [Burrough]

A stamp, when imposed, has a retroactive effect, so as to authorise acts previously done under the instrument in question.

But this rule does not apply to cases, with respect to which there is a positive enactment, that the stamp shall not be imposed after the instrument has been issued. *Anon.* 5 Law J. K.B. 76.

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STATUTE.

(A) CONSTRUCTION.
(B) DISPENSATION.
(C) PLEADING.

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(A) CONSTRUCTION.

To arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to

be viewed detached from its context in the statute; it is to be viewed in connexion with its whole context; understanding by this, as well the "title" and "preamble" as the "purview," or enacting part of the statute. *Brett* v. *Brett*, 3 Add. 210.

Effect of practice and desuetude in the construction of a Scotch statute. *Mac Dougall* v. *Hogarth*, 3 Bligh, 41.

Whether a custom beginning in 1760 can abrogate or control a Scotch Act of Parliament—*quære*. *Dingwall* v. *Gardiner*, 3 Bligh, 72.

An enacting clause in a statute, which interferes with existing rights, must be construed strictly; but the largest and most liberal construction will be given to an exception which protects those rights.

Thus, where a statute empowered a canal company to take the water raised from mines of coal, &c., such power and authority not to extend, except where the coal, &c. produced by the mines, should be conveyed along some part of the canal,—it was held, that these words applied substantially to the *whole* produce; and that the company had not the power in respect of a mine, about a *third* of the produce of which was conveyed along a part of the canal. *Finch* v. *the Proprietors of the Birmingham Canal*, 5 Law J. K.B. 17.

A statute which imposes a tax or duty must be clear and express; and any ambiguity will entitle the subject to be exempt from the tax or duty.

Accordingly, where an act of parliament imposed rates of wharfage in respect of goods "landed or discharged upon" the wharf, and directed the rates to be the same as those which were payable for goods "loaded or discharged upon" wharfs in the port of London, the Court refused to understand the latter expression, as meaning discharged "from"; which meaning, if given, would have rendered the goods in question liable to a higher rate of duty. *The Hull Dock Company* v. *La Marche*, 6 Law J. K.B. 216, s. c. 8 B. & C. 42, s. c. 2 M. & R. 107.

A statute contained a clause exempting certain ships from the payment of duties, "more than once for the same voyage, but out and home, notwithstanding such ship or vessel might go out and return with a loading of goods or merchandises:" Held, that where a vessel having cleared out of port at Hull with a cargo of goods for Mogadore, on the coast of Africa, which she discharged, and then took in another cargo for London, and discharged the same at London, and took in a cargo for Hull, with which she arrived at Hull, this constituted two distinct voyages, and that the vessel was not within the exemption. *The Hull Dock Company* v. *Huntington*, 2 Chit. 597.

An act of parliament which gives persons authority to repair and cleanse a navigable river, does not empower them to make a passage to a new wharf on the river. *Partheriche* v. *Mason*, 2 Chit. 658.

By 50 Geo. 3, c. 38, it is enacted, that the commissioners for the improvement of Brighton, might make an order to receive a duty, not exceeding the sum of three shillings, for every chaldron of sea coal, culm, or other coal, brought or delivered within the limits of the town: The Court held, that an order made to take effect from a preceding day was not bad *in toto*, and that the duty attached on every chaldron of coal, although it was brought into the town in quantities of less than a chaldron at a time. *Mills* v. *Funnell*, 2 Law J. K.B. 190, s. c. 2 B. & C. 899, s. c. 4 D. & R. 561.

Where an act of parliament appears to be the compact between the public on the one hand and an individual on the other; and the agreement is, that in return for certain advantages to be afforded by him to the public, he is to have a certain privilege, he will be allowed to retain that privilege, if he substantially and *bonâ fide*, though not literally, perform his part of the compact; and although, according to the strict and literal terms of the act, he would have forfeited the privilege.

By a local act of parliament, and a lease made in pursuance thereof, A grants to B lands, with liberty to lay waggon-ways for the carriage of coals, for the term of 60 years, and such further term as B, his executors, &c. should work certain coal mines; proviso (both in the act and the lease,) that if B cease to work the mines, or fail in any one year to carry a certain quantity of coals to a depository called C, A may re-enter. By a subsequent act the quantity to be carried is increased; proviso, that if B do not yearly carry such increased quantity to C, "or to some other place near thereto, to be used as a depository for coals instead thereof," A may re-enter. By the last proviso, the first is virtually repealed; and B carrying the increased quantity to a depository near to C, is excused from carrying coals to C. *Doe d. Bywater* v. *Brandling*, 6 Law J. K.B. 162, s. c. 7 B. & C. 643, s. c. 1 M. & R. 600.

A water-work company were empowered, by act of parliament, to make, &c., water-works, &c., to dig and break up the soil, &c., of any of the roads, highways, footways, commons, streets, lanes, alleys, passages, and public places, within, adjacent, and near unto, the parishes to be supplied with water; and to sink and lay pipes, &c.; and, by a subsequent clause, it was provided that the company should not enter upon the private lands and grounds of any person without the consent of the owner, &c.: Held, that a footway across a field was not within the meaning of the act. *Scales* v. *Pickering*, 6 Law J. C.P. 53, s. c. 4 Bing. 448, s. c. 1 M. & P. 195.

Under an act of parliament for making docks, the value or compensation for property taken for the purposes of the act was directed, in certain cases, to be paid into the Bank, in the name of the Accountant General, and to be laid out in bank annuities; and until such bank annuities should be sold, and the produce invested in other hereditaments, the dividends were to be paid to the person or persons who would be entitled to the rents and profits of the hereditaments if unsold. The act also directed, that the Court, on the application of any person or persons making claim to the money awarded as a compensation, by motion or petition, should, in a summary way of proceeding, or otherwise, order the same to be laid out and invested in the funds, or distribution thereof, or payment of the dividends, according to the estates, title, or interest of the person making claim thereto. On the petition of an annuitant, whose annuity was charged on the property, with powers of distress and entry, and further secured by a term, for payment of his annuity and the arrears thereof out of a fund brought into court under the act—the Court held, that it had no authority to proceed in a summary way on the petition of an incumbrancer, but only at the instance of

the persons who would have been entitled to the rents if the property had been unsold; and dismissed the petition. *In re St. Katherine Dock Company, ex parte Back*, 2 Y. & J. 386.

It is by no means unusual in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief.

The recitals in the disabling statute do not limit the force of the subsequent enactment to cases in which the mischief by the alienation is done to the personal interest of the successor of the alienor; for it is evident from the enactment that the legislature intended to apply the prohibition to the case of persons who were seised either as mere trustees, or in a great measure as trustees, and among other persons to the master or guardian of an hospital. *Dean and Chapter of York* v. *Middleborough*, 2 Y. & J. 196.

Where the word "inhabitant" and the word "occupier" occur in an act of parliament, in several clauses, the presumption will be, that they are used for the purpose of distinguishing one from the other; though this presumption must be governed by the object which the legislature appears to have had in view.

Accordingly, where an act of parliament imposed certain rates upon all who "inhabited" or "occupied"; and afterwards provided that the names and places of "abode" of a competent number of "substantial inhabitants" should be returned, and collectors of the rate should be appointed from that number,—it was held, that the last expression applied only to resident inhabitants; and that a person who was not resident, though liable to be rated as an occupier, was not compellable to serve as a collector. *Donne* v. *Martyr*, 6 Law J. K.B. 246, s. c. 8 B. & C. 62, s. c. 2 M. & R. 98.

A private act provided that the attorney's bill of costs for procuring it, should be paid out of certain tolls to be levied under the act: Held, that, before he could recover, he must shew that sufficient tolls had been collected to pay him. *Andrew* v. *Dalby*, 6 Law J. C.P. 117, s. c. 4 Bing. 566, s. c. 1 M. & P. 490.

Where, by act of parliament, the churchwardens and overseers, with the governors and guardians of the poor, were empowered, at a public meeting to be held for that purpose, to contract with persons for supplying the workhouse with necessaries: It was holden, that the plaintiff, who had contracted with four governors and directors only, might sue them without joining the churchwardens and overseers and the other directors. *Lambert* v. *Knott*, 6 D. & R. 122.

The unloading ballast into a hopper, with intent to carry it out to sea, is an offence against the express provision of 19 Geo. 2, c. 22, which says, "that it shall not be discharged but only upon land." *Brucklebank* v. *Smith*, 2 Ken. 358, s. c. 2 Burr. 656.

### (B) DISPENSATION.

The Crown may, by a perpetual dispensation of a statute, found an usage dissimilar to that directed by the statute.

The dispensation of a college statute may be presumed. *Case of Queen's College, Cambridge*, 1 Jac. 35.

### (C) PLEADING.

A defence under the statute of equity must be pleaded as such. *Rex* v. *Peto*, 1 Y. & J. 37.

Where the enacting clause of a statute gives a power to do certain acts, "except in the places hereinafter mentioned," the party claiming under such power need not negative the exceptions. *Ward* v. *Bird*, 2 Chit. 582.

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## STEWARD.

Where papers are delivered to a solicitor in the character of a steward, he has no lien on them. *Champernoun* v. *Scott*, 6 Mad. 93.

A steward duly subpœnaed, may be examined as a witness, to prove the contents of a document belonging to his employer. *Falmouth* v. *Moss*, 11 Price, 455.

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## STOCK.

If a purchaser agrees to pay, on a specified day, for an estate at three per cent. consols. taken at a given value, but, in consequence of intervening difficulties, the purchase cannot be completed on that day, and he continues to hold the stock; he holds it as a trustee for the vendor, and, when the purchase is completed, must pay by a transfer of the stock at a value fixed, unless the vendor desired him distinctly to convert it into money, so as to have thrown the risk of keeping it unsold upon the purchaser. *Puddicombe* v. *Bythesea*, 1 Law J. Chanc. 186.

Where a bill had been filed to restrain the transfer of stock, and the Bank having had notice of the bill, refused to allow the transfer, although no injunction had been obtained, it was ordered that the transfer should be permitted on a certain day, unless an injunction was obtained by the plaintiff in the meantime. *Ross* v. *Sherer*, 6 Mad. 1.

The costs of a petition under the 56 Geo. 3, c. 60, to re-transfer stock transferred to the Sinking Fund as unclaimed, are to be paid out of such stock. *Ex parte Martin*, 1 Jac. 55.

Under the 56 Geo. 3, c. 60, the Court, upon petition, will order stock, which has been transferred to the Sinking Fund, to be re-transferred to the petitioners where their title is clear, without referring to the Master for him to ascertain who is beneficially entitled to the stock. *Ex parte Nicholl*, 1 Turn. 119.

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## STOLEN GOODS.

The 3 Geo. 4, c. 24, seems so inaccurately framed that no conviction can take place upon it;—therefore a receiver of stolen securities for money is not punishable by that statute as an accessary to the felony. *Rex* v. *King*, 2 C. & P. 412. [Park]

Proof that stolen goods were found in the prisoner's possession sixteen months after the theft, will entitle him to an acquittal without any defence. *Rex* v. ——, 2 C. & P. 459. [Bayley]

The 4 Geo. 1, c. 11, applies to a case where the prisoner took money under pretence of helping the

prosecutor to the goods stolen from him, though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, nor to restore the goods. *Rex* v. *Ledbitter*, 1 R. & M. C.C.R. 76.

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## STOPPAGE IN TRANSITU.

(A) WHERE ALLOWED.
(B) WHERE NOT.

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### (A) WHERE ALLOWED.

Where A and B had mutually shipped goods to each other, and A refused to accept bills on account of a shipment, and became insolvent,—it was holden, that B might stop such shipment *in transitu*, without waiting until the mutual accounts were adjusted. *Wood* v. *Jones*, 7 D. & R. 126.

The circumstance of the packer of goods being also the agent of the purchaser, does not abridge the right of the vender to stop the goods *in transitu*. *Coates* v. *Railton*, 5 Law J. K.B. 209, s. c. 6 B. & C. 422.

The mere indorsement of a bill of lading by the vender of goods, to a third person, though without value by such indorsee, will be sufficient title to such indorsee to stop goods *in transitu*, and to maintain trover on refusal of the carrier or wharfinger to deliver. *Morison* v. *Gray*, 3 Law J. C.P. 261, s. c. 2 Bing. 260.

The consignor of goods is not divested of his right to stop *in transitu*, though the consignee has delivered over to a third person the shipping note of such goods, and an order to the wharfinger to deliver the same on their arrival. *Akerman* v. *Humphrey*, 1 C. & P. 53. [Burrough]

Consignors deliver a quantity of iron to a carrier by water, the freight of which is to be paid for by the consignee. After the carrier has placed some of the iron out of each of the boats on the wharf of the consignee, he discovers that he is a bankrupt, and immediately reloads the iron, and takes it to his own premises: The Court held, that inasmuch as the consignee had not tendered the amount of the freight, and the carrier had not consented to forego his lien upon it, that the delivery of the iron was not complete, and, consequently, that the consignors were entitled to stoppage *in transitu*. *Crawshay* v. *Eades*, 1 Law J. K.B. 90, s. c. 1 B. & C. 181, s. c. 2 D. & R. 288.

Where a master of a ship who had given a receipt for goods, and also signed a bill of lading without the receipt being given up, was called upon by the consignor to return the goods, (the consignee in the meantime having failed,) and refused so to do on the ground that he had signed a bill of lading to the consignee,—it was holden to be a conversion; though, if the captain had said, "the goods are now on board, and I must take them to their destination," that would have been no conversion; and the consignee naming the ship does not divest the consignor of his right to stop *in transitu*. *Thompson* v. *Trail*, 2 C. & P. 334. [Abbott]

Where the goods were sold upon the credit of one who within a few days stopped payment, and were consigned to a third person at Leghorn, and shipped accordingly, upon a receipt given by the mate of the vessel as from the sellers,—it was held, that the *transitus* was not at an end; and that they might stop the goods *in transitu*. *Thompson* v. *Trail*, 5 Law J. K.B. 34, s. c. 6 B. & C. 36, s. c. 9 D. & R. 31, s. c. 2 C. & P. 334.

A shipped flour on the 5th April 1824 for one Gilbert, on board a vessel addressed to the defendant's wharf, and sent an invoice to Gilbert. In the ship's manifest, the flour was marked to be delivered "to order." On the 12th the ship arrived at the wharf. On the 14th a commission of bankruptcy issued against Gilbert, who had committed an act of bankruptcy on the 10th. On the 17th the flour (not having been landed, or claimed by the consignee,) was claimed by an agent of the shippers on their account; and, on the 19th, the messenger under the commission produced the invoice and demanded the flour. The defendant delivered it to the agent of A; Held, that the *transitus* was not at an end; and that A had a right to stop the flour. *Tucker* v. *Humphery*, 6 Law J. C.P. 92, s. c. 4 Bing. 516, s. c. 1 M. & P. 378.

The plaintiff shipped goods to the order of one P. When the goods arrived at the wharf, the consignee, finding himself insolvent, declined accepting them, and caused them to be stopped for the consignor. The latter, being apprised of the stoppage, assented to it by letter; but, before his letter arrived in London, the defendants, as sheriff, had seized the goods in execution, as the property of the consignee, and had sold them: Held, that the plaintiff might recover them in trover, the transit of the goods not being ended before they were stopped. *Bartram* v. *Farebrother*, 6 Law J. C.P. 125, s. c. 4 Bing. 579, s. c. 1 M. & P. 515.

In trover for goods, over which the defendants claimed, as agents of the consignors, a right to stop *in transitu*, the plaintiff attempted to shew a sale by the consignee before the stoppage, which appeared to have been under a contract in writing: Held, that the *bonâ fide* sale could only be shewn by putting in the written evidence of it. *Brain* v. *Harden*, 2 C. & P. 52. [Abbott]

### (B) WHERE NOT.

R & Co. having imported several casks of tallow, and deposited them in the warehouse of the defendants, sold 100 casks to M & Co., and gave them a note directed to the defendants, to transfer the tallow to them. M & Co. sold the tallow to the plaintiffs, and indorsed on the note, that the defendants should transfer the tallow to the plaintiffs. The defendants delivered to the plaintiffs a note as follows: "We have this day transferred to your account, by virtue of an order from M & Co., 100 casks of tallow, with charges from 10th of October 1823."

No actual transfer was made in the books of the defendants, nor was the tallow weighed: M & Co. became bankrupts, and R & Co. gave notice to the defendants, to detain the tallow for them: The Court held, that the right of R & Co. to stop the goods *in transitu*, was gone. *Hawes* v. *Watson*, 2 Law J. K.B. 83, s. c. 2 B. & C. 540, s. c. 4 D. & R. 22.

If A B, having goods in the possession of the London Dock Company, order the Company to weigh,

deliver, transfer, or re-house the same to C D, and C D sell the goods to E F, and be paid for them, A B cannot stop the same *in transitu*, though the company have not weighed them—such weighing not appearing to be essential. *Barton* v. *Boddington*, 1 C. & P. 207. [Abbott]

The destination of goods in their transit may be altered by the consignee; and, on their arrival at the place of altered destination, the *transitus* will be at an end, and the consignor cannot stop them.

If, in the course of business, the consignee has been accustomed to use the warehouse of the carrier as his own—taking away the goods from time to time at his convenience, and paying for the warehouse-room—this will be giving a place of altered destination to the goods; and, on their arrival at that warehouse, the *transitus* will be at an end.

A delivery of part of a consignment of goods to the consignee will, generally, invest him with the right of property in the whole, so as to deprive the consignor of his right of stoppage *in transitu*. *Foster* v. *Frampton*, 5 Law J. K.B. 71, s. c. 6 B. & C. 107, s. c. 9 D. & R. 108, s. c. 2 C. & P. 469.

## SUBPŒNA.

[See PRACTICE, PRODUCTION OF DEEDS, &c. and WITNESS.]

If an officer of court be served with a *subpœna duces tecum* to produce a judgment-book, he must be informed if his personal attendance is necessary, or the Court will not grant an attachment against him, his clerk having attended with the book, though plaintiff was nonsuited through his non-attendance. *Bennett* v. *Jones*, 2 Chit. 403.

Service of notice on a defendant, to produce letters four days before trial, is sufficient, though it is objected that he is a foreigner, and has only been in England since the time when the letters were received by him, and therefore he might have left them abroad. *Drabble* v. *Donner*, 1 C. & P. 188, s. c. 1 R. & M. 47. [Abbott]

The possession of deeds by a steward being deemed the possession of his employer, serving a *subpœna duces tecum* on the former will suffice. *Falmouth* v. *Moss*, 11 Price, 455.

A mortgagee is not bound, in obedience to a *subpœna duces tecum*, to produce the title deeds of his mortgagor. *Rex* v. *Upper Boddington*, 5 Law J. M.C. 10, s. c. 8 D. & R. 726.

Service of subpœna on persons who in one instance had acted as agents of the defendant, who resided in Ireland, ordered. *English* v. *Kendrick*, 6 Mad. 205.

A defendant at law having refused his consent to a commission for the examination of a witness resident abroad, a bill was filed by the plaintiffs at law to obtain a commission for that purpose, the defendant at law having retired from the jurisdiction of the Court. Service of the subpœna, to appear to the bill, on his attorney-at-law, ordered to be good service. *Devis* v. *Turnbull*, 6 Mad. 232.

An appearance on motion to advance the cause, waives any irregularity in the subpœna to hear judgment. *Carvick* v. *Young*, 1 Jac. 524.

## SUNDAY.

[See LORD'S DAY.]

## SUPERIORITY.

When a vassal subfeuds his possession for its full adequate value at the time, it is only a year's subfeud duty, and not a year's rent upon the value improved by buildings, which he is bound to pay to his superior, as a composition for an entry to a singular successor. *Heriot's Hospital* v. *Ross*, 2 Bligh, 707.

## SURGEON AND APOTHECARY.

Under the Apothecaries Act, 55 Geo. 3, c. 194, s. 4, "that no person shall be admitted to the examination therein specified, unless he shall have served an apprenticeship," a certificate duly issued by the court of examiners, is conclusive evidence of that fact; and, therefore, in an action to recover the amount of a bill as an apothecary, the plaintiff need not also prove an apprenticeship served. *Sherwin* v. *Smith*, 1 Law J. C.P. 63, s. c. 1 Bing. 204, s. c. 8 B. Mo. 30.

In an action on the Apothecaries Act, 55 Geo. 3, c. 194, s. 20, for a penalty incurred by practising as such without a certificate, it was holden, that the defendant was bound to prove that he had obtained his certificate. *The Apothecaries' Company* v. *Beatty*, 1 R. & M. 159, s. c. 1 C. & P. 538. [Abbott]

But it is sufficient, on the production of his certificate in evidence, to shew that it is genuine, to prove the signature of one of the examiners, and that he obtained it from the court of examiners. *Walmsley* v. *Abbott*, 2 Law J. K.B. 223, s. c. 3 B. & C. 218, s. c. 5 D. & R. 62, s. c. 1 C. & P. 309.

The 6 Geo. 4, c. 1, declares that the common seal of the Apothecaries' Company shall be sufficient proof of the authenticity of the certificate to which it is affixed: Held, that the seal attached to such certificate must be shewn to be the common seal of the company. *Chadwick* v. *Bunning*, 2 C. & P. 106. [Abbott]

The 6 Geo. 4, c. 133, has made several amendments and alterations in the 55 Geo. 3, c. 94, relative to apothecaries.

An apothecary, not qualified as directed by the 55 Geo. 3, c. 194, cannot recover even for the value of the phials in which the medicines were conveyed, the words of the act being conclusive, that the party shall not recover any charges. *Steed* v. *Hanley*, 1 C. & P. 574. [Best]

The plaintiff, an apothecary, had a general certificate without restriction as to place: Held, that he was entitled to sue under the 55 Geo. 3, for medicines, &c. supplied in London, even though the sum paid for the certificate had not been given until after the commencement of the action. *Chadwick* v. *Bunning*, 2 C. & P. 106, s. c. 1 R. & M. 306. [Abbott]

In the absence of proof, that an apothecary has practised *on* or *before* the 15th of August 1815, or that he has duly obtained a certificate from Apothe-

caries Hall, he is not entitled to recover his charges. *Walmisley* v. *Abbot*, 1 C. & P. 309. [Garrow]

A party serving an apothecary as an assistant, is not to be deemed a practising apothecary, so as to be liable to the penalties within the meaning of 55 Geo. 3, c. 194, s. 22. *Brown* v. *Robinson*, 1 C. & P. 264. [Abbott]

It appears that a surgeon to a ship cannot sue for wages in the Admiralty Court. *Lord Hobart*, 2 Dods. 104.

A member of the Royal College of Surgeons cannot sue for medicines furnished, unless he be also certificated by the Apothecaries' Company.

*Semble*—That a surgeon may recover for such medicine as is necessarily administered in a surgical case. *Allison* v. *Haydon*, 6 Law J. C.P. 144, s. c. 4 Bing. 619, s. c. 1 M. & P. 588, s. c. 3 C. & P. 246.

A declaration in an action against a surgeon for improperly and unskilfully treating the plaintiff's wife, stating that the defendant was retained as a surgeon, and entered upon the cure—is good, though it does not aver that the defendant was retained and employed as surgeon for reward, to be to him paid, by whom he was so retained, nor by whom he was to be paid; nor that the defendant undertook &c. properly or skilfully to conduct himself in and about, &c. *Pippin* v. *Sheppard*, 11 Price, 400.

## SURRENDER.

Upon the question whether the surrender of a term created for portions was to be presumed, it appeared that the parties entitled attained their ages of twenty-one about sixty years since, and were all dead, and that the estate had been long dealt with as if there were no terms and no portion due: Held, that there was no sufficient doubt to entitle a purchaser to be relieved. *Emery* v. *Grocock*, 6 Mad. 54.

The jury may be directed to presume, that a term of years has been surrendered, or been extinguished, if it is no longer of any beneficial use; and there is recital in a deed, that all terms for years have been surrendered, although no mention is made of that particular term. *Bartlett* v. *Downes*, 3 Law J. K.B. 90, s. c. 3 B. & C. 616, s. c. 5 D. & R. 118, s. c. 1 C. & P. 522.

Where a deed dated sixty years back, contains a recital of the creation of a mortgage term, and a subsequent assignment of it, in trust to attend the inheritance, and the term is not subsequently noticed in the title, it will be presumed to have been surrendered; and it is no objection to the title that the vendor cannot produce the deed creating the term, nor the assignment of it. *Townsend* v. *Champernown*, 1 Y. & J. 536.

The Court cannot presume a reconveyance, in order to get rid of an outstanding legal estate. The presumption is one of fact alone, and must be left to the jury. *Doe d. Lloyd* v. *Passingham*, 5 Law J. K.B. 146, s. c. 6 B. & C. 305.

A landlord in 1810 let some premises to a tenant, at a yearly rent, as long as each should please to continue. In 1815, a distress for rent was made, and afterwards an agreement was entered into, by which the landlord agreed to let and demise the premises to the former tenant and another person, to hold to them for seven years. The tenant was arrested and taken to gaol, in which place he signed an agreement to give up the premises to the landlord upon certain terms, which were never fixed. The landlord entered, and, after notice, turned out the effects of the tenant.

The tenant brought an action for the expulsion and for the effects, averring the yearly tenancy to be continuing. The Court held, that the agreement containing words of present demise, operated as a surrender of the former tenancy. *Hamerton* v. *Stead*, 3 Law J. K.B. 33, s. c. 3 B. & C. 478, s. c. 5 D. & R. 206.

A demised certain premises to B, which B demised to C, reserving rent: the interest of B was afterwards sold to D, upon which D obtained from A a new lease, the lease to B having been cancelled: B and D afterwards distrained for rent, in the name of D, upon which occasion, D declared that the premises belonged to him: Held, in an action of trespass against B, D, and others, their servants, that the cancellation and new lease did not operate as a surrender of the interest of B, and that, rent being due to B by effluxion of time, the defendants were justified in making the distress, though in the name of D. *Wootley* v. *Gregory*, 2 Y. & J. 536.

## SURVEYOR.

[See PARTNERS.]

If a surveyor who makes an estimate sues his employers for the value of his services, and it appears that he was so negligent in not taking the proper measures to learn the nature of the soil of the foundation, that his estimate was bad, he is not entitled to recover; and the same rule holds if a surveyor relies on the information of others, if it turn out to be insufficient, because he is bound to use due diligence. *Moneypenny* v. *Hartland*, 1 C. & P. 354. [Abbott]

## SUSPENSION.

[See CHURCH, and CLERGY.]

## TAILZIE.

A deed, in the form of a bond of tailzie, declared in the prohibitory clause, that it should not be lawful for entailor, nor any of his heirs or successors, to sell; and he and they were thereby bound and obliged not to "sell, anailzie, wadset, *dispone*, dilapidate, or put away the lands," &c. The irritant clause is thus expressed: "and if I, or any of the heirs, whether male or female successive, shall contravene, &c. by the said heirs female, not using the surname, &c., or who, whether male or female, as I shall *dispone* the said lands, &c.; and if I, or any of the persons or heirs aforesaid, whether male or female, shall infringe or alter the succession and substitution aforesaid, all such deeds, &c. shall be void, &c."

One of the heirs of tailzie in possession granted a lease for 77 years, at a reduced rent, &c., upon a

grassum: Held, that the irritant clause, though confused and ungrammatical, was intelligible; and having received a construction in judgment upon a former litigation, could not be held to be unintelligible: Held also, that the lease was an *alienation* within the meaning of the prohibitory clause, and that the word "*dispone*" in the irritant clause was equivalent to the word "*alienate*," and rendered the prohibition effectual, and the act of contravention void, in a question between third parties, as lessees, purchasers, or creditors. *Elliott* v. *Pott*, 3 Bligh, 134.

The word "deed," in the irritant clause of a tailzie, held not to apply to all the things enumerated in the prohibitory clause, but to be restricted by the context to such deeds as were of the nature to create a debt or burden. *Barclay* v. *Adams*, 3 Bligh, 275.

Under a strict tailzie prohibiting alienation, but containing a power to grant leases, provided that they do not exceed twenty-one years, and be not let with evident diminution of the rental, the heir of tailzie in possession, acting upon the opinion of counsel, made leases to his steward at rents a little above the former rents of the lands leased, but far below their market value, with intent that the steward should underlet the lands at their full value, and pay the surplus, beyond the rents reserved in the principal leases, to persons named by the grantor of the leases and heir of tailzie in possession. The steward accordingly underlet the lands at rents exceeding the principal rents by 1371*l.*; and sometime after the grants of the principal leases, executed a trust obligation in favour of the objects in the trust: Held, that the leases from the time of the grants, until the declaration made by the trust obligations, were held in trust for the grantor, and that they were invalid as a violation of the prohibitions, and not within the power given by the deed of tailzie. *Hamilton* v. *Waring*, 2 Bligh, 196.

Whether receipt of the rent reserved upon the principal leases, or knowledge of and acquiescence for a considerable time in the payment to the objects of the trusts of the surplus, arising from the rents reserved upon the underleases, constitute homologation—*quære*. *Hamilton* v. *Waring*, 2 Bligh, 137.

## TAXES.

[See LAND TAX and POST-HORSE DUTY.]

Under the 59 Geo. 3, c. 51, the assessed tax act, a composition for saddle horses does not protect the owner of such horses from his liability to pay the duty imposed by 1 Geo. 4, c. 88, s. 3, where the same horses are let to hire. *Ramsden* v. *Hodgkinson*, 2 D. & R. 625.

Mode of enforcing re-assessment of amount of deficiency in the collection of the assessed taxes by *distringas* against the collectors, on motion by the Attorney General on the part of the Commissioners for affairs of Taxes. *In re Assessed Taxes*, 12 Price, 153.

In strictness, the land and assessed taxes may be collected before they become "due" according to the generally-received meaning of that word; because the acts of parliament provide that those taxes shall be paid into the Exchequer on the days when they are said to be "due"; and, unless they were previously collected, they could not be paid in on those days.

But a distress cannot be made for those taxes, until there has been a demand and a refusal or neglect to pay. And, if the demand be made, not on the person who is to pay, but at the premises charged, a reasonable interval must be allowed between the demand and a distress. *Gibbs* v. *Stead*, 6 Law J. K.B. 378.

The Court of Exchequer will compel the commissioners of assessed taxes to state and sign a case for the opinion of one of the Justices or Barons of the K.B. or C.P. *In re Commissioners of Yarmouth*, 9 Price, 149.

The collector of the personal assessed taxes may, by 43 Geo. 3, c. 99, s. 33, distrain "the person or persons so charged by his or their goods and chattels, and all such other goods and chattels as they are by that statute authorized to distrain;" and by s. 38, the remedies given by the bankrupt laws, &c. are extended to the collector, for enforcing the payment of the same taxes. Where the Duke of M was, by the trusts of his father's will, allowed to use the furniture in the mansion of B during his natural life, and was prohibited from removing it thence without the consent of the trustees: Held, that such furniture could not be distrained for the Duke's personal taxes, returned as payable at the mansion of B, and that it did not fall within the description of such "other goods and chattels," as might be distrained by force of s. 38: Held also, that the jurisdiction of the Court of King's Bench to try the legality of a distress upon the goods of A, for an assessment upon B, was not taken away by s. 3, which enacts, that "if any question or difference shall arise upon taking such distress, the same shall be determined and ended by two or more of such commissioners. *The Earl of Shaftesbury* v. *Russell*, 3 D. & R. 84, s. c. 1 B. & C. 666.

*Venditioni exponas* awarded to sell issues distrained under the 43 Geo. 3, c. 99, on motion. *In re Assessed Taxes*, 12 Price, 172.

## TEINDS.

A decree having been made under the authority of the High Commission Court in 1635, valuing the teinds of various lands therein described, an extract of that decree had been produced by the ancestor of the appellant, in a process of augmentation of the minister's stipend in the year 1720; when it appeared, or was assumed, without objection on the part of the heritor, that the word ascertaining the number of chalders at which the teinds of his lands were valued, had been obliterated by a fold in the paper, (or possibly left in blank); and in that process consequently the lands were held as unvalued. Upon a similar process, in 1799, it was found by the Court, that the valuation of the lands in question, in the decree of 1635, was not legible, and that, although the decree appeared to have been intended as a valuation of the whole parish, and the lands belonging to the appellant are set forth in the decree, the "valuation annexed to them is totally obliterated." The same course was pursued, and

with a similar result, in a process for augmentation in 1805. In 1814, upon a new process for augmentation, the appellant as heritor having, by his first defence, admitted that the word appeared to be obliterated, afterwards produced evidence to shew that the word supposed to be effaced was either *ten* or *two*, and that no other word could have occupied the vacant space: and reports to that effect were made by men of skill and experience in deciphering ancient and decayed instruments, to whom the inquiry was referred.

The original decree had perished among the records of the Teind Court, consumed by fire in the reign of Queen Anne. The extract had remained in the possession of the appellant and his ancestors.

Held, that the extract not being an original instrument in the possession of the law, but of the party claiming a right under it, whose duty it was to have supplied the defect under the provisions of the statute of Anne (1707) as to the records of the Teind Court destroyed by fire, conjectural evidence could not be admitted to supply the word supposed to be effaced.

Whether, under the provision of the Scotch statute 1707, for "making up the tenor of decreets, whereof the extracts are amissing and the registers lost in the fire," the Lords of Session were empowered to receive evidence and supply the defects of an extract not missing, but imperfect and unavailable, on account of obliteration of material words—*quære.*

Whether a defect by loss, erasure, or obliteration, in an instrument of gift or contract, if the proceeding to supply the loss, &c., were instituted recently after the accident, or the discovery of the defective state of the instrument, and where the party is not estopped by his own admission, and by former adjudications—*quære. Semb.—affirm. Mak Dougall* v. *Hogarth*, 3 Bligh, 41.

## TENANT FOR LIFE.

A tenant for life is bound to keep down the interest of debts, although he has the ultimate remainder in fee. *Burges* v. *Mawbey*, 1 Turn. 167.

Tenant for life of real estates, under a will, having expended money in finishing a mansion-house which the testator had begun, but left unfinished, and also in repairing the mansion-house which had been damaged by dry rot;—the Court in a suit for administering the trust of the will, directed an inquiry, whether it was for the benefit of all parties interested that the mansion-house should be finished, but refused an inquiry as to the repairs, and said, if it was found for the benefit of all parties interested, that the mansion-house should have been finished, and there was no personal estates applicable, the expense should be a charge on the real estates. *Hibbert* v. *Cooke*, 1 S. & S. 552.

In general, a tenant for life with power of charging his estate, is not liable to exonerate the land. *Ex parte Digby*, 1 Jac. 235.

## TENANT IN TAIL.

Where a tenant in tail in possession pays off a mortgage, and declares no intention that the charge shall continue for the benefit of the personal estate, the charge ceases: so also if he takes an assignment of the mortgage; because, it shews the intention of keeping the charge alive. *Wigsell* v. *Wigsell*, 2 S. & S. 364.

A fund, which, subject to certain charges, is directed to be laid out in lands, of which A would be tenant in tail, is within the 39 & 40 Geo. 3, c. 56; and the Court, after setting apart enough to answer the charges, will order it to be transferred to the tenant in tail. *In re Somerville*, 2 Law J. Chanc. 138, s. c. 2 S. & S. 470.

A tenant in tail is tenant for life under the stat. 11 Geo. 2, c. 19, and his representatives entitled to the proportion of half a year's rent, which had accrued under a lease made by him, at the time of his death, and had been paid by the lessee to the remainder-man. *Paget* v. *Gee*, 2 Ken. 31, Chanc.

## TENANT IN COMMON.

Two persons had a separate interest in lands, over which a reservoir was made, under an act of parliament, which provided, "that it should be lawful for the owner or owners of the lands on which any such reservoir should be made, to let all the water out of such reservoir once in every seven years, for the purpose of taking the fish therein:" Held, that they were not tenants in common of the fish, but that each had a separate right to the fish that should be left aground on his own soil. *Snape* v. *Dobbs*, 1 Law J. C.P. 58, s. c. 1 Bing. 202, s. c. 8 B. Mo. 23.

Where one tenant in common receives the whole rent, and excludes his companion from the share due to him, the Court will appoint a receiver. *Tyson* v. *Fairclough*, 2 S. & S. 142.

## TENANT AT SUFFERANCE.

If a tenant for life sell the estate, the devisees of the heir-at-law may maintain an action of ejectment against the descendant of the vendee, although there has been a possession of upwards of twenty years; for, after the death of the tenant for life, the purchaser is a tenant at sufferance to the heir-at-law, and, therefore, no disseisin of the heir-at-law having taken place, there is not a descent cast so as to bar him or his devisees. *Doe* v. *Hall*, 1 Law J. K.B. 37, s. c. 2 D. & R. 38.

## TENDER.

To constitute a valid tender, the amount must be produced to the creditor. *Kraus* v. *Arnold*, 7 B. Mo. 59.

It must not be made in full of all demands; and, it seems, that it must be taken to be made on the behalf of the person who owes the money. *Cheminant* v. *Thornton*, 2 C. & P. 50. [Abbott]

So the tender should be made without imposing any terms, leaving it open for one party to say that

more was due, and to the other that the sum tendered was sufficient. *Peacock* v. *Dickenson*, 2 C. & P. 51. *note*. [Abbott]

Where a defendant offered seven sovereigns to cover a demand of *6l. 17s. 6d.*, but accompanied by a counter-demand in writing, and the offer was "take your demand:" Held, insufficient to support a plea of tender, as there must be evidence of an offer of the specific sum due, unqualified by any circumstance whatever. *Brady* v. *Jones*, 2 D. & R. 305.

A tender must be unconditional; therefore, if a man makes a tender of money, insisting at the same time on a receipt in full of all demands, such a tender is unavailable. *Griffith* v. *Hedges*, 1 C. & P. 419. [Abbott]

It is not a good tender of money to offer it to the party, and say that you must have a receipt for the amount, if neither party has got a stamp for the receipt. It is the duty of the party wishing to make a tender, to take a receipt stamp with him, and deduct the amount of it from the debt. *Blyther* v. *Townsend*, 4 Law J. K.B. 27, s. c. 7 D. & R. 119: s. p. *Laing* v. *Meader*, 1 C. & P. 257. [Abbott]

A debtor, upon being called on by his creditor for payment,—saying, "I have the money up stairs, and will go and fetch it," it is a good tender if he is prevented by the plaintiff's replying that he cannot take it. *Harding* v. *Davies*, 2 C. & P. 77. [Best]

If a party says to his creditor, that he will pay him so much, and puts his hand in his pocket to take out the money, but before he can get his money out, the creditor leaves the room, and the money is in consequence not produced till he is gone, this is no tender. A plea of tender is, in practice, very seldom successful; and the Lord Chief Justice, observed, that he was, on that account, always sorry to see such a plea on the record. *Leatherdale* v. *Sweepstone*, 3 C. & P. 342. [Tenterden]

A tender is proved by a witness stating that he had in his hand the precise sum intended to be paid, twisted up in bank notes, provided he told the plaintiff what it consisted of, though he did not open it before him. *Alexander* v. *Brown*, 1 C. & P. 288. [Best]

If in making a tender the person asks for change out of a pound note, and no objection is made on that account, but it is refused because it is not enough, then the tender is good. *Cadman* v. *Lubbuck*, 3 Law J. K.B. 41, s. c. 5 D. & R. 289.

To make a tender to the mere collector of a bankrupt's estate legal, the whole sum demanded must be offered, since a less sum is insufficient, because the collector has no discretion on the subject. *Blow* v. *Russell*, 1 C. & P. 365. [Abbott]

A tender of reward is an admission of services. *Porcupine*, 1 Hag. 378.

A party who does not accept a tender is not entitled to his expenses in case of a litigation, when he might have had the same sum without it.

The justice of a demand is not always to be measured by an offer. *Frederick*, 1 Hag. 218.

## TIMBER.

Where A is tenant for life, remainder to his children, and B has an interest in the growing timber, which, in the usual course of management, will come to be felled during the continuance of A's estate, the infants can have no interest in, and cannot be made parties to, an agreement between A and B for the purchase of B's interest in the growing timber.

Even if the master has reported that they have an interest, all the proceedings will be rescinded for irregularity, as having been a surprise on the Court. *Anon.* 1 Law J. Chanc. 33.

To be proved by conduct, whether timber left standing for ornament or shelter. Timber so left standing not to be cut, though decayed or injurious to adjoining trees, unless removal essential to intended purposes of ornament or shelter. *Lushington* v. *Boldero*, 6 Mad. 149.

## TIME.

[See LIMITATIONS, STATUTE OF.]

The three months mentioned in the 23rd sec. of the statute 28 Geo. 3, c. 37, are to be computed as lunar, not as calendar months. *Crooks* v. *M'Tavish*, 1 Law J. C.P. 107, s.c. 1 Bing. 307, s. c. 8 B. Mo. 265.

It is no objection to the laying of the time in a coroner's inquisition, that the offence is stated to have been committed on the "26th day June," omitting the word "of." *Rex* v. *Huggins*, 3 C. & P. 414. [Vaughan]

Where a testator directs a purchase with all convenient speed, and interest in the meantime to accumulate, and trustees neglect the purchase, twelve months are to be considered as reasonable time within which the purchase might have been made. *Perry* v. *Warrington*, 6 Mad. 155.

When titles have for many years been founded and rested upon the principle of a decision, it ought not to be disturbed though erroneous.

On this ground the case of Rowes v. Alexander, so far as it relates to the doctrine of implied revocation, must be supported. *Crawford* v. *Coutts*, 1 Bligh, 687.

## TITHES.

[See TEINDS, and VARIANCE.]

(A) WHAT ARE.
(B) TITLE TO.
(C) WHAT TITHEABLE.
(D) EXEMPTION.
(E) SETTING OUT.
(F) MODUS.
(G) COMPOSITION.
(H) ACTIONS AT LAW.
(I) SUITS IN EQUITY.
(K) PLEADINGS.
(L) EVIDENCE.
(M) PRACTICE.
(N) COSTS.

### (A) WHAT ARE.

The word tithes is continually found in ancient instruments used to denote tithes *quâ* tithes, or a commutation for them, and may mean either one or

the other, as the subsequent usage explains. *Norton* v. *Hammond*, 1 Y. & J. 94.

(B) TITLE TO.

Where tithes are claimed by a vicar who relies on a special endowment to support his case, he is not precluded by the enumeration therein of specific titheable matters, the tithe of which had been thereby assigned to him, from demanding from the occupiers tithes of other articles *ejusdem generis*; therefore, where the vicar can shew that he has received some tithes not included in the enumeration in his endowment, and they are not shewn to be payable to some other person; and where such tithes are supposed to be paid to the rector, and no claim is made by him, but he stands by and allows the vicar to take them, he is bound, as between him and the vicar, by such laches. *Manby* v. *Lodge*, 9 Price, 231.

By the common law, and also by general presumption, all tithes are due to the incumbent of the parish where they arise; and, therefore, tithes renewing upon a common are due to the incumbent of the parish in which the common is situate, and not to the incumbent of the parish in which the tenement, to which the common is appurtenant, is situate, if that same tenement be in a different parish. Custom may however vary this.

When the tenement is in one parish, and the common in another, the incumbent of the farm is not of right, and by the common law, independently of custom or prescription, entitled to the tithes arising upon the common; and if the common be inclosed, the allotment will become, by the general rule, for the purpose of tithes, parcel of the parish in which it is actually situate. *Bishop of Carlisle* v. *Blain*, 1 Y. & J. 123.

Seed-tithes are a great tithe.

By a patent, that granted "*omnes decimas nostras garbarum et granorum*," every thing vested in the crown passed to the grantee, who was thus placed in the situation of the rector.

Tares are a tithe which ranks under the word "*garbarum*." *Daws* v. *Benn*, 1 Law J. K.B. 205, s. c. 1 B. & C. 751.

A title to the tithe of hay does not give a right to tithes of clover, vetches, and grasses, or food not green.

The right to the tithe of hay applies as well to artificial as natural grasses.

But with regard to the former, it can only be taken as a tithe in the nature of agistment-tithe.

Agistment-tithe does not pass under a title to the tithe of hay. *Lewis* v. *Young*, M'Clel. 113, 133, 139, s. c. 13 Price, 394.

The incumbent is entitled to the milk of the tenth day, morning and evening, and not to the tenth meal; and the milk of the whole herd of cows must be rendered on one and the same day.

The tithe of lambs is due when the animals are dropped, but payable when they are able to live without their dams; and, therefore, where the occupier removed lambs out of the parish immediately after they were dropped: Held, that he was liable to pay for the value when fit to be weaned.

It is easy to state the principle on which the tithe of vegetables in a garden, gathered for the consumption of a family, is to be rendered, but very difficult to imagine in what manner the principle is to be applied in practice; and therefore requires a mutual spirit of accommodation on the part of the vicar and the occupier. *Fanshawe* v. *Brittain*, 2 Y. & J. 575.

In the absence of fraud, a tithe-owner cannot control the farmer in his mode of husbandry. *Lewis* v. *Young*, M'Clel. 129, s. c. 13 Price, 394.

(C) WHAT TITHEABLE.

[See D.]

By the Barrington Inclosure Act, the commissioners are directed to ascertain what is a fair *corn rent* for the persons having possession of the lands, to pay to the lay impropriator or vicar in lieu of tithes. After the inclosure had taken place, a part of the lands lay uncultivated for several years; subsequently the owner of them put in a tenant, upon whom the impropriators levied a distress for the arrears of the corn rents, accruing during the time the lands lay unproductive: The Court held, that the distress was legally made. *Newling* v. *Pearce*, 1 Law J. K.B. 140, s. c. 1 B. & C. 437, s. c. 2 D. & R. 607.

Tithe of wood is due of common right. *Chichester* v. *Sheldon*, 1 Turn. 249.

Potatoes are titheable when dug up, and not when "ploughed out." *Bearblock* v. *Hancock*, 2 C. & P. 425. [Graham]

Oak wood springing or growing from the *germins*, or stumps of trees, though such wood was timber of the growth of eighty years, was held titheable. *Williams* v. *Rowe*, 1 M'Clel. & Y. 577. [See *Chichester* v. *Sheldon*, 1 Turn. 245, *post*, D.]

(D) EXEMPTION.

Where no tithes had been paid on lands from time immemorial, held by one of the alien priories, which subsequently came to the crown, and were granted to lay persons, and by them to one of the greater monasteries, in whose possession they remained until the dissolution, such lands held to be no longer exempt from payment of tithes. *Page* v. *Wilson*, 2 J. & W. 513, 535.

There can be no exemption from tithes inherent in the land, as the common law charges all lands equally with tithes.

A custom excluding "hedges" and "hedge-rows" of less than a certain width from tithes of underwood, is untenable. *Page* v. *Wilson*, 2 J. & W. 513.

Lands which had belonged to one of the lesser monasteries were not exempted as such from the payment of tithes, in the hands of the grantees of the crown, under 27 Hen. 8. c. 20. At common law it has been held, that if such lands were otherwise discharged of tithes, the discharge being terminated by the dissolution of the monastery, the right of the ecclesiastical rector revived: but as between two monasteries, the one holding an impropriate rectory, and the other lands within the rectory, whether the same doctrine is applicable—*quære*. *Semble*, that the case is not similar to a claim of exemption, as derived from a religious order, nor from unity of possession; but both bodies being capable of making an alienation, the monastery having an impropriate rectory might convey the tithes to the other body holding the lands. It is the case of a right of exemption by conveyance,

and, *semble*, that it is a title which admits of proof by presumption. *Norbury* v. *Meade*, 3 Bligh. 236.

An exemption from tithes was set up for lands, as parcel of the wastes of a manor, alleged to have formed part of the possessions of an abbey at the dissolution, and to have been discharged in the hands of the abbot; and the exemption was supported by evidence of non-payment of tithes; yet, it being proved that other lands, equally parcel of the manor, had always been treated and considered as liable to tithes: the Court held, that the inference usually drawn from the fact of non-payment was destroyed; that the payment of one part of the manor neutralized the effect of the non-payment by the other; and decreed an account. Where an exemption is set up for lands, as parcel of the possessions of an abbey, there is commonly found among the documents contemporary with the dissolution of monasteries, or shortly following it, a particular or general description of the lands forming the possessions of the abbey; and this, if accompanied by parol testimony that the lands had never rendered tithes, affords a strong inference to conclude that the lands were discharged in the hands of the abbot upon some legal ground. Where an estate is discharged from tithes, a right of common appurtenant to the estate is also discharged. On an approvement, the land which a commoner takes in severalty follows the tenement in respect of which it is allotted, not the incorporeal hereditament (the manor,) from which it is severed; and, therefore, if the tenement be not discharged, neither will the land allotted. *Carysfort* v. *Wells*, 1 M'Clel. & Y. 600.

An exemption from tithes was claimed as to certain copyholds, on the ground of unity of possession of the rectory, manor, and lands in one of the greater monasteries dissolved by 31 Hen. 8; other copyholds of the manor had belonged to the monastery at the dissolution, and were subject to tithes: Held, nevertheless, that the exemption was good, because the monastery might have granted out the latter copyholds before the union of the rectory, and the former after it. *Monck* v. *Huskisson*, 5 Law J. Chanc. 163, s. c. 1 Sim. 280.

To support a defence of prescription *in non decimando* to a suit for tithes, on the ground of the lands having belonged to a religious house, they must be shewn to have belonged to the religious house from time immemorial, since it is unavailable to shew that the lands were in the possession of the religious house at the period the dissolution took place. *Markham* v. *Smyth*, 11 Price, 126.

An exemption from tithes on the ground of the lands having belonged to a monastery of a privileged order, does not rest on prescription; but the owner must shew, satisfactorily, that the monastery was seized of the lands before the council of *Lateran*, and also at the time of the dissolution. And, therefore, where the owners of lands established the former, but not the latter fact, the Court decreed an account of tithes.

In order to support a general exemption *in non decimando*, it must be shewn that the lands were part of the possessions of a monastery before the time of legal memory, but it is seldom that such fact can be distinctly proved, and therefore it must usually depend upon presumptive evidence. *Norton* v. *Hammond*, 1 Y. & J. 94.

There may be a prescription *in non decimando*, for tithes of a district, or even for a hundred. Where a prescription *in non decimando* is set up, the party must shew the specific ground upon which he claims to prescribe: strong evidence is required in support of a prescription *in non decimando*. *Chichester* v. *Sheldon*, 1 Turn. 250.

An inclosure act, after directing allotments to be made to the rector of Waddington, &c. in lieu of tithes, contained a clause which excepted all rents, estate and interest, which persons, &c. had and enjoyed in respect of the said lands, &c. before the passing of the act. The commissioners, by their award, made several allotments, but neglected to allot in respect of Waddington: Held, that, under the saving clause, the rector was entitled to tithes in kind for Waddington, which was not included in the award. *Cooper* v. *Walker*, 4 B. & C. 36, s. c. 6 D. & R. 31.

Age does not exempt wood springing from the roots or stools of trees from being titheable. *Chichester* v. *Sheldon*, 1 Turn. 245. [See *Williams* v. *Rowe*, 1 M'Clel. & Y. 577, *ante*, C.]

Wood used for hop-poles; upon the farm; for hurdles, for hurdling sheep; for repairing hedges; for land-draining on the farm; and for fuel in the husbandry house, is not exempt from tithes by the common law, but may be so by custom. *Willis* v. *Stone*, 1 Y. & J. 262.

The rule that involuntary rakings are not titheable, does not extend to hay. *Bearbleck* v. *Tyler*, 1 Jac. 560.

The rakings of corn are in general exempt from tithe; but where, from the course of harvesting, they are unusually large in quantity, although there be no imputation of fraud, tithe must be paid upon them. *Glanville* v. *Stacey*, 5 Law J. K.B. 185, s. c. 6 B. & C. 543.

Tithes are not payable in respect of a man's own corn ground at his own mill, though he makes profit by selling the meal to the public. *Townley* v. *Colegate*, 6 Law J. Chanc. 159.

### (E) GETTING OUT.

Where a farmer caused every tenth sheaf of wheat to be thrown out for *tithe*, and put up the others in shocks of different numbers, varying from six to nine: Held, that this was illegal, as it was necessary for each shock to contain an equal number of sheaves. *Walker* v. *Ridgway*, 4 Law J. C.P. 74, s. c. 3 Bing. 317.

If a parson agrees to take his tithes of wheat, by one sheaf out of each shock of ten, each progressively—viz. the first sheaf in the first shock, the second in the second, and so on; in the absence of fraud, this agreement is not illegal, although the common law mode of tithing wheat is by the sheaf before it is put up in shocks. *Collier* v. *Jacob*, 3 Law J. C.P. 183, s. c. 3 Bing. 106.

Where peas grown in fields, but gathered green, were gathered by women and children in small baskets or aprons, and from those emptied into sacks, each sack being computed and intended to contain three bushels; and when the sacks amounted in number to ten, one sack was set out for the tithe; and when there were not ten, each sack was calculated to contain three bushels, and upon that presumption a tenth of the whole was measured out and

tendered for the tithe: and, if there were a surplus over ten sacks, the surplus was measured in the same manner: Held, that this was a good mode of setting out the tithe, though it was objected by the vicar, that the peas ought not to be put into sacks till the evening, and he had seen the whole measured, and by that means knew that he had the actual tenth; it being, however, shewn in evidence, that it was the usual mode of tithing in the neighbourhood, and that any other mode would greatly injure the peas, as exposure to sun and air for any time after they were gathered, would destroy their bloom and diminish their value in the market; and it being also shewn in evidence that the sack was a measure of three bushels, and that the occupier gave the vicar his choice of sacks, and did not insist upon his accepting the sack without giving him an opportunity of seeing and measuring the contents of any of the sacks he chose. *Fanshawe* v. *Britain*, 2 Y. & J. 575.

The tithe of calves is to be set out when they are fit to be weaned, and to live alone on the same food with the cow.

The proper mode of tithing hay is by the fork and rake. *Bearblock* v. *Tyler*, 1 Jac. 560.

### (F) Modus.

A defence of a modus is wholly inconsistent with a defence *in non decimando*. *Norton* v. *Hammond*, 1 Y. & J. 94.

If a certain sum in gross as a modus be payable to a vicar on his induction, in satisfaction of certain tithes during the period of his incumbency, with a further annual payment of a smaller sum in lieu of certain tithes during the same time, the modus cannot be supported. *Manby* v. *Taylor*, 9 Price, 249.

The union of articles, as "calves" and "milk," which are distinctly titheable, is bad.

A court of equity will decree tithes in kind, if it be satisfied that the modus set up is either bad in law, or that it has not been in existence from time immemorial.

A modus in lieu of tithes, as, 3*d*. for every hogshead of cider, and 1*d*. for fruit, apples, pears, and other fruit, is void.

So is a modus in lieu of tithes, of 4*d*. for every milch cow and calf, and 3*d*. for every heifer and calf. *Short* v. *Lee*, 2 J. & W. 464.

A modus for agistment tithe in satisfaction of all tithes, made in years when the grass land was otherwise cultivated, was holden bad. *Mould* v. *Wyat*, 2 Ken. 38, Chanc.

A modus of 1*d*. payable by every occupier of land, in lieu of the tithe of hay, is bad. So a modus of a shilling for a milch cow, in lieu of the tithe of milk. So a modus for every occupier of land to pay a penny in lieu of the tithes of calves. *Bush* v. *Lewis*, 1 Jac. 363.

Where a district modus was pleaded, and it appeared from ancient documents that the modus could not consistently with those documents have existed at the time of legal memory, the Court decreed an account of tithes in kind, and refused an issue, notwithstanding the payments were proved to have existed for a great number of years. A district modus, to be good, must cover all the lands in the district, and therefore, where a modus was pleaded for a particular district, and it appeared from the evidence that certain farms within the district never paid or contributed, the modus was considered bad. *Miller* v. *Jackson*, 1 Y. & J. 65.

Where a township modus of 5*l*. 3*s*. 10½*d*. was pleaded, as covering all the lands in a particular township, in lieu of predial tithes, and it appeared from the evidence, that for a great many years several small sums, amounting to about the sum pleaded, had been paid by the inhabitants severally, and not collectively, to the rector: The Court held, that, though some of the payments might be good moduses or prescriptive payments for their respective farms; yet that they could not together make a good township modus.

To render a township modus good, it ought to be payable by each and every of the inhabitants, and ought not to be collected by the rector. *Jackson* v. *Benson*, 2 Y. & J. 45.

Where moduses were 7*d*. for every milch cow, 5*d*. for every heifer, 4*d*. for every hogshead of cider, and 1*d*. in lieu of hoarded apples, they were held to be legal, and issues directed to try them. *Holwell* v. *Blake*, 1 M'Clel. 559.

Moduses of 1½*d*. for every cow calving and being milked within the year ending at Easter, in lieu of the tithe of milk and calf of every such cow; of 1*d*. for every cow not calving, but being milked within the year ending at Easter, in lieu of the tithe of milk of such cow; of 4*d*. for every colt foaled; of 3*d*. for every lamb; of 1*d*. for every sheep shorn, in lieu of the tithe of wool; and of 1*d*. for every garden, in lieu of the tithes of the produce of such garden: Held, good moduses, but issues offered. *Governors of Luston School* v. *Scarlett*, 2 Y. & J. 330.

Issue directed to try a modus of 37*l*. a year, payable half-yearly, alleged to be payable in lieu and satisfaction of all the vicarial tithes of certain farms constituting a particular hamlet within the parish, notwithstanding the presumptive rankness of the modus, and though it appeared from ancient documents that the whole value of the lands in the parish, at a date long subsequent to the time of legal memory, were of less annual value than the sum pleaded as a modus, and notwithstanding there was no evidence of any payment of tithes: the validity of the ancient documents, and their application to the subject, being however questioned, and a great deal of parol testimony being adduced in support of the modus, uncontradicted by any parol evidence to the contrary. *Strong* v. *Denchfield*, 2 Y. & J. 594.

A modus of 6*d*. in the pound on an ancient rent, held bad, as a shifting and uncertain modus. The following moduses were held good, viz. two-pence for every milch cow, called a new cow, that is, a cow that has had more than one calf, in lieu of the tithe of the milk of such cow; one penny for every milch heifer or whey of her first calf, in lieu of the tithe of milk of such milch heifer or whey; one penny for every far cow or strip, that is, a milch cow that has not had a calf within the year, in lieu of the tithes of such far cow and the milk thereof; one penny for every calf under five within the year; for five calves, the value of one halfpenny a calf; six calves up to fourteen inclusive, a calf in kind, or its value; fifteen calves, a calf in kind or its value, and the value of half a calf more; sixteen calves to twenty-four inclusive, two calves in kind, or their value; and so on in proportion. The like modus

for fowls; one penny for every garden; and fourpence for a hen, called a loak hen, in lieu of the tithes of eggs and young poultry.—The following moduses, viz. for every number of lambs within the year, under five, nothing; five lambs, the value of one halfpenny a lamb; six lambs, and up to fourteen, inclusive, a lamb in kind, or its value; fifteen lambs, a lamb in kind, or its value, and the value of half a lamb more; sixteen lambs up to twenty-four inclusive, two lambs in kind or their value, and so on: the like modus as to fleeces: the same as to geese;—were considered bad, nothing being paid under five. *Norton* v. *Hammond*, 1 Y. & J. 94.

A modus of 1½*d.* for every milch cow, if under seven, kept and fed on the lands, in lieu of the tithe of milk and calves of such cows; 2*s.* 4*d.*, if the milch cows and calves shall amount to seven, and not seventeen; and the like sum of 2*s.* 4*d.* for every ten milch cows after the first seven, in lieu of the tithe of the milk and calves of such cows,—considered good.

A modus of 2*d.* for every house and garden, in lieu of garden stuff, considered good; but held to cover only gardens annexed to houses for the use of the houses, and not to market-gardens, or the like.

A custom to pay the seventh lamb, pig, fleece, or gosling, if there be seven, instead of a tenth only of the value of the lambs, pigs, fleeces, or goslings, in lieu of the tithes of such lambs, &c., and if there be seventeen, then a lamb, pig, fleece, or gosling, and so an additional lamb, &c. for every successive ten, held a void custom. *Pritchett* v. *Honeyborne*, 1 Y. & J. 135.

The Court will not disturb a verdict establishing a modus, when the cause comes before them for further directions on the postea; hence a modus of 2*d.* a cover, for every cover of clover, and so in proportion; and another modus of 2*d.* yearly for every day's math of hay, and so in proportion, have been holden good. *Davies* v. *Mossley*, M'Clel. 143, s. c. 13 Price, 423.

Cases of moduses found differing from those laid in the answer, and directed to be tried by the issue ordered, but received and acted upon by the Court, disapproved, and the reasons stated. *Williamson* v. *Thompson*, 11 Price, 745.

Bill by the impropriate rector of A for predial tithes of land, allotted under an inclosure act. The defence was, that the land allotted was awarded in lieu of a right of common in A, appurtenant to a tenement in the parish of B; and that the tenement in B was protected from all tithes by a farm modus of 20*s.* payable to the rector of B, and therefore that the modus for the tenement protected the allotment. The Court, however, decreed an account. *Bishop of Carlisle* v. *Blain*, 1 Y. & J. 123.

The defendants to a bill by a rector for tithes of hay, set up a modus of two-pence for each load of hay of the weight of one ton, payable at Easter by the several occupiers, in lieu of tithes of hay grown from Easter in the year preceding inclusive; and they by their answer further stated, that the amount of modus payable to the rector under such custom had been usually ascertained by a person on behalf of the rector inspecting the ricks of hay made within the parish in each year, and forming an estimate of the number of loads of one ton weight contained in each rick, upon which estimate the whole of the annual modus payable to the rector was calculated, but that this mode of estimating the weight formed no part of the custom; it also appeared, that, in a suit instituted in the Exchequer by the same rector against some occupier for the tithe of hay in the same parish, an issue had been directed, and, the jury having found, that two-pence for every load of hay of the weight of one ton had been immemorially paid to the rector at Easter in each year, by the several occupiers of lands, in lieu of the tithes of hay, the rector's bill had been dismissed with costs: Held, that the alleged modus was bad in law, and that an account ought to be directed against the defendants, without directing an issue as to the validity of the modus.

*Quære*—Whether the Court ought to direct an issue to try the validity of a modus, where the modus is stated, in the answer, in such a form that it would not be good in law, if proved exactly as it is alleged, but the Court has reason to believe, that, on a trial, those circumstances, which would be requisite to give it validity may probably be established in evidence. *Goodenough* v. *Powell*, 2 Rust. 219.

By 7 & 8 Wm. 3, c. 6, a summary remedy is given before two justices for the recovery of small tithes, under the value of 40*s.* [increased to 10*l.* by 53 Geo. 3, c. 127, s. 4]; by s. 7, which gives an appeal to the sessions, the certiorari is taken away, "unless the title of the tithes should be in question;" and by s. 8, if any person complained against for subtracting tithes, should insist before two justices upon any prescription, composition, or *modus decimandi*, agreement, or title, in order to free himself from the tithes claimed, and deliver the same in writing to the justices, subscribed by him, and should give the party complaining security, to the satisfaction of the justices, to pay all costs and damages which, upon a trial at law, to be had for that purpose in any superior court, should be given against him, in case the prescription, &c. should not upon such trial be allowed; in such case the justices should forbear to give any judgment of the matter, and the party complaining should be at liberty to prosecute him for the subtraction in any court in which he might have sued before the act. *Quære*, whether by this act the justices have jurisdiction to try a *modus decimandi*. Where, however, after summons and appearance, two justices made an order under this statute upon a defendant to pay the value of certain small tithes, and upon the trial of an appeal against the order, the defendant then, for the first time, offered evidence of a *modus decimandi*, which was rejected: Held, that the sessions did right, and that if the defendant meant to avail himself of a modus as a ground of defence, he was bound to submit his evidence to the two justices in the first instance. *Rex* v. *Ambrose Jeffrey*, 2 D. & R. 860.

## (G) Composition.

A composition may be made by a privileged as well as by a religious order; hence the lessee, under the Crown's grantee of lands which had belonged to the Knights of St. John of Jerusalem, and his under-tenants, may defend themselves against a demand of tithes, just as they might have done if their lands had belonged to an order not privileged. *Donnison* v. *Elsley*, 1 M'Clel. & Y. 1.

By letters patent, 19 Jac. 1, a rectory, with the appurtenances, was granted to the Dean and Chapter of York, and their successors, for the support and maintenance of a grammar-school. In 1712, an arrangement was entered into between the Dean and Chapter, and their lessee of the rectory, and the lord of the manor of a district within the rectory, to take a perpetual composition in lieu of the tithes of that district, and such arrangement was carried into effect by deeds of covenant, executed by the Dean and Chapter and their lessee, and the lord of the manor, and the latter granted a perpetual rent-charge to the amount of the composition out of his estates. This composition or rent continued to be received by the lessees of the Dean and Chapter for upwards of a century, when the Dean and Chapter (the rectory being then in their own hands) refused any longer to receive it, and filed their bill for tithes. The Court held, that the deed of covenant of 1712 was void under the disabling statute, and that the covenant was not binding on the Dean and Chapter, and that they were entitled to the tithes. *Dean and Chapter of St. Peter, York,* v. *Middleborough*, 2 Y. & J. 196.

A tenant who enters into a parol composition for tithes creates merely a personal contract, which ceases with the occupation. The composition paid by the former occupier is *primâ facie* evidence of value. *Paynton* v. *Kirkby*, 2 Chit. 405.

Composition for tithe from Michaelmas to Michaelmas, is not determined by the tenancy of the land expiring at Lady-day, but there must be notice: therefore, where tenant continued to hold part of the farm for her away-going crop, till Michaelmas following the end of her term—Held, that tender of composition to Lady-day, and setting out of tithe upon the part thus occupied was no answer to an action for a year's composition. Notice to determine such composition must be similar to notice to determine a yearly tenancy, viz. six months. *Hulme* v. *Pardoe*, 1 M'Clel. 393, s. c. 1 C. & P. 93.

Where an inclosure act substituting a money payment in lieu of tithes, to be calculated with reference to the value of the tithes, contained these words, that the payment to the vicar was to be "free and clear of all rates, taxes and deductions whatever:" It was holden, that the vicar was exempt from poor rates, in respect of the money so directed to be paid to him. *Chatfield* v. *Ruston*, 3 B. & C. 863, s. c. 5 D. & R. 575.

Commissioners under an inclosure act were to allot by their award to the rector of the parish so much of the lands to be inclosed in the township of S, and of the titheable parts of the township of W, as should, quantity, quality, and situation considered, contain, or be equal in value to, two fifteenth parts of the titheable places thereof, in lieu of tithes arising within the same lands; after the enrolment of the award of the commissioners, all tithes arising within the lands inclosed were to cease; but there was a saving to all persons (other than the persons to whom any compensation should be made by virtue of the act, in respect of the interest for which such compensation should be made,) of all such interest as they had in respect of the said lands before the passing of that act; an award, by which the commissioners allotted to the rector, in lieu of the tithes of S and A, lands more in quantity than two fifteenths of the lands inclosed in S and A, but less than two fifteenths of the lands inclosed in S, A, and W, without any allotment expressed to be in lieu of the tithes of W, is not a bar to the rector's claim of the tithes in W. *Cooper* v. *Thorpe*, 2 Russ. 78.

To ascertain the tenability of a money payment in respect of an ancient composition in lieu of tithes, the Court directed an issue. *Markham* v. *Smyth*, 11 Price, 126.

### (H) ACTIONS AT LAW.

A party cannot proceed at law and in equity at the same time for the treble value of tithes. *Taunton* v. *Glyde*, 10 Price, 129.

But filing a bill in equity for tithes does not preclude the defendant from bringing an action of trespass for not taking them away. Therefore the Court will not grant an injunction to restrain the proceedings at law. *Bradley* v. *Bensted*, 13 Price, 221, s. c. M'Clel. 80.

Tithe had for years been set out in shocks. The gatherer, after notice, and inquiring how many shocks there were, did not take it away. The farmer declared in case, for not carrying it away, and alleged that it was lawfully and in due manner set out. The Court held, that there was evidence to go to the jury, that the parties had agreed that the tithe should be set out in shocks, and that such an agreement supported the allegation. They also held, that the question, whether corn has been on the ground a reasonable time to enable the party to examine it, was a question for the jury. *Facey* v. *Hurdom*, 2 Law J. K.B. 225, s. c. 3 B. & C. 213, s. c. 5 D. & R. 68.

In an action for not carrying away tithe, it was averred in the declaration (by mistake), that the land was that year sown with grass; the defence was, that the tithe was set out in an inconvenient manner for being carried away; but the jury found that it was set out according to the custom of the country: Held, that the uncertainty as to the declaration, and as to the setting out the tithe, was sufficient ground for granting a new trial. But the plaintiff was allowed to amend on payment of costs. *Hooper* v. *Mantle*, M'Clel. 388.

### (I) SUITS IN EQUITY.

In suits for tithes, the jurisdiction of a court of equity is limited to discovery and account. The title to tithes, as of other real property, is a question of a legal right, upon which the court of equity has no jurisdiction; and if the title is disputed and doubtful, the Court has no right to make a decree. *Norbury* v. *Meade*, 2 Bligh, 245.

If the occupier shews a colour of title to the tithes not rendered, a court of equity will not interfere, but leave the plaintiff to his remedy at law. *Cherry* v. *Legh*, 1 Bligh, N.S. 306.

A lay impropriator, who is in possession of a rectory, and in perception of the tithes subject to charges by way of mortgage, and for raising portions, (inasmuch as such mortgagees, &c. having permitted the possession, cannot claim the by-gone rents,) has a title sufficient to sustain a suit against occupiers for an account of tithes. *Glegg* v. *Legh*, 1 Bligh, N.S. 302.

It is not sufficient ground for an application to a court of equity, to restrain a plaintiff in a suit by

bill in that court for tithes, from proceeding in actions brought by him against parishioners, not parties to that suit, for not setting out their tithes, that the court of equity has decreed an issue to try the validity of (parochial) moduses laid in the answers as covering the articles, in respect of the tithes of which the action at law had been commenced; nor although the parties applying have entered into a bond to pay all costs of suits and actions relating to such tithes, to connect them with the suit in equity, as to entitle them to the interference of the Court. *Taylor* v. *Cook*, 9 Price, 207.

If a disinterested party be made a defendant to a suit for tithes, he is entitled to have the bill dismissed with costs; though, if he intermeddles, the bill will be dismissed without costs. *Markham* v. *Smyth*, 11 Price, 126.

Where a bill for an account of tithes, after stating that the plaintiff claimed as lessee of an impropriate rector, alleged that the owner demised the tithes to the plaintiff, without stating that the demise was by deed: Held demurrable; but the Court recommended the plaintiff to submit to an amendment, by making the rector party plaintiff, and other corresponding alterations, which he was allowed to do on payment of costs. *Jackson* v. *Benson*, 13 Price, 131.

In a suit by an impropriate rector for tithes, where the defence is, that the tithe in question is vicarial, and the vicar, who is a defendant, dies during the suit, it is not necessary to make the new vicar a party, if the plaintiff will waive the account subsequent to his induction. The tithe of tare-seed held to be a small tithe. *Daws* v. *Benn*, 1 Jac. 95.

Where a rector and vicar joined in a suit for tithes, respectively due to them, it was held multifarious. *Exeter College* v. *Rowland*, 6 Mad. 94.

A person entitled to a parcel or portion of tithes, was made a defendant in a suit by a person also claiming to be entitled to the tithes against occupiers; he joined with the occupiers in one answer, and insisted on his right to the tithes: The Court retained the plaintiff's bill for a year, with liberty to bring an action; if not, the bill to be dismissed without costs. An action was brought against the occupiers, and a verdict given for the plaintiff. The Court, on further hearing, decreed an account of the tithes, and ordered the payment of costs by the occupiers, and the other defendant.

When an impropriator, or owner, is made a party to a suit for tithes, and does not demur to the bill, or insist by his answer that he ought not to be made a party, but joins with the occupiers in an answer, and suggests their defence, though the Court cannot decree an account against him, yet it will visit him with costs. *Wing* v. *Murrell*, 1 M'Clel. & Y. 620.

## (K) PLEADINGS.

A plaintiff in equity must state his title in his bill, and, unless it is admitted by the defendant, must prove it. *Norbury* v. *Meade*, 3 Bligh, 245.

The same precision of pleading is not required in an answer insisting upon an exemption, as in a bill.

An allegation, in an answer, that a monastery held the lands discharged from tithes, is sufficient to raise the question of discharge by immemorial prescription; and that too, though the lands were not particularly described. *Williams* v. *Goodchild*, 8 Law J. Chanc. 53.

It is incorrect to plead, that by a custom used and approved of in P, and nineteen other parishes, no tithe of a particular kind was due or payable to the rector of P. *Page* v. *Wilson*, 2 J. & W. 521.

In pleading that particular lands are not liable to tithes; describing them accurately, and shewing their situation and boundaries, are indispensable requisites. *Markham* v. *Smyth*, 11 Price, 126.

A bill being filed against an occupier for tithes of certain lands called *Cook's Green*, the defendant, by his answer, states, that the lands in his occupation, together with a certain other close, in the occupation of A, containing nine acres, and separated from the former by a lane which had been recently laid to the defendant's grounds, were called and well known by the ancient name of *Cook's Green*; and he then insists that the lands called Cook's Green are covered by a modus: Held, that the lands comprised in the farm or district, alleged to be covered by the modus, were described with sufficient certainty. *Williams* v. *Walton*, 1 Russ. 605.

Where a *non decimando* was set up for lands, as part of the possessions of a monastery, which was dissolved by or came into the hands of King Hen. 8, and the answer alleged, that such lands were, at the dissolution, in the hands or occupation of the abbot, discharged of all tithes, without stating in what manner they were discharged, whether by bull, order, or prescription,—the Court, upon the effect of the whole answer, considered it might understand it to mean prescription. *Pritchett* v. *Honeyborne*, 1 Y. & J. 135.

In pleading a modus for certain land, it must be alleged in the answer that the defendant occupies the same. *Stuart* v. *Grenall*, 9 Price, 106.

A defendant cannot plead a payment as a modus, and afterwards insist upon the same payment as a composition, requiring six months to determine it. *Wolley* v. *Brownhill*, M'Clel. 317, s. c. 13 Price, 500.

Bill by an impropriate rector, against occupiers, for an account of tithes; and against a portionist, requiring a discovery from the latter, of the deeds under which he claimed to be entitled to the portion of tithes, to which the bill admitted him to be entitled; alleging, that the deeds would shew not only the title of the portionist to the tithes claimed by him, but also the title of the plaintiff to the tithes demanded by him of the occupiers. Demurrer by the portionist to the discovery allowed. *Compton* v. *Earl Grey*, 1 Y. & J. 154.

Where a bill did not pray an account for tithes against the occupiers, but an account of the money received for tithes, by a person claiming under an adverse title, it was holden not to lie. *The Bishop of St. Asaph* v. *Williams*, 1 Jac. 349.

Where a bill claimed the tithe of potatoes, turnips, and cabbages, generally; and the answer set up a garden modus, and the plaintiff did not go for tithe of gardens: The Court dismissed the bill in that respect, with costs. *Wolley* v. *Brownhill*, M'Clel. 317, s. c. 13 Price, 500.

It is not a demurrable objection to a bill for an account of tithes, that the plaintiff having stated, as the foundation of his claim, a decree made in pursuance of an act of parliament, also charges two other distinct sources from which he derives his right, and on which he rests his title; the bases of those two latter being, first, an agreement anterior

to the decree, charged to have been confirmed by an act of parliament passed ten years before the former act; and, secondly, custom founded on commercial usage,—there being nothing uncertain. *Owen* v. *Nodin*, M'Clel. 238, s. c. 13 Price, 478.

To part of a bill praying an account of the great tithes arising out of certain lands called the Old Inclosures in the occupation of the defendants, a plea setting forth an inclosure act, and an award of commissioners under it, wherein they had allotted certain parts of the inclosed land in lieu of the right to tithes in kind in various persons, and in lieu of and as a compensation for all tithes due to the plaintiff, (after having noticed a dispute between a claimant of the tithes of certain old inclosures as against the plaintiff, which they had declined to determine,) and averring that the lands in the occupation of the defendants were not part of the old inclosures so in dispute, overruled, and ordered to stand for an answer, with liberty to plaintiff to except,—not being a short answer to the demand, bringing the question between the parties to a single point precisely meeting the allegations in the bill. *Wing* v. *Murrells*, 11 Price, 723.

Covenant for not setting out certain tithes: plea, that by an inclosure act, the plaintiff received an allotment in lieu thereof, not stating that the commissioners under the act had made their award as directed thereby: Held, although the jury had found for the defendant upon that issue, that the plea was untenable, as it did not shew that the forms of the act had been complied with: judgment *non obstante veredicto* was therefore entered for the plaintiff. *Ellis* v. *Armison*, 3 D. & R. 27.

## (L) EVIDENCE.

All owners of lands in the same parish are incompetent witnesses on issues to try moduses; and the depositions of interested witnesses, who are dead, cannot be read, although their being so interested does not appear upon the face of the written document. *Jones* v. *Carrington*, 1 C. & P. 329. [Park]

The lessee of a vicar is a competent witness on an issue to try a modus between a vicar and occupiers, if he release the vicar. *Robinson* v. *Williamson*, 9 Price, 136.

To establish a bill to enforce a contribution between tithe-owners, the evidence must be express, and not doubtful. *Stone* v. *Yea*, 1 Jac. 426.

A person suing, as lay impropriator, for the tithes of a parish in which there has been, within the living memory, a parish church and a burial ground, in order to establish his title, must shew that there has been an impropriation, and when it was made; because, if it was not prior to the 15 Ric. 2, c. 6, it is further necessary, according to that statute, that an endowment of a vicarage should be shewn; and if the plaintiff does not allege and prove either that the appropriation was before the 15 Ric. 2, or that a vicar has been endowed, *primâ facie* the appropriation is invalid. *Norbury* v. *Meade*, 3 Bligh, 245.

According to ancient practice in suits by lay impropriators, the production of the original grant, and a regular deduction of the tithe by the necessary documents, were required. That practice was altered in consideration of the frequent loss of instruments of title. But it is still necessary to produce the original grant, and to prove a possession corresponding with the title. *Norbury* v. *Meade*, 3 Bligh, 224.

Upon a lease of tithes, by the lay impropriator, if the tithes of particular lands are excepted, it might admit of the construction that the lessor is entitled to that which he accepts. But if a former owner of the tithes upon a lease has made a parol declaration, that he is not entitled to the tithes of those lands, that declaration is in itself important evidence, and gives a construction to the exception in the lease. *Norbury* v. *Meade*, 3 Bligh, 224, 257.

In a suit for tithes by an impropriate rector against occupiers, where the plaintiff by the answer is put to the proof of his title, it is sufficient—1. As to personal ownership, to prove that he is the beneficial owner of the tithes subject to terms vesting the legal estate in trustees, and creating charges on the rectory, but which charges being annual are satisfied up to the date of the suit. 2. As to general title, it is sufficient to prove a recent perception of tithes, with occasional payment of composition, and leases of the tithes taken by the occupiers. *Glegg* v. *Legh*, 1 Bligh, N.S. 302.

Upon a bill filed by a lay impropriator, who is in possession of a rectory, and in perception of the tithes, subject to charges by way of mortgage, and for raising portions against an occupier, who had taken a lease from the rector of the tithes of corn and grain, but expressly without prejudice to any question as to the tithe of hay, and who, by his answer, set up but did not prove a modus as to the small tithes: Held, that proof of the perception of some tithes by a lay impropriator, without evidence of a grant from the Crown, gives a title to other tithes, of the perception of which there is no actual proof. *Glegg* v. *Legh*, 1 Bligh, N.S. 302.

The Court will presume a subsequent endowment in support of an appropriation by a rector, which has been acted on for a very great length of time,—though an insufficient endowment has been actually produced in evidence, appearing on the face of it to be inadequate to that required to be made by the terms of the condition of the original licence,—where it is not shewn, by proof of some deficiency in any particular respect. *Wolley* v. *Brownhill*, M'Clel. 317, s. c. 13 Price, 500.

When no endowment is produced, the presumption in favour of the vicar is narrowed to the perception or usage; and where a tithe has never been taken by a vicar, he cannot claim it, even if it be generally a small one. *Daws* v. *Benn*, 1 Law J. K.B. 205, s. c. 1 B. & C. 751, s. c. 3 D. & R. 122.

Receipt of a vicar for a particular species of tithe, is evidence to shew that he is endowed with that species of tithe. *Apperley* v. *Gill*, 1 C. & P. 316. [Park]

Where, in a suit for the vicarial tithes of a particular district within a parish, the defendants (the lessee of the Crown's grantee of the land, and his tenant,) pleaded, that the district had formerly been parcel of the possessions of the hospital of St. John of Jerusalem; the statutes 32 Hen. 8, c. 24, and 31 Hen. 8, c. 31; that the district had come to the Crown discharged, and had ever since been enjoyed by its grantees, their lessee and tenants, absolutely and wholly acquitted: and proved that the district had been in the possession of the order in the 22 Edw. 3, 1357, and usage of non-payment, prior to a decree for an account of tithes of the same lands eight years before,

as far back as living memory went, and tendered much evidence of reputation to the same point; but the plaintiff produced an inquisition of the profits of the vicarage, taken in 1314, certifying that the vicar ought to receive the tithes of wool and lambs of the whole parish, and all other tithes to the church in anywise belonging, excepting the tithes of corn and hay; and that all vicars had, ever since the ordination of the vicarage, received all other tithes peaceably, and did so at the then present time: Held, that this instrument afforded evidence that the small tithes had been, *de facto*, paid to the vicar at the time when it was made; and that the usage proved, had grown up from some unexplained cause after the time of memory, and that it, therefore, overturned the defendant's *primâ facie* case; and an account of the tithes demanded by the bill was decreed. *Donnison* v. *Elsley*, 1 M'Clel. & Y. 1.

Under a bill claiming small tithes, evidence of other tithes being due to the vicar, over and above those specifically demanded by the bill, is admissible. *Manby* v. *Lodge*, 9 Price, 231.

An incumbent of one parish is capable of tithes in another, as a portionist or in nature of a portionist, but it is incumbent on him, as claiming against a common right, to prove his title strictly, either by producing an actual grant or evidence of usage, affording by presumption legal evidence of a grant.

Evidence of usage to receive certain mixed tithes by an incumbent in another parish, as a portionist, or in the nature of a portionist, is not, of itself, evidence of a right to receive the tithes of all description, which the lands may produce under any circumstances. *Bishop of Carlisle* v. *Blain*, 1 Y. & J. 123.

In an action by the contractor against the lessee, on the 2 & 3 Edw. 6, for not setting out tithes, it is sufficient for the former to prove that he received payment for tithes in the preceding year. *Ganson* v. *Wells*, 8 Taunt. 542.

On a vicar's bill for tithe of agistment, no endowment being extant, the plaintiff produced a series of terriers, commencing from the year 1685, describing the several rights of the rector and vicar, and enumerating, among the rights of the former, a sum of 1*l.* 17*s.* 9*d.* in lieu of tithe-hay: and among the rights of the vicar, "tithe-calf, and all small and petty tithes." On the part of the defendants, a number of terriers were also produced, commencing from 1749, conflicting with those produced by the vicar in some respects, but all containing the 1*l.* 17*s.* 9*d.* as payable to the rector in lieu of tithe-hay, but with the addition, "*and grassing*": the defendant also produced accounts of the rector's agents, containing entries of the payment as for tithe of hay and grassing, and gave evidence of the general reputation, that the sum was payable for both. There was no evidence of perception of the tithe of agistment by either rector or vicar. The Court declined to decree for the vicar, but offered him an issue.

In a suit by the vicar, where the endowment is lost, and it appears from the evidence, that the rector has not received any small tithes, but that the vicar has received all the small tithes which have been rendered, the Court infers, in favour of the vicar, that the endowment conferred upon him, by a general expression, all small tithes whatsoever, carrying, not only such small tithes as were then actually received, but such as were at that time neglected, or came afterwards into existence by the improvements in husbandry. But where the vicar never has received or been entitled to receive the whole of the small tithes, then it cannot be so readily presumed that the endowment contained a gift to him in those general terms. *Willis* v. *Farrer*, 2 Y. & J. 217.

Ancient documents in the possession of the lessee of an ecclesiastical corporation aggregate, to whom the rectory belonged, purporting to be accounts furnished by some of their members, employed to collect the tithes, and appearing to be approved and settled, are admissible in evidence in a suit instituted by the lessee of tithes.

A book, purporting to contain an account of tithes collected by A B, although in his handwriting, cannot be received in evidence, without proof that he was collector of tithes at that time. *Short* v. *Lee*, 2 J. & W. 464.

Extracts from documents cannot in general be received; since the original ought to be produced, so that the Court may judge, by inspection, of the admissibility even of the document itself. *Woolley* v. *Brownhill*, 13 Price, 500, s. c. M'Clel. 321.

Between strangers the Court will not order depositions in a tithe cause in the Exchequer to be read in a tithe suit in this court (Chancery), though the interests of the parties be the same. *Goodenough* v. *Alway*, 2 S. & S. 481.

Office copies of depositions by living persons in a tithe suit in the Exchequer, may be read in a similar suit in this court against another defendant who makes the same defence, on production of office copies of the bill and answer in the former suit, without any order of this Court for that purpose. *Williams* v. *Broadhead*, 5 Law J. Chanc. 112, s. c. 1 Sim. 151.

It seems that the answers to interrogatories of one of several defendants on the same record, who may by possibility be liable in the result to pay any proportion of the costs of the cause, cannot be admitted in evidence on behalf of either of the other defendants. *Woolley* v. *Brownhill*, M'Clel. 324, s. c. 13 Price, 500.

Where the defendants, occupiers of land, in respect of which, a suit had been instituted against them for tithes, set up a defence of title to the tithes in their landlord, and produced in evidence, on the hearing of the cause, certain deeds belonging to their landlord—the Court made an order, on an application by petition, that the defendants should produce such deeds on the trial of an issue granted, or that they should upon the trial admit the fact, which it was alleged the deeds would establish, although the deeds belonged to their landlord, who was not a party to the suit. *Pulley* v. *Hilton*, 10 Price, 118.

Although a vicar, plaintiff in a suit for tithes, is not bound to produce and leave in the hands of his clerk in court his book, containing entries by him and his predecessors; yet the Court will compel him to produce the entries in such book relating to the money payments in question, for the inspection of the defendant at the office of the plaintiff's solicitor; and will order in such case the publication in the original cause to be enlarged, so as to give the defendant an opportunity of applying the sub-

ject-matter of the discovery to his defence, although publications have been twice before enlarged on motion. *Firkins* v. *Lowe*, 13 Price, 193, s. c. *Lowe* v. *Firkins*, 13 Price, 193, s. c. M'Clel. 73.

Terriers, like other documents, may be controlled by other evidence, and explained by the usage of the subject-matter to which they refer; hence, on the trial of an issue, whether a modus of 5*s*. was payable of all hay within a sub-division of a parish, the occupier's case was proved by parol testimony of usage, reputation, and tradition, carried back above a century; by receipts, and collateral circumstances: but was met by the ecclesiastical survey, which valued the tithe hay of the whole parish at only 3*s*.; the parliamentary survey, which made no mention of the modus (nor of another modus which was taken, as confessed, against the clergyman); and by nine terriers from 1727 to 1809, which described the modus thus—"In S (the district) only 5*s*. for all the hay in their crofts, and nothing paid for all other hay, except herbage." The jury found that the payment had been immemorial and general over all the lands; but the Judge certified that "he should have been better satisfied, had the verdict confined the modus to the ancient crofts." This Court was satisfied with the verdict, and, therefore, refused a new trial: Baron Hullock dissenting, and Baron Garrow, who had not heard the whole of the argument, giving no opinion. And an application to have the rule re-argued, for the purpose of having the opinion of the whole Court, was refused, being new and of dangerous precedent, particularly as regards the mode of transacting a great part of the common law business of the court. The modus was laid to have been immemorial, and payable by every occupier growing hay: Held, not to be disproved by evidence of an endowment in 1253, and of a contributory payment by every occupier indiscriminately. Old receipts by churchwardens to parishioners, for contributions by the latter to the modus, rejected as evidence to support it. An entry, purporting to be a terrier, in an old book called a parish register, produced from an iron chest in the vicarage house, of which the only key was kept by the vicar, and accompanied by other suspicious circumstances, admitted in evidence, at Nisi Prius, and left to the jury to receive its due weight; found by them not to be authentic, and, therefore, rejected by the Court. *Atkins* v. *Drake*, 1 M'Clel. & Y. 213.

The rector's books and ancient receipts are evidence of a modus. *Brazier* v. *Mytton*, 1 M'Clel. & Y. 613.

*Quære*—Whether the receipts of a vicar's lessee are admissible evidence of a modus. *Jones* v. *Carrington*, 1 C. & P. 329. [Park]

In an action for tithes, on 37 Hen. 8, as presumptive proof of the enrolment of a decree, evidence that some parishes in L had paid at the rate mentioned in the decree, and that a copy of such decree had been annexed to the statute produced by the king's printer, are admissible. *M'Dougall* v. *Young*, 2 C. & P. 278, s. c. 1 R. & M. 392. [Best]

Where there are no ancient documents to support the presumption of a prescription *in non decimando*, the modern evidence of usage must be carried back a great way, to satisfy the Court that it is acting upon a presumption by usage of considerable antiquity. *Pritchett* v. *Honeyborne*, 1 Y. & J. 135.

It was proved that, for upwards of a century, a payment in lieu of tithes had been accepted by the rector for the time being; but, it appearing manifest, from certain ordinances and other ancient documents produced and proved in the cause, that the payment had its origin subsequently to the time of legal memory,—notwithstanding the antiquity of the payment, the Court decreed an account of the tithes. *Fisher* v. *Graves*, 1 M'Clel. & Y. 362.

*Quære*—Whether, in answer to a claim of tithes by a spiritual rector, it is enough for a layman to shew, that the portion of tithes demanded, or a modus in lieu of them, has been enjoyed and conveyed by those under whom he claims, for a period of 150 years. *Williams* v. *Bacon*, 1 Law J. Chanc. 210, s. c. 1 S. & S. 415.

If in a suit for tithes, the plaintiff, to prove his title as tithe-owner, reads passages from the answers, in which the defendants state their belief, that as to certain matters, the lands in question are covered by moduses;—this constitutes a *primâ facie* case for the moduses; and it becomes the business of the plaintiff to overthrow them, not that of the defendant to sustain them. *Carrington* v. *Jones*, 2 Law J. Chanc. 11.

Evidence of a modus having been established at law and in equity for hay, will rebut parol evidence of a payment for hay and agistment; therefore, a modus including both those tithes is suspicious, and requires very strong proof that it is a payment in lieu of both. Evidence of the payment, however, was sent to be tried by a jury. *Williamson* v. *Thompson*, 9 Price, 197.

A modus, stated in an answer to be payable in lieu of tithes, is not supported by proof of a payment of a larger amount. *Fisher* v. *Graves*, 1 M'Clel. & Y. 362.

On an issue directed to try the tenability of a parochial modus: Held, that the witness called to prove the immemorial custom, might give evidence that he had heard old persons who at that time occupied lands in the parish, and were since dead, say that it had always been the custom to make such money payments. *Moseley* v. *Davies*, 11 Price, 162.

As evidence of reputation of the existence of a parochial modus, the testimony of witnesses, that they have heard from deceased tithe-payers that there was such a modus in existence, is admissible. *Deacle* v. *Hancock*, 13 Price, 226, s. c. M'Clel. 85.

To support a defence of a modus for the produce of an ancient farm, proof that it is *ancient*, is absolutely necessary.

Although a map is produced of the lands of which a farm is stated to consist, and the description of the lands in the map is proved to be accurate, as compared with them in 1803, (with reference to the time of commencing the suit,) it is no proof of such farm being ancient, nor is it sufficient even to raise a presumption that it may be capable of further proof, so as to furnish ground for giving an opportunity of establishing it by an issue. *Stuart* v. *Greenall*, 9 Price, 106.

A farm modus cannot be established in the absence of proof—1st, that the farm was an ancient one; and 2nd, the particular payment in respect of that ancient farm. *Wolley* v. *Brownhill*, M'Clel. 331, s. c. 13 Price, 500.

A statement by witnesses, that they had known a farm for upwards of seventy years, and that it had always consisted of the same lands,—was holden to be proof of the antiquity of the farm.

On the hearing of a tithe cause, in which the defendant set up a farm modus, the defendant produced his title-deeds to shew that the farm was an ancient one. By arrangement between the parties, and to save time, it was agreed that the deeds should not be read, but should be entered as read, and an abstract thereof be delivered to the Court, and that the plaintiff should have an opportunity of seeing that the abstract delivered to the Court corresponded with the deeds: Held, that the plaintiff was only entitled to compare the abstract with the deeds, in the same manner as if the deeds had been read, in which case he would have been at liberty to take minutes thereof. But that he was not entitled to examine the defendant's title deeds, or to take copies of or extracts therefrom. *Brazier* v. *Mytton*, 1 M'Clel. & Y. 613.

Where it appears in evidence that Quakers have been convicted for non-payment of their tithes, or prescriptive payments, it is strong evidence that a township modus in respect of those tithes does not exist.

It is no objection to the testimony of a witness, in a suit for predial tithes, that, from his description in the deposition, he appears to reside in the township where the tithes arise, unless it appear that he is also an owner or occupier of lands, producing predial tithes, and so interested in supporting the modus. But it seems to be otherwise, where the modus is for all tithes generally, in which case the modus for the great tithes may, possibly, be a discharge for the small tithes. *Jackson* v. *Benson*, 2 Y. & J. 45.

A money payment for tithe of hay of a township, is not supported as a modus by a terrier limiting a modus to the occupiers of certain crofts, the parol testimony being quite inconsistent therewith. *Drake* v. *Smith*, 8 Price, 692.

Evidence of reputation cannot be received in support of a farm modus.

The evidence required to establish a farm modus is, 1st, the clear identity of the farm by metes and bounds; 2dly, the antiquity of the farm; and, 3dly, immemorial payment of the modus. But it cannot be expected that any testimony should be adduced, that the lands comprising the farm were cultivated together before the year 1189, and that the payment was then made. It would be as reasonable to require the actual production of the deed of composition.

There seems to be no reason why the same evidence which establishes a parochial modus, viz. usage, as far back as can be reasonably traced, of the payment being made on one side, and tithes in kind not having been demanded on the other, should not be good evidence of a farm modus: and such seems to be the result of the authorities. *Pritchett* v. *Honeyborne*, 1 Y. & J. 135.

Evidence that sums had been collected from the inhabitants by a person employed by the parson, and from a list furnished by him, affords strong presumption that the payments are farm moduses, and not a district modus; for if it were a district modus, the collection would be made by the parishioners, and handed over to the incumbent. Vicars' books were admitted in evidence, though they contained private entries and memorandums of the vicar, not relating to the parish; and though one of the books had remained for many years in the hands of a representative of a deceased vicar, instead of having been delivered to the succeeding incumbent. *Miller* v. *Jackson*, 1 Y. & J. 65.

A modus set up for hay, hemp and flax, is proved by receipts for money payment made for hay, hemp and flax, for forty-five years back, although earlier receipts describe it as payable for hay only, which would have otherwise been conclusive against the occupiers. Where payments are called a "hay rent" in the receipts, it is no objection to them as evidence of the existence of a modus. *Manby* v. *Lodge*, 9 Price, 231.

Held, that an omission, in the earliest of two or three of a series of old terriers, of money payments set up as moduses, does not destroy the evidence of the existence of the moduses arising from the subsequent terriers which do notice them. And even a variance in the amount of one of the sums, and a qualification of the payment of it occurring in one of them, does not vitiate.

Four-pence for a colt, one penny for a barren cow agisted, and three half-pence for cow and calf, or calving cow, sent to trial at law on conflicting evidence.

Tithe of milk held to be within the payment for cow and calf, laid as a modus in lieu of the tithe of such cow and calf. *Stuart* v. *Gresnall*, 9 Price, 105.

The testimony of one witness is not sufficient to induce the Court to direct an issue to try a farm modus. *Wolley* v. *Brownhill*, 13 Price, 500, n. c. M'Clel. 317.

An account of tithes in kind decreed, notwithstanding evidence of payment of certain customary payments for upwards of a century; and evidence that numerous bills had been filed by vicars, but had been subsequently abandoned; it appearing from the depositions and proceedings in an old cause, rather more than a century back, that the customary payments did not then exist; but that the then vicar had endeavoured to set them up. *Jackson* v. *Morris*, 1 Y. & 7. 275.

## (M) PRACTICE.

On a bill by an impropriate rector for the tithe of lands which have never actually paid tithes, an issue will not be granted to the defendant, where the Court is of opinion that there is not sufficient evidence of the alleged legal origin of the non-payment. *Ross* v. *Aglionby*, 6 Law J. Chanc. 131.

The jurisdiction of equity in tithe suits is limited to discovery and account; if the tithe is in question and doubtful, the Court has no right to make a decree without directing an issue. *Norbury* v. *Meade*, 3 Bligh, 246.

The respondent, an impropriate rector, having by a decree of the Court of Chancery been found to be entitled (under the decree made in pursuance of the act 37 Hen. 8,) to the tithes, according to the value, of warehouses in London, occupied by the appellants, and which never had been rented, the Court has jurisdiction to make an order upon the appellants as occupiers to permit inspection, for the purpose of

ascertaining the value. *East India Company* v. *Kynaston*, 3 Bligh, 170.

If a decree directs an issue to try the tenability of moduses, and the plaintiff wishes to have them tried in another county where the lands do not lie, a direction to that effect cannot be inserted in the decree, but an order must be obtained for that purpose. *Sparke* v. *Ivatt*, 1 S. & S. 366.

Where a bill is retained for a year, with liberty to bring an action, the proper course is, not to set down the cause on the *postea*, or as on the equity reserved, but to set down the cause for further hearing, and give the verdict and judgment at law in evidence. *Wing* v. *Murrell*, 1 M'Clel. & Y. 620.

*Semble*—That, where a bill is filed for tithes in kind, and the defendants do not admit the title of the plaintiffs, but set up moduses to be payable in lieu of the tithes *to the person entitled to the tithes*; and the Court, on the hearing, considers the plaintiffs' title made out, but directs issues to try the moduses, and the plaintiffs decline to try those issues, the Court will not direct an account of what is due in respect of the moduses, with costs, as against the defendants. *Governors of Lucton School*, v. *Scarlett*, 2 Y. & J. 370.

Where in a tithe-cause the defendant has set up a modus, and is desirous of protecting himself from costs, he should move for an order that the plaintiff may accept the sums admitted to be due by the answer, or proceed at the peril of costs. Such a motion may be made without notice, and may be sustained without paying the amount into court. *Davis* v. *Moseley*, 9 Price, 211.

If, in a suit by the rector of tithes, the defendant make out a clear defence as a portionist claiming, under the successive grantees of the Crown of the possessions of one of the dissolved monasteries, a right to some of the great tithes of the rectory, yet if neither can ascertain and shew specifically what were the tithes which belonged to the pastor or to the monastery, the Court has no means of assisting either party, in availing himself of his title. And the Court will not decree an account in favour of the rector under such circumstances, where he has never had perception, but they will retain the bill to give him an opportunity of taking an issue, or proceeding by commission, ejectment, or by action on the statute. Nor is the *onus probandi* on the portionist, if there has been no perception on the part of the rector. *Boulton* v. *Richards*, 11 Price, 671.

After a plaintiff's title in a tithe cause has been proved, it is for the defendant to make out his defence, and for the plaintiff afterwards to bring forward evidence to rebut such defence, but not precluding the defendant's counsel from a reply, if circumstances require it. *Lowe* v. *Perkins*, M'Clel. 595. [See *Cerrington* v. *Jones*, 2 Law J. Chanc. 11.]

Where respecting tithes a verdict is founded on an apparent inconsistency, it cannot be entered for either party. Hence, in the case of an issue directed by the Court to try a fact, it would be useless to consider the object of such trial; and the Court, on the ultimate disposal of the subject-matter of the suit, may correct any such inconsistency which may appear. *Robinson* v. *Williamson*, 9 Price, 136.

On an application to amend the *postea* in an action of debt on 2 & 3 Edw. 6, c. 13, which gives treble value for not setting out tithes; it appeared, that the jury had found damages which amounted only to the single value: Held, that the Court could not amend it by entering the verdict for the treble instead of single value. *Sandford* v. *Porter*, 2 Chit. 351.

The defendant having set up a farm modus, in answer to a bill for tithes, issues were directed to try whether the ancient farm consisted of lands mentioned in the answer, and whether a certain modus had been immemorially payable for the tithes arising upon it; the jury found that the farm consisted of those lands, together with four other closes, and was covered by a modus; the circumstance, that the jury found the ancient farm to consist of other lands besides those mentioned in the pleadings, is no ground for a new trial, unless the plaintiff can shew that he has evidence with respect to those four closes, which upon the supposition that they are parcels of the alleged ancient farm, might materially vary the substance of the case. *Bailey* v. *Sewell*, 1 Russ. 239.

An issue being directed, a circumstance which had not been suggested on the pleadings was given in evidence, which made the finding of the jury upon the issue contrary in appearance to the evidence, though it was in substance correct: the party, who gave in evidence that circumstance, having moved for a new trial, on the ground that the jury had found what was clearly not true, the motion was refused with costs. *Cerrington* v. *Jones*, 3 Law J. Chanc. 56, s. c. 2 S. & S. 134.

Where the evidence in a tithe cause is of a conflicting description, the Court will not, in general, give an opinion without a reference to a jury. *Stokes* v. *Edmeades*, 1 M'Clel. & Y. 436.

But if it entirely depends on the construction of ancient documents, the judge, and not the jury, is the proper tribunal. *Fisher* v. *Graves*, 1 M'Clel. & Y. 362.

## (N) COSTS.

*Semble*—Where judgment by default is obtained in an action on 2 & 3 Edw. 6, c. 13, for subtracting tithes, no costs are recoverable, as the stat. 8 & 9 Wm. 3, c. 11, s. 3, is confined to cases where there has been a plea pleaded, or joinder in demurrer. In such an action a writ of inquiry is not necessary, but at the option of the plaintiff. *Bale* v. *Hodgetts*, 1 Law J. C.P. 34, s. c. 1 Bing. 182, s. c. 7 B. Mo. 602.

Where a *primâ facie* case has been made out by a vicar to all tithes except corn, grain and hay, in a suit for agistment tithe, a defence that it belonged to the lay impropriator is not proved by shewing that agistment tithe has never been paid to the vicar, and that, under a grant from the crown, the lay impropriator is entitled to the tithes of corn, grain, grass and hay, and that the tithe of agistment is covered by a modus payable to the impropriator in lieu of tithe of hay and grass; and under such circumstances, the lay impropriator is not a necessary or proper party defendant, and should demur on that ground; but if he do not, and permit the cause to go on to a hearing, the Court will not give him costs; but, it not being in their power to make any decree against him, they dismissed the bill filed against him, without costs. *Williamson* v. *Hutton*, 9 Price, 187.

Where, in an action on 2 & 3 Edw. 6, c. 13, for not setting out tithes, the declaration contained a

count on the statute for treble value, and *indebitatus* counts for tithes bargained and sold, and on an account stated; and the jury, on a writ of inquiry, after judgment by default, assessed the damages at 17*l.* 4*s.* 9*d.* on the first count for the treble value, and 9*l.* for the single value on the other counts, and a blank was left in the inquisition for the costs: the Court ordered the inquisition to be amended, by the insertion of nominal damages on the two last counts of the declaration, so as to give the plaintiff his costs. *Bale* v. *Hodgetts*, 1 Law J. C.P. 34, s. c. 1 Bing. 182, s. c. 7 B. Mo. 602.

A bill to establish a modus being a matter of favour, costs are never allowed to parties succeeding in such suits. *Morrell* v. *Gregson*, 11 Price, 421.

On defendant's submission, in a tithe cause, to part of plaintiff's demand, the Court will refer it to the Master to ascertain what is due from defendant, and to tax the costs, without prejudice to the other objects of the suit, in any stage of the proceedings. *Lowe* v. *Firkins*, 11 Price, 453.

There is no inflexible rule that costs shall follow the result of the issue;—therefore, if there appear a reasonable ground for contention, no costs will be given on either side.

An account of tithe hay being decreed, the defendants appealed from so much of the decree as directed the account with respect to lands in the township of S, and the decree was, to that extent, ultimately reversed; pending the appeal, the plaintiff took the account as to all the lands, including those in the township of S; the Court, on application, declining to restrain him from so doing: On an application for costs, the Court held, that it was convenient that the whole account should be taken at the same time, and refused to make the plaintiff pay the costs of the accounts as to the township of S; but, at the same time, did not allow him any costs in respect of so much of the account. *Drake* v. *Smyth*, 1 M'Clel. & Y. 380.

## THEATRE.

The proprietors of a theatre having brought an action against an actor for not performing according to his contract: Held, that the performances having gone on without interruption, was sufficient *primâ facie* evidence that the theatre was duly licensed. *Rodwell* v. *Redge*, 1 C. & P. 220. [Abbott]

## TOLLS.

Action for toll traverse: evidence that the defendant on a market-day sold forty-one quarters of corn by two sacks pitched in the market: Held, not sufficient to authorise a verdict against him. *Vines* v. *the Mayor of Reading*, 4 Bing. 8.

The grantee of a market cannot maintain any action for evading the toll by selling just out of the market bounds, unless he has appropriated the whole of the market site for the purpose (and that only) for which it was originally intended. *Prince* v. *Lewis*, 4 Law J. K.B. 188; s. c. 5 B. & C. 363, s. c. 8 D. & R. 121.

A clause in an act of parliament exempting carts from toll when loaded with manure, extends to them when going to fetch the same. *Harrison* v. *Jones*, 2 Chit. 547. [But see now 52 Geo. 3, c. 145, s. 1.]

The exempting clause in the 48 Geo. 3, applies to carts laden with manure. *Rex* v. *Adams*, 6 M. & S. 52.

A statute exempting carts from toll when loaded with compost, &c. or anything whatsoever used in the manuring of land, does not exempt lime from the toll—as the words "or anything whatsoever used in the manuring of land," were considered as only applying to the carriage of ploughs, harrows, and such like instruments. *King* v. *Gough*, 2 Chit. 655.

The exempting clause in a turnpike act is to be liberally construed; therefore, where in one clause of such an act the toll was made payable in respect of the *horses* to a carriage, and in another, in respect of the *carriage* drawn by the horses, and the exempting clause was, in language, confined to the case of the *horses* only, it was nevertheless construed to extend also to the case of carriages; there being no other words in any part of the act to shew that the exemption was *intended* to be confined to horses. *Jackson* v. *Curwen*, 4 Law J. K.B. 227, s. c. 5 B. & C. 31, s. c. 7 D. & R. 838: s. p. *Chambers* v. *Williams*, 4 Law J. K.B. 229, s. c. 7 D. & R. 842.

Where there are two local acts which regulate toll and exemption, and the last act varies the mode of imposing the toll, so as to enlarge an exemption under the old act, the exemption shall prevail, though it be not expressly given by the new act. *Farraley* v. *Morley*, 4 Law J. K.B. 225, s. c. 5 B. & C. 25, s. c. 7 D. & R. 832.

The 46 Geo. 3, c. 46, having limited and prescribed, the sums payable for the tolls on carriages, according to the width of the wheels: Held, that it virtually repealed the 13 Geo. 3, c. 84, s. 23, which imposed an additional half-toll more than that payable, in respect of carriages having wheels less than six inches in width. *Ridges* v. *Garlick*, 8 Taunt. 424, s. c. 2 B. Mo. 481.

The 13 Geo. 3, c. 84, the General Turnpike Act, which exempts from the payment of toll a passenger crossing a road, and not going 100 yards thereon, is confined to carriages merely crossing the road. *Phillips* v. *Harper*, 2 Chit. 412.

Where a section of a turnpike act exempted carriages laden with materials for repairing roads, from paying the toll in those parishes in which the materials were to be used, or were procured; and by the same section, carriages laden with manure or lime were also exempted, and by the following section, the trustees under the act were empowered to compound with persons residing in one parish and occupying lands in an adjoining parish: Held, that the exemption in favour of carriages laden with manure or lime was general, and not confined or restricted by the preceding part of the section containing the exemption, or by the following section. *Higginbotham* v. *Perkins*, 8 Taunt. 795.

By a local act of parliament one toll was put on every horse drawing a coach or carriage, another toll on every horse drawing a waggon, and another on every horse not drawing. No person was to pay toll more than once in the same day, with the same horse, cattle, beasts and carriages.

The Court held, that the toll was put on the horse with reference to the manner in which it was employed, and consequently that a second toll ought to

be paid for horses returning with a different stage-coach to that which they had before taken through the gate. *Loaring* v. *Stone*, 2 Law J. K.B. 66, s. c. 3 D. & R. 797.

Where it was enacted, by a local turnpike act, that there should be demanded and taken of the person or persons attending any cattle or carriage, the tolls thereinafter mentioned; that is to say (*inter alia*), for every horse drawing any stage-coach or machine, the sum of 6*d*.: and it was further enacted, that if any person or persons should have paid the tolls for the passing of any cattle or carriage through the turnpike, the same person or persons, upon producing a note or ticket of the day denoting such payment, should be permitted to pass and repass through the same gate or turnpike, with the same cattle or carriage, toll free, at any time during the same day: Held, that the toll was imposed on the horses, and not on the coach; and, therefore, where the coachman had paid toll on passing in the morning for the horses drawing the coach, a second toll could not be demanded in the evening for the same horses repassing, although they were drawing a different coach, and driven by a different coachman, but belonging to the same proprietor. *Norris* v. *Peats*, 3 Law J. C.P. 134, s. c. 3 Bing. 40, s. c. 10 B. Mo. 270.

Where a local turnpike act provided, first, that no more than one toll should be taken from persons passing and repassing with the same horses and carriages. And second, that no action should be commenced for anything doing in pursuance of the act, until after 21 days' notice given to the clerk of the trustees, and that every such action should be brought in the county or place where the matter should arise: It was holden, first, that a stage-coach which had paid toll in the morning, and in the evening repassed with the same driver, but with different horses and passengers, was within the exemption; —and secondly, in assumpsit against a toll-collector to recover such tolls improperly collected, that the venue was local, and also that the defendant was entitled to 21 days' notice of action. *Waterhouse* v. *Keen*, 4 B. & C. 201, s. c. 6 D. & R. 257.

By a turnpike act, the trustees were authorized to take at each and every of the several respective turnpike-gates erected on the road, certain tolls on a uniform scale; and were empowered to reduce or raise all such tolls; and the tolls, so reduced or raised, were to be collected as the old tolls were: Held, that they must reduce or raise at all the gates, and could not reduce or advance them at one gate without doing the like at all the others. *Rex* v. *the Trustees of the Bury and Stratton Roads*, 4 B. & C. 361, s. c. 6 D. & R. 360.

A notice of action under an act of parliament against a toll-gate keeper, "For demanding and taking of me, toll for and in respect of certain matters and things particularly mentioned and exempted from toll in and by a certain act of parliament, entitled," &c., is void for uncertainty. *Freeman* v. *Line*, 2 Chit. 673.

## TRADE.

[See CONTRACT.]

Where an apothecary gave a bond, that he would not set up in business within twenty miles of A: Held not illegal, as being in restraint of trade. *Hayward* v. *Young*, 2 Chit. Rep. 407.

## TRANSFER.

[See BARON AND FEME.]

## TRANSPORTATION.

[See JUDGMENT, and INDICTMENT.]

Indictment for being at large after an order for transportation.

Variance in the statement of the condition upon which the royal mercy had been extended; the condition not being general, as stated, but specific—that the prisoner should be transported to places specified. *Rex* v. *Fitzpatrick*, 1 R. & R. C.C.R. 512.

Where a prisoner was convicted of perjury in an inferior jurisdiction, and the sentence for transportation was entered upon the record, as follows: "Wherefore all and singular the said premises being seen by the said justices here, and fully understood, it is therefore ordered that he, the said L K, be transported to the coast of New South Wales, or some one or other of the islands adjacent, for and during the term of seven years," &c.: Held, on error brought, that this was no judgment at all, and the Court awarded a *procedendo* to the Court below, commanding them to pronounce the proper judgment; but in the meantime allowed the prisoner to be bailed. *Rex* v. *Kenworthy*, 3 D. & R. 273, s. c. 1 B. & C. 711.

If a judgment of transportation be bad for excess, it is bad *in toto*, and the Court will not send it back to the Sessions to be amended, but will on error reverse it. *Rex* v. *Ellis*, 5 Law J. M.C. 5, s. c. 5 B. & C. 395, s. c. 8 D. & R. 173.

## TREASURER OF THE COUNTY.

In order to obtain a rule against the treasurer of Middlesex, to compel him to pay over money to the treasurer of the county of Surrey, for the expense of relieving a prisoner in the King's Bench prison, under the 53 Geo. 3, c. 113, s. 6, a demand and refusal must be sworn to. *Mainwaring* v. *Treasurer of the County of Middlesex*, 2 Chit. 409.

## TREES.

[See TIMBER, TRESPASS, and TROVER.]

## TRESPASS.

[See ANIMALS, ASSAULT, and JUSTICE OF THE PEACE.]

(A) WHERE MAINTAINABLE.
(B) PLEADINGS.
(*a*) *Declaration.*
(*b*) *Pleas.*
(*c*) *Replication and Rejoinder.*
(*d*) *New Assignment.*

(C) EVIDENCE.
(D) VERDICT AND DAMAGES.
(E) COSTS.
(F) OF THE PETTY TRESPASS ACT.

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(A) WHERE MAINTAINABLE.

Trespass may be maintained by a person who has returned from his term of transportation, for an injury committed on property created by his wife during his absence. *Spooner* v. *Brewster*, 2 C. & P. 34. [Best]

An action of trespass does not lie against a magistrate, for anything done by him in the discharge of his duty, unless his attention be called to all the facts necessary to enable him to form a judgment as to the course he ought to have pursued, when he was called upon to act. Where, therefore, the treasurer of a benefit society brought trespass against a magistrate for signing a warrant of distress, under which, monies collected from the society, and vested in the plaintiff as treasurer, were forcibly taken from his custody; and it appeared that an order of magistrates having been signed for the relief of a member in pursuance of the statute 33 Geo. 3, c. 54, s. 15, the treasurer appeared to answer the matters of the complaint, which was heard on oath, but he made no defence: Held, that trespass could not be maintained against the magistrate, for signing a warrant of distress in pursuance of such order, as his jurisdiction to act was not questioned at the time, nor was a rule of the society presented to his notice, whereby disputes between the members were to be referred to arbitration, and which was confirmed by the 16th section of the statute 33 Geo. 3, which made such award binding and conclusive on all parties, without being subject to the control of the magistrates. *Pike* v. *Carter*, 3 Law J. C.P. 169, s. c. 3 Bing. 78, 85, s. c. 10 B. Mo. 376.

Trespass lies against an attorney as well as his client, the party, in respect of the seizure of goods under a writ of execution which is afterwards set aside.

But, where process is lawfully issued, is in a course of execution, and is afterwards rendered unnecessary, it is not incumbent on the party who issued the process to be active in stopping its execution. The activity should then be by the party against whom it has been properly issued in the first instance. *Bates* v. *Pilling and Seddon*, 5 Law J. K.B. 40, s. c. 6 B. & C. 38, s. c. 9 D. & R. 44.

A landlord having taken some unthreshed barley as a distress for rent, agreed with the tenant that he would not proceed to sell it, but that the tenant should thresh it out, and deliver it to a person to whom it was sold, and that the landlord should receive the money. The tenant threshed out a small quantity and then left off.

The Court held, that after a reasonable time for threshing out such barley had elapsed, (of which it was the province of the jury to decide,) it was not a trespass for the landlord to enter the barn of the tenant and thresh out the same. *Huddlestone* v. *Pearson*, 3 Law J. K.B. 43.

The commander of an English merchant ship lying in a port of a foreign state, sent a seaman, who had committed mutiny on board the ship, ashore, in custody of the soldiers of the port, and procured him to be flogged and imprisoned by the local authorities: Held, that the captain was answerable in trespass for what was done on shore, he having taken an active part in instigating and promoting the proceedings. *Aitken* v. *Bedwell*, 1 M. & M. 68. [Tenterden]

The owner of goods may retake them by force from a person wrongfully refusing to deliver them up. *Rex* v. *Milton*, 1 M. & M. 107. [Tenterden]

In an action for an injury by a vicious bull, the plaintiff recovered, although it appeared that the bull was attracted by a cow, in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head, to drive him away from the cow.

*Semble*—That the owner of a vicious animal, after notice of its having done an injury, is bound to secure it at all events, and is liable in damages to a party subsequently injured, if the mode he has adopted to secure it proves to be insufficient. *Blackman* v. *Simmons*, 3 C. & P. 138. [Best]

A purchaser of a growing crop of grass, in possession of a field, for the purpose of making the grass into hay, may maintain trespass against the sheriff, if his bailiff authorize a purchaser, who has bought part of the grass under a *fi. fa.*, to enter and carry it away by his authority. *Tompkinson* v. *Russell*, 9 Price, 287.

A tenant may maintain trespass *quare clausum fregit* against a stranger, for a trespass committed on his land prior to his bankruptcy. *Clark* v. *Calvert*, 8 Taunt. 742.

Trespass *vi et armis* may be supported by the landlord of a tenant from year to year, although there is no reservation of the timber on the premises, against a third person for carrying it away after it has been cut down. *Ward* v. *Andrews*, 2 Chit. 636.

A, leaving his house for a considerable time, requested B to let it, saying, the key was in the custody of C. A person wished to look at the house, but C having left that place, the key could not be obtained. B therefore directed the sash of an unfastened window to be opened, and several persons entered and examined the house. On A's return, it was discovered that the house had been robbed. In an action brought by A to recover the value of the goods from B, the Court determined that B was not justified in opening the window, and in that way going into the house. *Ancaster* v. *Milling*, 2 D. & R. 714; s. c. as *Acaster* v. *Binney*, 1 Law J. K.B. 168.

An action of trespass is maintainable for removing or defacing a tombstone, at the suit of the party by whom it is erected or set up; as the right to it vests in such person during his life, and descends to his heir or representative after his death. *Spooner* v. *Brewster*, 3 Law J. C.P. 203, s. c. 3 Bing. 136, s. c. 10 B. Mo. 494.

The royal forest of Needwood was inclosed by an act of parliament, in which it was enacted, that the commissioners should set out roads and paths, and that no other should afterwards be used; and that the King might let the allotments reserved to the crown, according to 1 Anne, st. 1, c. 7. The commissioners in 1805 awarded some woodlands to the crown, over which they did not set out any road or path; the allotment was fenced up, and the crown paid certain officers to preserve the trees from de-

predations. The plaintiff held these woodlands, except the trees, from the crown, *by parol*, at a nominal rent, and for a few months in the year shot the game on them, and permitted the woodward to take the grass. The defendant walked over this allotment, along a foot-path which had been used as such ever since the inclosure: The Court held, that the plaintiff had the actual possession of these lands, so as to entitle him to maintain trespass against a wrong-doer; and that there had not been a dedication of the foot-path to the public, because the king, who was not in possession, had not assented to it. *Harper* v. *Charlesworth*, 4 Law J. K.B. 22, s. c. 4 B. & C. 574, s. c. 6 D. & R. 572.

The plaintiff by deed assigned all his property in trust for the payment of his debts. The defendants, as the agents or servants, and by the command of the trustee, forcibly entered and took possession of a chapel (part of the estate) in which the plaintiff was occasionally in the habit of preaching, and the key of which he held at the time—not, however, as a symbol of possession, but merely to enable him to preach there. In trespass for the breaking and entering,—held, that the plaintiff had not a sufficient possession of the chapel to enable him to maintain the action. *Revett* v. *Browne*, 6 Law J. C.P. 194, s. c. 5 Bing. 7, s. c. 2 M. & P. 12.

Trespass will lie in respect of possession only, independent of the right; but the damages are, in such a case, to be given in respect of the possession only.

But the actual possession must be clear and unequivocal; and therefore, where there was a previous dispute between two parties, as to the right to a certain chattel, which had not come into the possession of either; and, in a scuffle to obtain the possession, it had been snatched by one of the claimants out of the hand of the servant of the other: it was held, that the servant could not maintain trespass in his own name, on a possession so transient and equivocal. *Peachey* v. *Wing*, 6 Law J. K.B. 55.

A party having the legal title to land having entered, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards. *Butcher* v. *Butcher*, 6 Law J. K.B. 51, s. c. 7 B. & C. 399, s. c. 1 M. & R. 220.

Where in trespass *quare clausum fregit*, it appeared that plaintiff and defendant respectively occupied lands belonging to the same landlord, and abutting on different sides of a lane, and that the landlord had let the lane jointly to the plaintiff and the defendant, as much to one as to the other,—it was held, that the plaintiff and defendant were tenants in common of the lane, and consequently that neither could maintain trespass against the other in respect thereof. *Noys* v. *Reed*, 6 Law J. K.B. 5, s. c. 1 M. & R. 63.

Trespass on a free warren, will not lie for shooting grouse. *Duke of Devonshire* v. *Lodge*, 5 Law J. K.B. 319, s. c. 7 B. & C. 36.

If a person who keeps hounds and a hunting establishment, receive notice not to trespass on the lands of A, and after this his hounds go out, followed by a number of gentlemen, who go upon the lands of A, the owner of the hounds is answerable for all the damage they do, though he himself forbear to go on the lands, unless he distinctly desires the gentlemen so out with his hounds not to go on those lands.

If a stag, hunted by the hounds of B, run into the barn of A, B and his servants have no right to enter the barn to take his stag; and if they do so, they are trespassers. *Baker* v. *Berkeley*, 3 C. & P. 32. [Tenterden]

If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted. *Holder* v. *Coates*, 1 M. & M. 112. [Littledale]

Although a party, by setting up a stall in a street, is not liable to an action of ejectment, yet he is liable to an action of trespass. *Doe d. Overseers of St. Julian, Shrewsbury*, v. *Cowley*, 1 C. & P. 123. [Hullock]

An action on the case, and not trespass, is the proper mode of proceeding against a party for falsely, maliciously, and without any probable cause, procuring the warrant of a magistrate, to search the premises, and cause the person of A, on suspicion of felony, to be imprisoned. Nor is a positive oath that a felony has been actually committed, necessary to justify a magistrate in granting such a warrant. *Elsee* v. *Smith* (in error), 2 Chit. 304.

The act by which a person is to be deemed a trespasser *ab initio*, must of itself be a trespass. No abuse of an authority originally lawful, will render him liable to an action of trespass, unless a substantive trespass be committed in the course of that abuse. *Shortland* v. *Govett*, 4 Law J. K.B. 212, s. c. 5 B. & C. 485, s. c. 8 D. & R. 257.

In trespass, it appearing that subsequent to the alleged trespasses, the plaintiff had given the defendant a notice to quit the premises; it was holden that he had thereby treated him as his tenant, and could not maintain this action. *Barton* v. *Cordy*, 1 C. & P. 664. [Garrow]

### (B) PLEADINGS.

#### (a) *Declaration.*

In an action of trespass for seducing the plaintiff's daughter, the Court after verdict held the declaration good, although it omitted the words "with force and arms." *Parker* v. *Bailey*, 4 D. & R. 215.

In an action of trespass for driving against plaintiff's cart, held unnecessary to describe who was in it. *Howard* v. *Peele*, 2 Chit. 315.

Where a declaration in trespass for taking goods, did not describe their nature or quality, (as, one hundred articles of household furniture,—one hundred articles of wearing apparel,) and the defendant, who was under terms of pleading issuably, demurred generally, and the plaintiff signed judgment for want of a plea; the Court set it aside with costs, on the ground that the declaration was bad in substance, and therefore the judgment was irregular. *Holmes* v. *Hodgson*, 8 B. Mo. 379.

The plaintiff declared for a trespass in his manor and close.

The defendants pleaded that from time immemorial there was part of a public navigable river situate within that manor and close, and that on that part there was an *ancient work* or erection, necessary for rendering the navigation of the river safe for

ships; and that it was in a ruinous condition, and that the plaintiff had neglected to repair it, and therefore they entered and put it in repair: The Court held, that the pleas did not justify the trespass. *Earl of Lonsdale* v. *Nelson*, 2 Law J. K.B. 28, s. c. 2 B. & C. 302, s. c. 3 D. & R. 556.

Where, to a declaration of trespass against A and B, for assaulting the plaintiff, and forcing him to go to a police office to be examined as a prisoner before a magistrate, on a charge of felony, which was dismissed, A and B pleaded a *joint* plea of justification, that a horse of A had been, without his knowledge or consent, taken out of his close, and found in the plaintiff's stable, and that A having reason to suspect that the horse had been feloniously stolen and taken away by the plaintiff, he (A) requested B, a constable, to re-take the horse, and gave charge of the plaintiff to B, for having feloniously taken him; and requested B to take the plaintiff into custody, and to convey him and the horse before a magistrate, in order that the plaintiff might be dealt with according to law; and that thereupon B, as the constable, and A, in his aid and by his command, attempted to re-take the horse, and gently laid their hands on the plaintiff, who resisted them, whereupon they took him into custody, and brought him before a magistrate, where he was examined as to such charge: Held, that such plea was bad on general demurrer, as it afforded no ground of justification to A; and that, being bad as to him, it was bad as to him and B. *Hedges* v. *Chapman*, 3 Law J. C.P. 91, s. c. 2 Bing. 523, s. c. 10 B. Mo. 148.

To a declaration in *trespass* for breaking open the outer door of the plaintiff's house, and afterwards entering the same, the defendants justified the entering under civil process, but omitted to state that the outer door was open at the time of such entry: Held, that such plea was bad on demurrer. *Buckenham* v. *Francis*, 4 Law J. C.P. 51.

Where, to an action of trespass for entering the plaintiff's close and digging peat, the defendant pleaded that the plaintiff was his tenant of the *locus in quo*, subject to a certain reservation to the defendant, of all pits whatsoever therein, with liberty to cut and carry away the produce of the pits, and so justified the trespass in the terms of the reservation: It was held, that the plea was bad; for the defendant should have confessed and avoided the trespass. *Fancy* v. *Scott*, 6 Law J. K.B. 305.

Where, to trespass *quare clausum fregit*, the defendant pleaded a custom applicable to all farms within the parish, which were not exempted by special agreement or otherwise, and the plaintiff traversed the custom generally: Held, that it was not competent for the plaintiff to prove that his particular farm was exempted by special agreement or otherwise. The proper mode of availing himself of such a defence would have been to have confessed the custom, and avoided it, by shewing that the exception applied to his farm. *Evans* v. *Ogilvie*, 2 Y. & J. 79.

### (C) REPLICATION AND REJOINDER.

Where there is one continued trespass, part of which is justifiable and part not, and the defendant pleads a justification which goes to the whole declaration, the plaintiff should not reply *de injurid*, but newly assign that part of the trespass which was unjustifiable. *Lambert* v. *Hodgson*, 1 Law J. C.P. 114, s. c. 1 Bing. 317.

The plaintiff declared in trespass against three persons. They all pleaded the general issue, and one of them also pleaded a justification. The plaintiff joined issue, and in his replication traversed the justification. All the defendants rejoined to that replication: The Court held, that the rejoinder was bad in law. *Morrow* v. *Belsher*, 4 Law J. K.B. 42, s. c. 4 B. & C. 704, s. c. 7 D. & R. 187.

Trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods; the defendant justified under a writ of *fi. fa.*, to which the plaintiff replied *de injurid, &c. absque residue cause*, and new assigned: Held, that it was competent for the judge to leave it to the jury to say whether the goods were seized *bonâ fide* under the execution, or colourably only, for a collateral purpose. *Lucas* v. *Nockells*, 2 Y. & J. 304.

In trespass, for assault and imprisonment, the defendants pleaded that the plaintiff was trespassing on their close, and they removed him. The replication stated, that the defendants had nothing in the close, except under R N C.; that, before they had anything in the close, W C held it as tenant from year to year to R N C; that W C permitted the plaintiff and one D, to plant teazles in the close, W C to have one half, and plaintiff and D the other; and that the plaintiff had entered the close to take his and D's share: Held, good on demurrer; although it was objected that W C's interest was not alleged to be continuing when the plaintiff entered. *Kingsbury* v. *Collins*, 5 Law J. C.P. 151, s. c. 4 Bing. 202.

### (D) NEW ASSIGNMENT.

The purport of a new assignment is, to state the place *where*, with more precision than that described in the declaration. *Jefferies* v. *Pitter*, 1 Ken. 389.

The plaintiff declared for a trespass committed in his close, called the Foldyard; the defendants pleaded *liberum tenementum*, and the plaintiff took issue; at the trial the defendants proved that one of them had a close in the same parish called the Foldyard. But the Court held, that, inasmuch as the plaintiff had in his declaration given a name to his close, he was not bound to new assign, and that if the act complained of was really done in the close of that defendant, then they ought to have set out its abuttals. *Cocker* v. *Crompton*, 1 Law J. K.B. 172, s. c. 1 B. & C. 489, s. c. 2 D. & R. 719.

If, in an action of trespass *quare clausum fregit*, the plaintiff name his close by the general name of a tract of land of which that close is a part, and the defendant plead *liberum tenementum*, and establish that plea as to a part of the tract,—the plaintiff will not thereby be compelled to resort to a new assignment, but will be entitled to recover on proof of a trespass on the part in his possession. *Cooke* v. *Jackson*, 5 Law J. K.B. 181.

To trespass on several days—pleas, general issue, and leave and licence—as to the whole of the alleged trespasses there was no new assignment, but a replication *de injurid*: Held, that if some of the trespasses were committed after the licence was revoked, the plaintiff need not newly assign, as the defendant by his plea undertakes to prove a licence sufficient to cover all the acts of trespass. And *semble*, a

licence by the lessor of plaintiff would not support the plea of licence by him. *Hayward* v. *Grant*, 1 C. & P. 448. [Park]

Where a new assignment to pleas of justification in trespass, in describing the abuttals, after mentioning three closes by name, alleged that it was in a certain part of a certain lane, opposite to those three closes, or *some or one of them*, to which the defendant pleaded "*liberum tenementum*," the Court, after issue being joined thereon, and after verdict, would not allow the defendant to take advantage of the uncertainty, though the new assignment would have been bad on demurrer. *Lethbridge* v. *Winter*, 2 Law J. C.P. 107, s. c. 2 Bing. 49, s. c. 9 B. Mo. 25.

### (C) EVIDENCE.

If to an action for trespass *quare clausum fregit*, the defendant justifies that the *locus* is a wharf for the inhabitants of O, an inhabitant of O is an incompetent witness; but if the defendant abandons that plea, his testimony is admissible. *Prewit* v. *Tilly*, 1 C. & P. 140. [Park]

Acts of ownership exercised upon one piece of waste or inclosed land, cannot be admitted as evidence of title to another, unless such a connexion between the two, as may lead to a fair inference that they are both parcel of the same district, manor, or estate, shall have been previously established.

But evidence of several tracts of land having passed under one royal grant to the same parties, and of these tracts being comprehended in one manor, (although the legal existence of that manor may be doubtful,) is sufficient preliminary proof to raise such a presumption, and, therefore, to justify the admission of acts done upon any one or more of those tracts, to affect the rest. *Wynne* v. *Blair*, 5 Law J. K.B. 42.

To an action of trespass brought by the mortgagor in possession, against the mortgagee for breaking and entering the premises, and taking away the corn and other produce, the defendant may give his legal title as mortgagee in evidence under the general issue, although the mortgage is for a term, and not in fee. *Johnson* v. *Howson*, 6 Law J. K.B. 236.

Ownership of land adjoining either side of a road, *primâ facie* evidence of a right to the soil extending to the centre of the road. *Cooke* v. *Green*, 11 Price, 730.

Where adjacent lands belong to two distinct owners, the legal presumption is, that the ditch which divides them is a part of the soil of him to whom the hedge belongs; and where a road runs between those lands, that the owner on each side has a right of soil *ad medium filum viæ*.

But *semble*, that such presumption will not arise where the entire property of such lands is in one landlord, who has let them out to different tenants; but that it will be incumbent upon either tenant who shall bring trespass against the other to *prove* his right of exclusive possession of the ditch, or the half of the road next to his close, in order to sustain the action. *Noye* v. *Reed*, 6 Law J. K.B. 5, s. c. 1 M. & R. 63.

To trespass *quare clausum fregit*, the defendant justified a right of way over the *locus in quo* in the occupiers of premises adjacent thereto, and it being proved that he was seised of the premises, in respect of which the right of way was claimed, and occupied only by means of a tenant to whom the premises were demised: Held, that he was an occupier to sustain the plea of justification pleaded. *Hollis* v. *Proud*, 2 D. & R. 31.

Where, to an action of trespass, for seizing and taking away furze, the defendant pleaded the general issue, and several special pleas, in which he justified the taking under a claim for estovers on a common: Held, that although he had limited his claim to estovers in his pleas, he might adduce evidence to shew that he had exclusive right of possession, under the general issue; and parties claiming similar rights on the common with the defendant were held to be competent witnesses to prove that the defendant was entitled to the exclusive possession of the land on which the trespass was committed. *Pearce* v. *Lodge*, 5 Law J. C.P. 9.

In an action of trespass, for assaulting and imprisoning the plaintiff, the defendant pleaded, that the plaintiff was wilfully trespassing and breaking down his hedges, wherefore he apprehended him, and took him before a justice. The plaintiff replied, that he entered the land and broke down the hedges in the assertion of a right of way; traversing that he did so wilfully, or for any other purpose than in the exercise of such right. The defendant rejoined, that the plaintiff was in the act of committing wilful damage, &c. to him, the defendant: Held, that, upon this issue, evidence, as to the right of way claimed by the plaintiff, might be given in order to shew *quo animo* the plaintiff entered the *locus in quo*. *Hooker* v. *Halcomb*, 5 Law J. C.P. 149, s. c. 4 Bing. 183.

It is not justifiable in a music-master to moderately correct a chorister for singing at a catch-club, although that might be injurious to his performing in a cathedral; and upon evidence being offered that it was the practice of other cathedrals, the Court rejected it as inadmissible. *Newman* v. *Bennett*, 2 Chit. 195.

### (D) VERDICT AND DAMAGES.

In trespass, where a defendant pleads a particular defence to one trespass, and Not guilty to another, and a general verdict be found against him, it shews the justification was disproved. *Hawkes* v. *Crofton*, 2 Ken. 388, s. c. 2 Burr. 698.

In trespass a verdict may be sustained, though the damages be only one farthing. *Kitchen* v. *Knight*, M'Clel. 373.

A person having obtained several very valuable articles without paying for them, the tradesmen, on hearing that he was reputed to be a swindler, went to his house, gained admittance, and broke open an inner door, and took away part of the goods. He brought an action of trespass, the jury gave him a verdict, and the Court refused to reduce the damages by allowing the tradesmen to set off against it the amount of the debts due to them. *Hawkins* v. *Baynes*, 1 Law J. K.B. 167.

The guardians of a young lady directed her teacher not to permit her to visit a relation, who was a tavern-keeper. The young lady went to his house to spend an evening at Christmas, when the guardians sent two police-officers to bring her away. The tavern-keeper refused to let her go, and brought

an action of trespass against the officers. They pleaded the general issue, and a verdict was given for 20*l.* The Court held, that the damages were excessive, and that if the facts had been pleaded in justification, they thought that there would have been an answer to the action. *Fleming* v. *Pratt*, 1 Law J. K.B. 195.

Where, to an action of trespass for breaking and entering the plaintiff's close, the defendant pleaded a right of way, granted by deed to certain persons, under whom he claimed, but which he averred to have been lost and destroyed; and the plaintiff in his replication traversed the right of way by grant; and it appeared at the trial, that the right had been frequently contested; and the judge told the jury, that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, it would be presumptive evidence of the existence of a deed; and that if such deed had been lost, they would find for the defendant; but if they thought there had been no way granted by deed, then for the plaintiff: Held, that such direction was right, as the question the jury had to determine was, whether such a deed had ever existed or not; and they having found a verdict for the plaintiff, the Court refused to grant a new trial. *Livett* v. *Wilson*, 3 Law J. C.P. 186, s. c. 3 Bing. 115, s. c. 10 B. Mo. 439.

## (E) Costs.

In an action of trespass, for breaking and entering a close, and cutting trees, &c., the defendant pleaded the general issue and *liberum tenementum*, on which issue was joined. The question tried was, whether the trees grew on plaintiff's or defendant's land, and a verdict was found for the plaintiff, with damages 37*l.*: Held, that as upon this record the freehold might necessarily have come in question, although it did not in fact, it was not within the 43 Eliz. c. 6, and the plaintiff therefore was entitled to his full costs. *Littlewood* v. *Wilkinson*, 9 Price, 314.

Where there was a verdict for defendant on a plea of right of way, and judgment by default on a new assignment, and the jury found 1*s.* damages by consent: Held, that the plaintiff was entitled to no more costs than damages, although he had evidence at the trial for the purpose of shewing a wilful trespass after notice. *Harber* v. *Rand*, 9 Price, 336.

In an action of trespass where the costs of particular issues are adjudged to the plaintiff, but the general costs of the cause to the defendant, the costs of the particular issues extend only to the costs of the pleadings. *Othir* v. *Calvert*, 1 Law J. C.P. 101, s. c. 1 Bing. 275, s. c. 8 B. Mo. 239.

The plaintiff declared in trespass; the defendant pleaded the general issue, and pleas of justification; the plaintiff joined issue, and newly assigned; the defendant then let judgment go by default on the new assignment, on which the jury gave the plaintiff damages; but they found a verdict for the defendant on the special pleas: The Court held, that the defendant was not entitled to any costs on the pleas that were found for him. *Longden* v. *Bourn*, 1 Law J. K.B. 118, s. c. 1 B. & C. 278.

Where the plaintiff's cause of action is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict on some issues, and the defendant on others, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but not the costs of the issues found for the defendant, on which, however, the latter is not entitled to claim any costs from the plaintiff. But where the defendant suffers judgment by default as to some causes of action, and pleads as to others, and the plaintiff takes issue on the pleas, and at the trial all the issues are found for the defendant, the latter is entitled to the costs of the issues found for him, and the plaintiff to those only of the judgment by default. Hence, where to an action of trespass the plaintiff pleaded the general issue to the whole declaration, and several special pleas as to part, and the plaintiff new assigned, and the defendant suffered judgment by default as to the new assignment, and the plaintiff was bound to go to trial to get rid of the general issue, which would otherwise have barred his whole action, and he could not by any other means have obtained damages on the judgment by default: Held, that the plaintiff was entitled to the general costs of the cause, including those of the trial, although the jury found a verdict for the defendant on one of the special pleas, the costs of such issue being deducted, but not allowed to him on that issue. *House* v. *the Treasurer to the Commissioners of the Thames and Isis Navigation*, 6 B. Mo. 324.

Where to an action of trespass the defendant pleads the general issue to the whole declaration, and justifies as to part of the trespasses, and the plaintiff newly assigns, to which the defendant suffers judgment by default; the plaintiff being bound to go down to trial to get rid of the general issue, which would otherwise bar his whole action, is entitled to his full costs of the trial, although the jury find a verdict for the defendant upon the special pleas which cover part of the trespasses; the costs of such issues being deducted, but not allowed to defendants. *Booth* v. *Ibbotson*, 1 Y. & J. 354.

An action of trespass had been brought against two defendants; one suffered judgment by default, and a writ of inquiry was executed against him. The plaintiff then entered a *nolle prosequi* as to the other, who was held to be entitled to costs under the 8 Eliz. c. 2, s. 2, although two years had elapsed. *Jackson* v. *Chambers*, 8 Taunt. 643.

In an action of trespass, the jury having given one shilling damages, on a plea of licence: Held, that the judge might certify under the 43 Eliz. *Howard* v. *Cheshyre*, 1 Ken. 245.

If it appear at the trial of an action for a trespass that it was wilful, the judge may, at a convenient time after the trial, grant his certificate that the plaintiff may, on 8 & 9 Wm. 3, c. 11, s. 4, have his costs, although the damages are less than forty shillings. *Woolley* v. *Whitby*, 2 Law J. K.B. 115, s. c. 2 B. & C. 580, s. c. 4 D. & R. 147.

If in an action of trespass the judge certifies under the 43 Eliz. c. 6, no costs are payable under the 4 Anne, c. 16. *Howard* v. *Cheshyre*, 1 Ken. 246, s. c. Sayer, 260.

If, in an action of trespass for taking a cart, the plaintiff recover 5*s.* damages, and the judge certifies under the 43 Eliz., the plaintiff is not entitled to costs, if the cause of action arose within the jurisdiction of an inferior Court, empowered to hold pleas of any suit not exceeding 50*s.* *Pyebarn* v. *Gibson*, 8 B. Mo. 450.

(F) OF THE PETTY TRESPASS ACT.

A party neglecting to obey a summons under the Petty Trespass Act (1 Geo. 4, c. 56), may be apprehended on a justice's warrant, and taken before the petty sessions to answer the alleged complaint. *Bane* v. *Methuen*, 2 Law J. C.P. 121, s. c. 2 Bing. 63, s. c. 9 B. Mo. 161.

The Malicious Trespass Act, 1 Geo. 4, c. 56, gives an appeal to the sessions on condition of the party's giving immediate notice of such appeal, and finding sufficient security. Notice given seven days after conviction is too late. *Rex* v. *the Justices of Huntingdon*, 5 D. & R. 588.

In an action for false imprisonment the defendant justified under the 1 Geo. 4, c. 56, (commonly called the Petty Trespass Act,) as the owner of land on which the plaintiff was trespassing: It was held that to make out his justification he must give positive proof of actual damage being done, so as to enable the jury to decide on the quantum of it; and that the jury were not to presume damage from the mere fact of a trespass being committed. *Semb.* that the principle of this decision will apply to the substituted provisions of the 7 & 8 Geo. 4, c. 30, the above act of 1 Geo. 4. having been wholly repealed by the 7 & 8 Geo. 4, c. 27. *Butler* v. *Turley*, 2 C. & P. 585, s. c. 1 M. & M. 54. [Best]

## TRIAL AT BAR.

[See PREROGATIVE, and PRACTICE.]

## TRINITY HOUSE.

A duty of ballastage is payable to the Trinity House, of screened garden gravel, although not taken from the Thames. *Quære*—Whether gravel taken from the river Lea, is within the jurisdiction of the Trinity House. *The Trinity Corporation* v. *Staples*, 2 Chit. 689.

## TROVER.

(A) WHERE MAINTAINABLE.
(B) DEMAND AND REFUSAL.
(C) CONVERSION.
(D) PLEAS.
(E) EVIDENCE.
(F) DAMAGES.
(G) PRACTICE.

(A) WHERE MAINTAINABLE.

[See *Colegrave* v. *Dias Santos*, *ante*, AUCTION, A.]

To sustain trover, the plaintiff must have the right of property, and the right of possession; therefore the vendee of goods cannot support such an action, without having paid the price of the articles; for though he acquires the right of property by the purchase, he can only gain the right of possession by the payment. *Bloxam* v. *Sanders*, 4 B. & C. 951, s. c. 7 D. & R. 407.

A father gave his son a watch, some printed books, and several articles of wearing apparel: Held, that, though the son was under age, (viz. about sixteen years old), the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son. *Hunter* v. *Westbrook*, 2 C. & P. 578. [Abbott]

The plaintiff abroad consigned sugars to R P in London, directing him to sell the same, and place the nett proceeds to the credit of J G, to whom the plaintiff was indebted, and who drew bills on R P to the probable amount of the sugars. The invoice stated the plaintiff to be the shipper, and was accompanied with a letter from him to R P, directing him to sell the sugars on the plaintiff's account. R P, however, pledged them with the defendants for a certain sum advanced to him by them. R P having absconded, the plaintiff authorized an agent to demand the sugars from the defendants, but they proceeded to sell them; and the proceeds were also demanded after the sale by the agent, with the authority of the plaintiff: Held, first, that the plaintiff had a sufficient title in the sugars to maintain trover, although it was insisted that the right of possession was in J G; secondly, that no demand by the plaintiff was necessary, as R P had no authority to pledge the sugars to the defendants; and, lastly, that the demand of the proceeds after the sale not having been complied with, the proper remedy was by an action of trover, and not for money had and received. *Sellick* v. *Smith*, 4 Law J. C.P. 194.

A man who is discharged under the Insolvent Debtors Act, and who in consequence has assigned his property, cannot maintain an action of trover for property which vested in him before his discharge. *Lea* v. *Telfer*, 1 C. & P. 146. [Abbott]

Where the correspondent of a foreign merchant, who had consigned goods to him in L, pledged them with a factor as his own property, and obtained the value of the goods in advance, but afterwards became bankrupt: Held, that the foreign merchant might, in an action of trover, recover the goods from the factor. *Duclos* v. *Ryland*, 5 B. Mo. 518.

If A deliver a bill of exchange to a person, not knowing that he is a bankrupt, who gives it back again to A, his assignee cannot maintain trover for the bill. *Moore* v. *Barthrop*, 1 Law J. K.B. 4, s. c. 1 B. & C. 5, s. c. 2 D. & R. 25.

A person receiving a stolen bank note, without a knowledge of the larceny, is entitled to maintain trover against a cashier of the bank who refuses to pay it, and retains the note at the request of the party robbed. *Miller* v. *Race*, 2 Ken. 189, s. c. 1 Burr. 452.

And where a person who had lost a note, having eight days to run, gave no public notice, and only on the seventh day directed the payer not to honour it,—it was holden, that he could not, under such circumstances, maintain trover. But the plaintiff's conduct is not to be questioned, if it appear that the defendant took the property, knowing it had been obtained by means of felony. *Beckwith* v. *Corrall*, 2 C. & P. 261. [Best]

If a person take a Bank of England note, under circumstances which might awaken suspicion in the mind of a reasonable man acquainted with business, and which ought to cause him to make inquiries, and he forbear to do so, he cannot hold the proceeds of such note from the person who has lost it. And, where a porter, who had securities to get cashed, either purloined or lost them,—it was holden for the

jury to say, whether the stealing was after the securities were cashed and converted into money; for if it were, whether the porter purloined the notes, or whether they were stolen from him, was immaterial: Held also, first, whether a notice given a year previous to the notes being taken, renders it incumbent on the defendants, as men of business, to advert to that notice,—or whether they might not suppose, as they heard nothing more about the matter, that the notes had been recovered—were questions for the jury: though, in point of law, such notice ought to be renewed. And, secondly, that a mistake of the date of one of the notes in the notice, the number and amount being correct, was of no avail to the defendants, in the absence of proof that they had been misled. *Snow* v. *Leatham*, 2 C. & P. 314. [Abbott]

In an action of trover to recover a 500*l.* bank note from a banker in a small market town, who had given change on merely asking the party's name; it appeared that the note had been lost or stolen: Held, that it was for the jury to say—first, whether the plaintiffs had done all that could be expected, to give public notice of the loss; and secondly, whether the defendants had used due and reasonable caution under the circumstances—which the jury negatived, and the Court refused to disturb the verdict. *Snow* v. *Peacock*, 2 C. & P. 215. [Best]

To support trover against the vendee of stolen property, the plaintiff must have done everything in his power to bring the criminal to justice. *Gimson* v. *Woodfull*, 2 C. & P. 41. [Best]

Trover lies against a party for wrongfully interfering with a testator's effects. *Bear* v. *Seper*, 2 Ken. 441.

In an action of trover against a succeeding overseer to recover the value of some manure, it appeared that the preceding churchwardens and overseers of a township had leased lands vested in the poor to the plaintiff, for a term of years, covenanting that it should be lawful for the plaintiff to take all manure, &c. from the poor-house, and to use it upon the demised premises; and the plaintiff covenanted to provide straw for the use of the poor: Held, that the action would not lie, though the overseer had used the manure on his own land, and the manure had accrued from the straw supplied by the plaintiff to the poor-house. *Sowden* v. *Emsley*, 3 Stark. 28. [Bayley]

Trover will not lie against a livery-stable keeper for a horse taken away from his stables without his knowledge or consent. *Barnard* v. *How*, 1 C. & P. 366. [Abbott]

If A has in his possession a box containing papers belonging to a person deceased, and sends the box with its contents to his solicitors, with directions to deliver the box and papers to the executor, on his giving an inventory of them, and a receipt: Held, that trover lies against the solicitors, if they refuse to deliver the box and papers to the executor, he refusing to give an inventory and receipt, although the solicitors offered to give them up if the executor would give an inventory and receipt. *Cobbett* v. *Clutton*, 2 C. & P. 471. [Abbott]

### (B) DEMAND AND REFUSAL.

A demand and refusal need not be made in trover by the assignees of a bankrupt to recover goods in the possession of the bankrupt at the time of the act of bankruptcy, and which had been taken in execution by the defendant. *Seymes* v. *Watts*, 1 C. & P. 400. [Best]

In trover against a person who has possessed himself of property improperly, no demand and refusal are essential. *Beckwith* v. *Corrall*, 2 C. & P. 261. [Best]

The right to trees severed by the tenant of a copyhold or customary freehold is *primâ facie* in the lord; and in general he may maintain trover for them when so severed. *Lady Fleming* v. *Simpson*, 6 Law J. K.B. 207, s. c. 2 M. & R. 169.

The plaintiffs and P & Co. having each a separate lien on a bill in the hands of the plaintiffs, for advances, and the defendant, the acceptor, having improperly possessed himself of it, P & Co. sued him in trover, and recovered, by the award of an arbitrator, to the extent of their claim; and the plaintiffs afterwards sued the defendant also in trover: Held, that, notwithstanding the former recovery by P & Co., the plaintiffs were entitled to recover for the amount of their lien. *Knight* v. *Legh*, 6 Law J. C.P. 125, s. c. 4 Bing. 589, s. c. 1 M. & P. 528.

Trover is an action for a "demand," within the meaning of the statute 6 Geo. 4, c. 16, s. 92. *Robson* v. *Alexander*, 6 Law J. C.P. 111, s. c. 1 M. & P. 448.

### (C) CONVERSION.

Verdict in trespass for taking a filly, the identity being in dispute, with 25*l.* damages, subject to a reference to D, to whom it was delivered by consent of plaintiff, and T G, defendant's brother, who claimed the property, to determine by a specified day, whether it had a certain scar or not. By the award of D, it was ordered that the verdict should stand for the plaintiff, but he did not deliver the filly to any one; ten days after the award had been made, T G demanded the filly of D, who refused to deliver it, upon which refusal T G brought trover: Held, that as T G was no party to the original action, and the arbitrator was bound only to deliver it to the defendant, who was liable for the damages awarded, a refusal to T G, having no authority from his brother, was not evidence of a conversion to sustain the action. *Gunton* v. *Nurse*, 5 B. Mo. 259, s. c. 2 B. & B. 447.

A packer, by acting under the order of his master, is not guilty of a conversion. *Greenway* v. *Fisher*, 1 C. & P. 190. [Abbott]

If, upon a demand of goods, and a refusal to deliver them, there is, in fact, a just reason for the refusal, unless he who demands will make a certain compensation; but the person, who holds the goods, does not allege the just reason as an excuse, and gives a general unqualified refusal; his doing so is evidence of a conversion sufficient to maintain trover. *Thompson* v. *Trail*, 5 Law J. K.B. 34, s. c. 6 B. & C. 36, s. c. 9 D. & R. 31, s. c. 2 C. & P. 334.

A, as the agent of B, bought goods of C, and paid for them by C's acceptance; C became bankrupt; B proved the bill under the commission. A, in whose hands the goods remained, afterwards returned them to C, who thereupon destroyed B's bill: Held, that this was a joint conversion by A and C. *Robson* v. *Alexander*, 6 Law J. C.P. 111, s. c. 1 M. & P. 448.

Where the distrainor was about to sell the goods distrained, and just before the sale, a warrant to replevy was served, notwithstanding which the sale was proceeded in,—but the goods were not actually removed, and were afterwards restored to the party who replevied, it was held, that the conduct of the distrainor did not amount to a conversion; and consequently that trover was not maintainable. *Cuckson* v. *Winter*, 6 Law J. K.B. 309, s. c. 2 M. & R. 313.

If a person who has possession of another's goods, is desired by the owner to send them to a particular place, and he not only refuses to send them to that place, but says generally that he will not deliver them up, unless payment of a debt due from the owner to him is guaranteed; such general refusal is evidence of a conversion, although he might not be bound to send the goods to any particular place. *Sharp* v. *Pratt*, 3 C. & P. 34. [Tenterden]

(D) PLEAS.

To trover commenced more than six years after the conversion, the Statute of Limitations is a bar, though the plaintiff was ignorant of the conversion till within six years. *Granger* v. *George*, 5 B. & C. 149, s. c. 7 D. & R. 729.

In an action of trover against a treasurer of the West India Dock Company, for refusing to deliver sugars deposited in the docks, he is entitled to the protection of the statute 30 Geo. 3, c. 69, s. 185, which enacts that no action shall be brought against any person for anything done in pursuance or under colour of the act, after three months next ensuing the time when the act shall have been done, for which such action shall have been brought; and the defendant's having taken a bond of indemnity, is not a waiver of such protection. *Sellick* v. *Smith*, 4 Law J. C.P. 180, s. c. 3 Bing. 603.

(E) EVIDENCE.

Proof that A and B took away bricks, saying they were ordered by the defendant, and that the cart by which they were conveyed bore the defendant's name, is not, in an action of trover, conclusive evidence to shew that the property was removed by the defendant. *Everest* v. *Wood*, 1 C. & P. 75. [Gifford]

A being employed by B to negotiate a loan to assist the cause of the Greeks, a power of attorney was put into his hands by B, which turned out to be a fabricated document, and the whole transaction appeared to be founded in fraud. In trover by A, held incumbent that he should prove such document genuine. *De Wurtz* v. *Hendricks*, 2 Law J. C.P. 3, s. c. 2 Bing. 314.

In trover for copper ore raised under the plaintiff's land: Held, that the presumption that the right to the minerals accompanied the fee simple of the land, might be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil. *Rowe* v. *Grenfel*, 1 R. & M. 396. [Abbott]

Where goods have been sold by a miller under circumstances which give him the right of refusing to deliver them, evidence of the insolvent state of the buyer's circumstances cannot be received in an action of trover, brought by the indorsee of the bill of lading against the wharfingers of the miller, unless such evidence can be brought home to the knowledge of the plaintiff. *Holliday* v. *Mann*, 2 C. & P. 509. [Abbott]

In trover against the assignees of a bankrupt, by a party claiming under an assignment from the sheriff, under an execution issued by him before the bankruptcy, the plaintiff must prove the judgment as well as the writ of execution. *Glasier* v. *Eve*, 1 Law J. C.P. 67, s. c. 1 Bing. 209, s. c. 8 B. Mo. 46.

K, the owner of furniture, lent it to plaintiff under the terms of a written agreement; plaintiff placed it in a house occupied by the wife of C, a bankrupt; C's assignees having seized the furniture: Held, the plaintiff might recover it in trover, without producing the agreement. *Burton* v. *Hughes*, 2 Bing. 173, s. c. 9 B. Mo. 334.

(F) DAMAGES.

The amount of damages in trover is a question for the jury, who may give the value at the time of the conversion, or at any subsequent time, in their discretion. *Greening* v. *Wilkinson*, 1 C. & P. 625. [Abbott]

The price at which goods are sold at a sheriff's sale, is not necessarily the measure of damages in trover, if the sale be wrongful; but when the plaintiff is an assignee, as he must have sold the goods if they had come to him, juries are often induced to find a verdict for no more than the sum at which the sheriff actually sold. *Whitehouse* v. *Atkinson*, 3 C. & P. 344. [Tenterden]

In trover for a bill of exchange, the jury may, if they think fit, include the amount of the interest in the damages, and this although there is no mention of interest in the declaration, and no special damage laid. *Paine* v. *Pritchard*, 2 C. & P. 558. [Abbott]

(G) PRACTICE.

Where an action of trover has been brought in the Court of Common Pleas, it will not stay the proceedings upon an affidavit that the subject-matter in dispute does not amount to forty shillings. *Lowe* v. *Lowe*, 1 Law J. C.P. 99, s. c. 1 Bing. 270, s. c. 8 B. Mo. 220.

In an action of trover for a horse, the defendant obtained a rule to shew cause why all proceedings should not be stayed on his delivering up the horse and paying costs, which was discharged with costs, notwithstanding an affidavit that the animal was in an improved condition since it came into his possession. *Makinson* v. *Rawlinson*, 9 Price, 460.

The Court will not stay proceedings in an action of trover, on the defendant's delivering certain goods to the plaintiff, where their value was not ascertained, and where there was an uncertainty as to their quantity. *Tucker* v. *Wright*, 4 Law J. C.P. 190, s. c. 3 Bing. 601.

In trover, for several letters, the Court ordered the proceedings to be stayed, on the defendant's delivering to the plaintiff one of the letters, and paying him the costs of the suit and of the application, if the latter would consent to accept thereof in discharge of the action: but, if he would not accept thereof, then they ordered that he should be at liberty to proceed; but that, if he did not recover damages for the other letters, or recovered nominal damages only for that delivered up, he should pay the costs of the action. *Earle* v. *Holderness*, 6 Law J. C.P. 68, s. c. 4 Bing. 462, s. c. 1 M. & P. 254.

## TRUST AND TRUSTEE.

(A) TRUST.
(a) *Construction.*
(b) *Creation and Execution.*
(B) TRUSTEE.
(a) *Appointment.*
(b) *Power and Duty.*
(c) *Liability.*
(C) COSTS.

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### (A) TRUST.

#### (a) *Construction.*

In order to render a trust imposed on a devisee, through the medium of an obligation upon the conscience, binding, the words must be imperative, and the subject must be certain. *Wright* v. *Atkyns*, 1 Turn. 157.

This Court will not extend the terms of a trust, where it is that each trustee shall receive and be answerable only for a moiety. *Birls* v. *Betty*, 6 Mad. 90.

If a testator by his will, names two or more persons trustees of his property, and if afterwards, in the course of that will, he give estates, interests, powers, and authorities, generally to his trustees, under the name of trustees, then all such estates, interests, powers, and authorities, are annexed to the office of the trustees, and not to their persons; and it will follow, that if only one, out of two or more persons named trustees, accepts the office, all these estates and interests will vest in, and all these powers and authorities will be to be exercised by, the single individual who so accepts the trust, and will be as nothing with respect to the other individuals named trustees. *Worthington* v. *Evans*, 1 Law J. Chanc. 126, s. c. 1 S. & S. 165.

After marriage, a husband covenanted with trustees to pay 4000*l.* to them, upon certain trusts, for the benefit of himself, his wife, and children; he did not pay it: subsequently, he gave them a mortgage for that sum, and covenanted to repay it, but no money actually passed between the parties: afterwards, his title to the mortgaged estate was evicted: Held, that the trustees were specialty creditors upon his estate. *Tanner* v. *Byne*, 5 Law J. Chanc. 125, s. c. 1 Sim. 160.

Where a party, who by writing obligatory (without any penal sum) had bound himself to pay to A B an annuity of 20*l.* a year for her life, devised his estates to trustees upon certain trusts, until his son should attain the age of twenty-one years: Held, that the estate of the trustees ceased upon the death of the son under the age of twenty-one, all the purposes of the trust being then at an end; and that the trustees were only liable to pay to A B such arrears of the annuity as became due before the son's death. *Morrant* v. *Gough*, 6 Law J. K.B. 14, s. c. 7 B. & C. 206, s. c. 1 M. & R. 41.

A, having insured his life for 3000*l.*, assigned to trustees the policy, and all sums of money to accrue in respect of it; and, by an indenture of the same date, being the settlement made on his marriage, it was declared, that the trustees should stand possessed of the 3000*l.* upon certain trusts therein mentioned, which, after the death of A, were for such of the children of the marriage as the husband and wife, or the survivor of them, should appoint: A, being the survivor, appointed the 3000*l.* to his daughter, who was the only child of the marriage; and she, subsequently, under a power, reserved to her by her marriage settlement, of appointing the 3000*l.* and other property, bequeathed 1000*l.* part of the 3000*l.* to A, and the remaining 2000*l.* to C and D; she died, and then A died, when 9270*l.* was payable upon the policy, by reason of the additions made to it by the regulations of the insurance-office: Held, 1st, that the whole of the 9270*l.*, and not merely 3000*l.*, was bound by the trusts of the settlements; 2dly, that C and D, and the personal representatives of A, were each entitled under the daughter's will, not to the sum of 1000*l.*, but to a third part of 9270*l.* *Courtney* v. *Ferrers*, 5 Law J. Chanc. 107, s. c. 1 Sim. 137.

A, by a trust disposition, directed trustees therein named, to lay out the residue of trust funds therein specified, and "the interest and proceeds thereof" in purchasing lands, which he thereby directed to be settled upon a certain series of heirs, named in a deed of tailzie, to which he referred, and afterwards by his will directed that the residue of his personal estate should be invested in government securities, which he gave, together with all the funds, &c., of which he should die possessed, to the same uses as before provided by the trust disposition.

The funds having remained uninvested, held, reversing the judgment of the Court below, that each successive heir, after the lapse of one year from the death of the testator, is entitled to the beneficial enjoyment of the interest and proceeds of the funds, until they are invested; and that the words do not import an intention that the interest and proceeds should accumulate for the benefit of the heir, who should happen to be entitled, at the time when the funds are invested, according to the trust. *Earl of Stair* v. *Macgill*, 1 Bligh, N.S. 662.

Where estates are vested in trustees for the payment of debts, and subject to that charge are limited for life, with remainders over, the charge being introduced upon the estate by an agreement between the father and the son, (remainder-man in tail,) that the son should suffer a recovery, and charge these debts of his father upon the estate;—the trustees hold the estate in trust for the creditors, and, subject to the claims and rights of the creditors, are trustees for the father for his life, and after his death for the several persons who are entitled in remainder under the deed.

Upon a trust created for the payment of debts, whether interest is payable will depend upon the language of the deed. If there be debts with and debts without interest, and the words are general, it must be construed *reddendo singula singulis*. In decrees, the language is guarded with special view. The Master is directed to compute interest on such of the debts as bear interest. *Hamilton* v. *Houghton*, 2 Bligh, 192.

Though the 32 Geo. 3, after directing trustees to light, cleanse, and improve certain streets, empowers them to sell waste lands in order to defray the expenses, &c. and to expend the surplus in such a manner as they shall deem necessary, it does not authorize them to expend such overplus in opening

a bill in parliament, which if passed would be extremely prejudicial to the purposes of the act under which they officiated. *Edwards* v. *Wilson*, 5 Law J. Chanc. 107, s. c. 2 Chit. 610, s. c. 1 Sim. 137.

(*b*) *Creation and Execution.*

By the law of England, a trust for illegitimate children to be begotten, cannot be supported. *Hamilton* v. *Waring*, 2 Bligh, 209.

If a testator means to create a trust, and the trust be ineffectually created or fails, the next of kin takes. *Ommanney* v. *Butcher*, 1 Turn. 270.

Testator, after giving his real and personal estates to his wife in fee, said that he had so given the same to her, unfettered and unlimited, in full confidence that, in the future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate, together and entire, to such of his father's heirs as she might think best deserved her preference: Held, that no trust was created. *Meredith* v. *Heneage*, 1 Sim. 542.

A testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending her to, and not doubting that she would, consider his near relations, as he would have done if he had survived her: Held, that there was no trust for the next of kin, but that the wife took the residue absolutely. *Sale* v. *Moore*, 1 Sim. 534.

A testator bequeaths a legacy to A and B in trust for certain purposes, which the will states to have been fully explained to them. On the same day, a paper writing is signed by A and B, in which they declare that the bequest is upon trust for six persons, whose names are stated, and, after their signature, some lines are added in the handwriting of the testator, by which a seventh person is admitted to a share of the legacy. Upon a bill filed by one of these six persons, the paper was holden to be a valid declaration of trust, though it had not been proved as a testamentary paper. *Smith* v. *Attersoll*, 1 Russ. 266.

It seems, notwithstanding a decision of the commissioners appointed by the stat. 59 Geo. 3, c. 31, and the conventions for liquidating the claims of British subjects on the French Government, or of the Privy Council on appeal in favour of a claimant, his right may be disputed, and he may be declared a trustee of the sum awarded to him, for other persons shewing themselves to be entitled. *Hill* v. *Reardon*, 1 Jac. 84.

A trust, to be carried into execution by the Court, must be of such a nature that it can be under the control of the Court.

If a particular object, as the erection of a school, or even a general object, provided it can be seen what the purpose is, is pointed out, the Court will execute the trust, although the object pointed out may fail. *Ommanney* v. *Butcher*, 1 Turn. 271.

Where a term is created in trustees, charged with portions for younger children, and with the expenses of their maintenance and education till the portions are payable; and afterwards, the trustees are empowered to raise, out of the personal estates, the same portions, with interest at 5 per cent., to accumulate as far as it is not expended in maintenance: Held, that the Court will not direct out of which fund the portions shall be raised, and that, unless they are raised out of the personal estate, the children will not be entitled to interest. *Trollope* v. *Linton*, 2 Law J. Chanc. 3, s. c. 1 S. & S. 477.

Some of the clauses, which are frequently introduced into the deeds of trust for sale, are of such a kind, that a court of equity will not act upon them, where the trustee for sale is also the creditor for whose benefit the trust is created. The Court will not restrain trustees for sale from completing a sale, on the ground that they cannot shew a good title. *Roberts* v. *Bozen*, 3 Law J. Chanc. 113.

The ownership and profits of a secret in medicine were, by marriage articles, settled upon A for her life, and, after her death, the secret was to be sold, and the money divided equally among her children. She communicated the secret to her eldest son, without informing him of the trusts of the marriage settlement; and he, during the latter years of her life, conducted the business of preparing and selling it for her advantage: Held, that he was a trustee of the secret for the general purposes of the settlement.

The Court will not decree the sale of a secret, of which there is no written recipe, and which lies in the personal knowledge of a single defendant: But, in such a case, the Court will order an account of that defendant's expenditure and receipts in preparing and selling the medicine, in order to ascertain what is the value of the secret to him. *Green* v. *Church*, 1 Law J. Chanc. 203, s. c. 1 S. & S. 398.

Where lands are vested in trustees in trust, and out of the receipts and profits, certain payments are to be made, and the surplus is to be laid out upon mortgages or government securities, with a view to accumulation, and with a bequest of such accumulations; on a petition, a real estate contiguous to the real estate of the testator was permitted, under the circumstances, to be purchased, and will be considered as personal property. *Webb* v. *Shaftsbury*, 6 Mad. 100.

A trust created by will, to purchase land, to be added and closely entailed to testator's family estate in the possession of T B, testator declaring that his object was to have a head to the family, and that if T B should die without male issue, or dispose of the family estate, the residue of his fortune should go to A B, or his nearest relative in the male line: how to be executed. *Woolmore* v. *Burrows*, 1 Sim. 512.

Where a trust is created by deed for the payment of debts, if a bill is filed by one of the creditors to enforce the payment of his debt, that purpose can only be effected by the general execution of the trust. The decree ought to direct such execution, and an inquiry as to all the debts owing and payable under the trust, and that they should be paid according to their priorities. *Hamilton* v. *Houghton*, 2 Bligh, 169.

By a deed, purporting to be executed in consideration of 400*l.*, a son conveys certain lands to his father; in fact, the conveyance was intended only to facilitate the raising of money for the son's use: but there was no declaration of trust in writing. The father died, and the lands thus conveyed passed by general words to his devisees: Held, That parol evidence would not be received to shew that the father was a trustee for the son:—That the son was

not entitled to a reconveyance from the devisees:—But, that he had a lien on the estate for the purchase-money mentioned in the deed. *Lemon* v. *Whitley*, 6 Law J. Chanc. 152.

*Quære*—Whether, a solicitor acting for both sides, if he omits to call for the payment of the trust-monies into court, may not be made answerable for any loss occasioned thereby. *Gresley* v. *Heathcote*, 3 Law J. Chanc. 107.

After a decree for the execution of the trusts, the trustees for creditors will be restrained from proceeding in a suit in the Court of Chancery in Ireland for the same purpose. *Harrison* v. *Gurney*, 2 J. & W. 563.

## (B) TRUSTEE.

### (a) *Appointment.*

Where trustees for sale have taken various steps, with a view to the execution of their trust, and, one of them retiring shortly before the sale, a new trustee is, under a power contained in the trust-deed, appointed in his stead; the new trustee must be a person who can and will exercise his discretion fairly and beneficially for all persons, and as fairly and beneficially as the retiring trustee could have done. *Roberts* v. *Boson*, 3 Law J. Chanc. 113.

The Court will not disturb the Master's appointment of trustees, on the ground that other persons, who had been proposed before him, were more fit to have been elected as trustees. *Attorney General* v. *Dyson*, 4 Law J. Chanc. 164, s. c. 2 S. & S. 528.

Where personal property is bequeathed to the executors, as trustees, the probate of the will is an acceptance of the trusts. *Muckloe* v. *Fuller*, 1 Jac. 198.

### (b) *Power and Duty.*

Trustees who are empowered to sell for the benefit of infants, may give receipts for the purchase-money. *Lavender* v. *Stanton*, 6 Mad. 46.

It is not the rule of equity, that every person to whom the artificial name of trustee applies, is incapable of dealing with his *cestui que trust*, respecting the fund; but the rule is, that the trustee shall not deal with the *cestui que trust*, where the relation between them gives the former any possible advantage over the latter. *Naylor* v. *Wynch*, 2 Law J. Chanc. 132, s. c. 1 S. & S. 555.

Where A and B are trustees, and one of them desires a broker to sell stock standing in their joint names, and undertakes to procure his co-trustee to join in the transfer: Held, that unless such co-trustee authorised or concurred with the other trustee in making the transfer, the broker was not warranted in making the sale. *Leyton* v. *Sneyd*, 8 Taunt. 532, s. c. 2 B. Mo. 588.

One of several co-executors and trustees, cannot make use of his testator's share of a partnership concern, through the medium of the surviving partners. A valuation made with a view to such a purpose, and to which the executor who intended to purchase was a party, cannot stand. *Cooke* v. *Collingridge*, 1 Law J. Chanc. 74.

A person, before he accepts of a trusteeship, to which a discretionary power is annexed, is bound to disclose any circumstances in his situation, which give him a bias or an interest against the due exercise of that discretionary power.

If he accepts the trusteeship, without disclosing such circumstances in his situation, he cannot afterwards exercise the discretionary authority for his own benefit. *Peyton* v. *Robinson*, 1 Law J. Chanc. 191.

A trustee, to whom a yearly recompense is given for his trouble, may nevertheless employ a collector, where several of the testator's houses are let at weekly rents. *Wilkinson* v. *Wilkinson*, 2 S. & S. 237.

Where, under a joint power of attorney given to bankers to sell out stock, they gave the proceeds to one without an authority from his co-trustees: It was holden, they were not discharged in the absence of an authority from them. *Stone* v. *Marsh*, 1 B. & M. 364. [Abbott]

The 7 Anne, c. 19, does not apply to an infant trustee for sale. *Ex parte Chartesey*, 1 Jac. 56.

Trustees of a charity grant an improper lease of the charity lands, in which they covenant with the lessee for his actual enjoyment of the demised premises during the term. The Court, in setting aside the lease, will order the indenture of demise to be cancelled *in toto*, and will not leave the personal covenants of the trustees in force for the benefit of the lessee. *Attorney General* v. *Morgan*, 2 Russ. 306.

If trustees under a paving act sign cheques drawn by the clerk of the person who is clerk to the trust, those cheques being drawn so as to be alterable from small sums to larger, the trustees cannot charge the clerk to the trust for negligence if these are altered, as it was their duty not to sign cheques drawn in such a form; nor can they charge him for misconduct of his clerk, which would have been prevented if the trustees had done their own duty in the way in which the clerk to the trust had fair reason to expect they would.

If, by a private act of parliament, forty-eight trustees are appointed, (not being a corporation,) of whom sixteen are to go out annually by rotation; and, by the same act, the trustees are to sue and be sued in the names of their treasurers for the time being; an action for money had and received may be maintained in the names of the present treasurers, although both they and the present trustees came into office since the time when the money was received by the defendant to the use of the trust. *Whitmore* v. *Withes*, 3 C. & P. 364. [Tenterden]

### (c) *Liability.*

If an executor or co-trustee, without taking due means to learn from his co-executor or co-trustee, whether it is necessary in the due execution of the trust to sell stock, concur in the sale of stock and leave it in the disposition of his co-executor or co-trustee, he is liable for the stock so sold. *Harrington* v. *Harrington*, 1 Law J. Chanc. 41.

The *usual* indemnity clause does not exonerate one of two trustees from a loss occasioned by a debt due from the other having been suffered to remain outstanding. *Marklow* v. *Fuller*, 1 Jac. 198.

A trustee of a term for payment of debts, purchased the inheritance from the tenant for life, and had it conveyed to him by fine and feoffment. The circumstance of the purchaser being trustee does not entitle the remainder-man to an account of rents, except from his entry to avoid the fine; nor, if he neglects to claim for five years, does it prevent his being barred. *Reynolds* v. *Jones*, 2 S. & S. 206.

An executor, to whom personal property is bequeathed, in the character of trustee, cannot, after proving the will, refuse to take on himself the performance of the trusts. *Marklow* v. *Fuller*, 1 Jac. 198.

Where a trustee entered into an improvident contract, the Court would neither cancel it nor order its execution. *Turner* v. *Harvey*, 1 Jac. 178.

A legatee, by dealing with the agent of a trustee, under the impression that such agent is the only person accountable to her, does not exonerate the trustee from his liability. *Adams* v. *Clifton*, 1 Russ. 297.

Trustees, who, instead of investing the testator's property as directed, apply it to their own purposes, will be decreed to pay the principal, with interest at the rate of 5 per cent. *Brown* v. *Sansome*, 1 M'Clel. & Y. 427.

Where the estate of a trustee is secondarily liable, in consequence of a breach of trust by a co-trustee, the *cestui que trust* is bound to pursue his demand against the former estate with due diligence. *Newham* v. *Newham*, 1 Law J. Chanc. 23.

In cases of breach of trust, courts of equity may decree an account of all the profits made; but *semble* they cannot award damages, *i. e.* compensation for damage done to the trust property.

The Ecclesiastical Court has no jurisdiction over trusts; and therefore, where a party, sued as a trustee, was arrested on a writ *de contumace capiendo*, the Court of King's Bench discharged him out of custody. *Ex parte Jenkins*, 1 B. & C. 655.

(C) Costs.

A debtor to an infant, without ever offering to pay the trustee under the settlement, filed his bill to have it secured for the infant, not alleging insolvency in the trustee: Held, that he was not entitled to costs. *Ellis* v. *Ellis*, 1 Russ. 368.

Where a trustee seeks the direction and indemnity of the Court, as to the execution of his trust, the costs should be paid out of the trust-fund. *Curtois* v. *Chandler*, 6 Mad. 123.

A person who is made party to a suit, is entitled to his costs out of the trust fund, although he be made so only for the protection of the trustees. *Hicks* v. *Wrench*, 6 Mad. 93.

In what case trustees are allowed costs only as between party and party. *Edenborough* v. *Archbishop of Canterbury*, and *Carter* v. *Bishop of London*, 2 Russ. 93.

## UNIFORMITY, ACT OF.

[See Office, and Officer.]

## UNION.

In construing the 39 & 40 Geo. 3, the Act of Union between Great Britain and Ireland,—Held, that the legislature placed both countries on an equal footing of advantage and disadvantage, in respect of the manufacture and trade of either, when exported from one into the other; and that therefore, spirits distilled in Ireland, if imported from thence into England, become British spirits, and are entitled to the advantages of British spirits, except being subject to all the Excise regulations affecting British spirits, existing at the time of the Act of Union. *Attorney General* v. *M'Kenzie*, 11 Price, 285.

## UNITARIAN.

The 55 Geo. 3, c. 160, did not give any positive liberties to Unitarians, but merely put them on the footing of other dissenters, by releasing them from their disabilities, which had been removed from other dissenters. *Rex* v. *Waddington*, 1 Law J. K.B. 37, s. c. 1 B. & C. 26.

## UNIVERSITY.

[See Statute.]

Where, to hold college offices, a possession of real estate is indispensable, the Court is by no means strict in deciding what is real estate for that purpose; hence an interest in land will suffice.

A master of a college must possess 20*l.* per annum, real estate.

The possession of 10*l.* per annum, real estate, disqualifies a member from holding a fellowship. That sum, however, seems to be influenced by the value of money.

Where costs are incurred by a petition relative to the election of president, they will be defrayed out of the college funds. *Case of Queen's College, Cambridge*, 1 Jac. 47.

A college may either accept or reject an accession to its foundation. *Attorney General* v. *the Masters of Catherine Hall*, 1 Jac. 391.

## USE.

[See Trust.]

Where a use is executed by the common law in the same person to whom the seisin is conveyed, a further use, to another person, cannot be executed by the statute of Uses: for the statute applies only to cases where the use is not executed by the common law; and cannot be called into action where a use has once been so executed.

Accordingly,—Grant to A, to the use of A in fee, upon trust; that is to say, to the use of B, with certain trusts and limitations; and the ultimate use to B in fee: Held, that, although the first use might be well executed by the common law, yet the statute of Uses could not be called in aid to execute the second use to B; and, therefore, that B had not the legal, but only the equitable estate under the ultimate use. *Doe d. Lloyd* v. *Passingham*, 5 Law J. K.B. 146, s. c. 6 B. & C. 305.

## USE AND OCCUPATION.

[See Landlord and Tenant.]

(A) Action for.

(*a*) *Where maintainable.*

(*b*) *Pleading.*

(*c*) *Evidence.*

(*d*) *Verdict and Damages.*

## (A) ACTION FOR.

### (a) *Where maintainable.*

Defendant, in 1807, paid rent to R for certain premises, which afterwards vested in the plaintiff. No rent was ever paid to the plaintiff; but he recovered in an ejectment, and afterwards in an action for mesne profits, accruing due from 1st January 1820, to 4th May 1822. Though R's title had ceased, the defendant was in under him, and an action lies for use and occupation. *Read* v. *Godwin*, 3 Law J. K.B. 128.

The rent for lodgings, originally let for prostitution, cannot be recovered from the period after the landlord was fully aware of the female's character. *Jennings* v. *Throgmorton*, 1 R. & M. 251. [Abbott]

A person who suffers an immodest woman to live and prostitute in his house, is not entitled to recover for her board and lodging; but, if the consort with the other sex be consummated not in his house, he may recover. *Appleton* v. *Campbell*, 2 C. & P. 347. [Abbott]

If a tenant, contrary to his agreement, leave without giving a notice to quit, and the landlord take possession, and let the premises to another person, he cannot maintain an action for use and occupation for any time after the leaving by the tenant. *Hall* v. *Burgess*, 4 Law J. K.B. 172, s. c. 5 B. & C. 332, s. c. 8 D. & R. 67.

So, where the plaintiff let furnished apartments to the defendant for a year at a certain rent, and the defendant quitted at the end of the first quarter, and paid rent to that day, and the plaintiff shortly afterwards let the apartment to another, who quitted before the expiration of the year: Held, that the plaintiff could not recover the balance of rent due at the end of the year in an action for use and occupation, as, by re-letting the apartments to another, he had put an end to the original contract. *Watts* v. *Atchesson*, 4 Law J. C.P. 154, s. c. 3 Bing. 462, s. c. 2 C. & P. 268.

In an action of debt for use and occupation, it appeared that the plaintiff had recovered a judgment, and sued out an *elegit* against J S, and the sheriff returned an inquisition that J S was seised for life of certain lands in the occupation of the defendant: but the latter proved that they were vested in trustees to raise a sum of money, which had not been done; but the trustees allowed J S to receive the rents: Held, that the action could not be maintained, as J S had only an equitable interest in the lands, which was not the subject of a common law execution. *Harris* v. *Booker*, 5 Law J. C.P. 92, s. c. 4 Bing. 97.

In the absence of an express tenancy, no tenancy can, in law, be implied (as regards the character of landlord), except in favour of him who has the legal estate.

And where the legal estate is in trustees for the benefit chiefly, but not entirely, of one person, that one person cannot treat himself as the principal, and the trustees as his agents, so as to maintain an action in his own name for a breach of the tenancy.

Accordingly, where a testator devised a term of five hundred years to a trustee, in trust, amongst other purposes, to raise 3000*l.*, and 2000*l.*, for a portion for his daughter, to cease on these purposes being satisfied, and then to his son A B in strict settlement, reserving to such son a power to make leases under his hand and seal, and to appoint a jointure; and an agreement was made for a lease by A B with the defendant, under which the defendant held, during the life and after the death of A B: and by marriage settlement, a term of ninety-nine years, if A B should so long live, and subject to the larger term, was vested in trustees to pay an annual sum to the plaintiff (A B's intended wife), and then to plaintiff for life: and during the life of A B the defendant attorned to the trustees under the marriage settlement, and paid them rent up to and after his death, and they gave receipts, and subsequent to the death of A B, agreed to reduce the rent *in the character of trustees*:—it was held, that the tenancy under the agreement for a lease, not being in execution of the power, determined; that, the purposes for which the original term was created remaining unsatisfied, the trustees of the second term must be considered, subsequent to A B's death, to have acted as agents for the estate generally, and, therefore, that the plaintiff could not maintain an action for use and occupation. *Morgel* v. *Paul*, 6 Law J. K.B. 290.

In an action for use and occupation, it appeared that W P assigned certain pictures to P T as an indemnity against all losses which he might incur on account of W P; P T hired rooms of the plaintiff at a yearly rent, and deposited the pictures therein. W P having died, the defendants administered to his effects as creditors, and filed a bill in Chancery against P T for an account, and he being unable to substantiate any claim, the suit was dismissed: pending the suit the plaintiff's rent was paid yearly, on the petition of the defendants, out of funds paid into court in the course of the cause; and the defendants eventually recovered the pictures from the plaintiff under an order of the Court, and then paid him rent to the day of the delivery: Held, that the relation of landlord and tenant did not subsist between the plaintiff and defendants, and consequently that the former was not entitled to a notice to quit, nor could he demand rent to the end of the current year, in which the pictures had been delivered up by him to the defendants. *Strachan* v. *Smith*, 5 Law J. C.P. 95, s. c. 4 Bing. 91.

### (b) *Pleading.*

To an action for use and occupation, a plea of distress, if valid at all, must combine two requisites, 1st, That the distress was retained; 2d, That it was legally taken and the goods sold. *Deare* v. *Edmunds*, 2 Chit. 301.

Assumpsit for use and occupation of lodgings by A H, defendant's wife, at his request. Plea, that A H was not his wife; on demurrer to this plea, the Court held that it was bad, as it amounted to the general issue: Held also, that it tended to put in issue a matter which is immaterial. *Sinclair* v. *Hervey*, 2 Chit. 642.

### (c) *Evidence.*

A having let premises, (to which his wife was entitled for her separate use), in his own name, to a tenant from year to year, the tenant having occupied the premises under an agreement with A as his landlord, and A having subsequently demised the premises for a term of years to another person: Held, that such lessee stands in the place of A, and

A's title having been acknowledged as landlord, the title of his lessee cannot be questioned by the tenant, in an action for use and occupation of the premises. *Rennie* v. *Robinson*, 1 Law J. C.P. 30, s. c. 1 Bing. 147, s. c. 7 B. Mo. 539.

In an action for use and occupation, the defendants, assignees of a bankrupt, produced, under a notice from the plaintiff, the deed of assignment of the bankrupt's effects: Held, that although the attesting witness had not proved the deed, yet it was admissible in evidence, as it had been shewn that the defendants occupied under the deed. *Orr* v. *Morice*, 6 B. Mo. 347, s. c. 3 B. & B. 139.

Whether an action for use and occupation can be maintained upon mere proof of title in the plaintiff, and occupation by the defendant; and without any contract to pay rent—*Quære.*

But where the defendant's father had occupied for several years, and paid 5*s.* a year; and the defendant occupied several years after his father's death; and, on being applied to for payment, denied the plaintiff's right, but said, "Prove the land to be yours, and I'll pay you:" It was held, that on proof of the title, the defendant's expression was properly left to the jury as evidence of a tenancy by the defendant at 5*s.* a year; and was sufficient to warrant a verdict for the plaintiff in an action for use and occupation. *Cripps* v. *Jefferson*, 5 Law J. K.B. 78.

In an action for use and occupation, where the tenancy is established, it lies on the defendant to shew that the tenancy has been determined, or that the landlord has accepted another person as his tenant. *Ward* v. *Mason*, 9 Price, 291.

A, being in possession under a lease for years, underlet the premises from year to year to the defendants, who knew the extent of A's interest. The plaintiff afterwards took a lease of the same premises, expectant on the determination of A's term; and the defendants, after the determination of A's term, continued in possession for a quarter of a year, when they paid the rent for that period, and claimed to give up the premises: Held, in an action for use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year. *Freeman* v. *Jury*, 1 M. & M. 19. [Abbott]

(*d*) *Verdict and Damages.*

Where, in an action for use and occupation, it was found that the defendant said that he had taken the premises for which the action was brought, and that he afterwards paid for the repairs, but that his brother had continually occupied them, and paid the rent under a distress made by the plaintiff, and that no rent had ever been demanded from the defendant, and it was left to the jury whether the defendant took the premises for himself or his brother, and they found a verdict for the defendant: The Court granted a new trial. *Choumert* v. *Haswell*, 3 Law J. C.P. 100.

A writ of inquiry must be executed after judgment by default, in an action of debt for use and occupation. *Anon.* 3 Law J. K.B. 138.

Under an agreement to take a mansion and farm, the lessee also to occupy the glebe land of the parish, and have the privilege of sporting over the manor, the lessee entered into possession, but never signed the agreement, and it turned out that the lessor had not the power of procuring the glebe, or of conferring the right of sporting: Held, that the agreement was only evidence of the rent to be paid, where the lessee had enjoyed under the agreement, but that, the lessor having failed to make it good in a principal part, he could not be said to have so enjoyed; and therefore, in an action for use and occupation, the jury must ascertain the value independently of the agreement. *Tomlinson* v. *Day*, 5 B. Mo. 558, s. c. 2 B. & B. 680.

## USURY.

(A) In general.
(B) Loans.
(C) Discount and Commission.
(D) Securities.
(E) Action for.

### (A) In general.

If A mortgage stock to B, by a conveyance, which is apparently absolute, and B assigns it to C as a security for an usurious loan, A's right of redemption is not affected by the transaction between B and C, but is as extensive against C as against B.

Where, on a bill for redemption, a party is brought before the Court in the character of mortgagee, but has acquired his interest in the subject-matter of the suit by an usurious contract, he will not be allowed his costs. *Johnson* v. *Williamshurst*, 1 Law J. Chanc. 112.

The Court allowed a demurrer to a bill stating that money was lent by the defendant to the plaintiff on his promissory note, for the amount and interest, and that it was agreed by them that interest should be paid after the rate of 6*l.* 10*s.* per cent., and that interest had been in fact paid, on praying that the defendant might answer an interrogatory as to the fact of such agreement, and for an injunction to stay proceedings commenced at law on the note; but the plaintiff did not make any offer to pay the money so admitted to have been lent. The objection on which the demurrer was founded, was, that the statute had not imposed forfeitures or penalties on the agreement to take, but on the taking of illegal interest; having, in the case of an usurious agreement, only made the instrument void. *Whitmore* v. *Frances*, 8 Price, 616.

An usurious transaction cannot be made legal by a subsequent promise, in the absence of proof that all payments beyond legal interest were deducted. *Wicks* v. *Gogerly*, 1 R. & M. 123, s. c. 1 C. & P. 396. [Best]

To make a bond usurious, the extra interest should be agreed for, at or before its execution—and it is for the jury to say at what period it was so agreed. *Fussil* v. *Brookes*, 2 C. & P. 318. [Abbott]

Where a testator directed that one of his residuary legatees should be answerable for all debts due to him from the legatee's father: Held, that a debt, though usurious, must be deducted from the share of that legatee. *Stanton* v. *Knight*, 1 Sim. 482.

A fair and *bonâ fide* sale is not usurious, though the principal money should carry a rate of interest exceeding 5 per cent., if the principal sum, and the rate and mode of payment, formed part of the con-

tract of sale. *Beete* v. *Bidgood*, 6 Law J. K.B. 35, s. c. 7 B. & C. 453, s. c. 1 R. & M. 143.

The receipt of interest at the rate of more than 5 per cent. per annum, under a bargain which, in substance, though not in colour or form, is corrupt, is usury within the provisions of the statute 12 Anne, stat. 2, c. 16.

But the question whether such bargain and the mode of receipt were colourable only, and contrived for the purpose of evading the statute, is a question for the jury, under all the circumstances of the case.

Therefore, where a bill-broker, conceiving himself, as he stated, to be "bound in honour" to discharge a debt due to a party with whom he discounted bills, agreed, that, in addition to the usual legal allowance of 5 per cent., such party should also, in their future dealings be allowed to retain 1*l.* per cent. to go towards the payment of such debt, which agreement was acted upon in several transactions, he upon those occasions not deducting more than the legal interest for discount, with brokerage, in his account with his employers, and the judge at Nisi Prius told the jury that, in his opinion, this did not amount to usury, but left it to them to determine whether this was the real nature of the transaction: The Court refused to disturb the verdict, finding that the transaction had not been usurious. *Solarte* v. *Melville*, 6 Law J. K.B. 68, s. c. 7 B. & C. 430, s. c. 1 M. & R. 19.

## (B) LOANS.

A contract of loan, which gives the lender the option of claiming either a sum of money or a certain amount of stock for repayment of the principal, is usurious. *Johnson* v. *Williamhurst*, 1 Law J. Chanc. 112.

If one person, in consideration of a sum of money, promises to pay another a much larger sum on a particular event which depends on a contingency, it is not usury. *Lamego* v. *Gold*, 2 Ken. 422, s. c. 2 Burr. 715.

The 13 Geo. 3. does not limit the rate of interest to 12 per cent. on loans made within the dominions of native Indian sovereigns by British subjects, domiciled and residing within such dominions. *Anon.* 3 Bing. 193.

On a consignment of goods from A in London to B at Gibraltar, for sale on commission, B, on the delivery of the invoice and bill of lading to his agent in London, advanced through him to A, two thirds of the invoice price of the goods, by bills at 90 days date, upon which he received 6*l.* per cent. interest from the date of the bills, that being the usual interest at Gibraltar. In assumpsit for the proceeds of the goods, it was holden, that the advance was not a loan of money in England, consequently not usurious, and therefore, the subject of a set-off. *Harvey* v. *Archbold*, 3 B. & C. 626, s. c. 5 D. & R. 500, s. c. 1 R. & M. 184.

To accommodate a lady, a man sold out 400*l.* 3 per cent. consols, which produced 223*l.* She signed an agreement, undertaking, within the space of one year from the date thereof, if required by him or his executors, to replace in his name, or in those of his executors, the amount of that stock. She also executed a bond to pay 223*l.* at the end of a year, and surrendered copyhold premises as a security for the payment: The Court held, that they were bound to look at all the three instruments as if they had been one writing; that the principal was not in danger; that more than 5 per cent. was taken, and that the whole transaction was usurious. *White* v. *Wright*, 3 Law J. K.B. 34, s. c. 3 B. & C. 272, s. c. 5 D. & R. 100.

Deed by which A, B and C, partners in trade, in consideration of 4,000*l.* paid to them by D, in augmentation of their capital, agree to admit him into partnership with them for a term. It was agreed that D should receive, in lieu of profits, a clear sum of 550*l.* per annum, and all the property of the concern was charged with the payment of this sum quarterly, and of the 4000*l.* at the determination of the partnership. A, B and C were to pay rent, taxes, wages, and the other outgoings of the trade, which was to be carried on by them, and in their names only; and D was not required to attend to it. D was at liberty to retire on giving twelve months' notice; and on his retiring, or at the end of the term, the 4000*l.* and the arrears (if any) of the 550*l.* per annum were to be paid to him by A, B and C, by instalments, to be secured by their bonds; and they were to indemnify him from the debts of the partnership: Held, that this deed was not usurious. *Fereday* v. *Hordern*, 1 Jac. 144.

In 1787, three persons entered into partnership, as bankers, for twenty-one years. In 1809, the partnership was renewed for seven years. On 17th July 1810, one of the partners advanced 30,000*l.* 3 per cent. consols (then 67¼,) for the use of the concern; and on 1st January 1813, each of the other two partners gave him a bond for 18,000*l.* respectively, to secure the re-transfer, before 1st January 1814, of 9000*l.* stock by each of them, being their proportions according to their interests in the business. In the interim they had paid the dividends to him, which he received without making any allowance for the property-tax, and with interest on the dividends when they were not immediately paid. There were also certain securities assigned to him.

In 1813, stock to the amount of 10,000*l.* was replaced. On 1st of January 1814, the remainder of the stock (then 61⅝,) was not replaced, and the lender obtained judgment on the bonds. On 30th July 1814, the partnership was dissolved. The lender retired, and it was agreed to re-transfer to him 20,000*l.* stock, in four instalments, on 5th January and 5th July, 1815 and 1816. At that time the concern was solvent as to the world, but was insolvent as a separate establishment. The first instalment of 5000*l.* was paid.

On the 6th of September 1815, an agreement was entered into between all the parties, that the three remaining instalments of stock (then 56¼,) should be accounted for in money, at the price the stock was originally sold out at. The value of the stock, according to the price on 17th July 1810, was 10,083*l.* 15*s.*; but, according to the price on 6th September 1815, it was only 8437*l.* 10*s.*: The Court held, 1st, That the agreement made on 6th September 1815 was usurious; 2nd, that, that contract not varying the one made on 17th July 1810, the latter and the deed of dissolution remained unimpeached, and, consequently, that the plaintiff had a lien on the securities; 3rd, that, the partnership being solvent as to the world, the retiring partner could prove his debt against the estate of the new partnership; and,

4th, that, as there was no proof that the partners paid the property-tax, the lender was not bound to allow it to them. *Parker* v. *Ramsbottom*, 3 Law J. K.B. 16, s. c. 3 B. & C. 257, s. c. 5 D. & R. 138.

Where the defendant employed the plaintiffs to sell an advowson, subject to his own incumbency, and they, being unable to do so, applied to an attorney, by whom a sum was ultimately raised by way of mortgage, but the plaintiffs interfered no further in the transaction: Held, that they were to be considered as drivers of a bargain, within the statute 12 Anne, stat. 2, c. 16, s. 2, and consequently could only recover at the rate of 5*s*. per cent. by way of commission, for causing the loan to be negotiated. *Pryce* v. *Wilkinson*, 3 Law J. C.P. 103, s. c. 2 Bing. 470, s. c. 10 B. Mo. 177.

(C) DISCOUNT AND COMMISSION.

Where a lender discounts a bill to enable the borrower to take up a former bill, the discounting of which was tainted with usury, the usury becomes complete on payment of the first bill. *Wright* v. *Laing*, 3 B. & C. 169, s. c. 4 D. & R. 783.

It is usurious for the discounter of a bill to engage with the holder that he shall pay to the agent procuring the discount a premium, though he himself retain only the legal discount. *Meago* v. *Simmons*, 1 M. & M. 121. [Tenterden]

A person requested bankers in the country to give him a bill drawn by them on their London bankers, in exchange for another bill of the same date and value, which they did, deducting 4 per cent. for interest and commission: Held not to be usurious. *Stevold* v. *Eade*, 5 Law J. C.P. 85, s. c. 4 Bing. 81.

(D) SECURITIES.

A substituted security is subject to the same objections as the original; therefore, if the original were void on account of usury, the substituted one will be also unavailable: in order to render the latter valid, a deduction should be made of all sums paid usuriously under the former security. *Wickes* v. *Gogerly*, 1 C. & P. 396. [Best]

C being largely indebted to his son-in-law O, and being seised of a remainder in fee, in certain lands, expectant upon certain life estates and certain contingent estates tail, a deed is made between C and O, and other proper parties, by which, (after reciting, among other things, that C was desirous of securing the repayment of the sums which he owed to O,) C, in consideration of the premises, and of natural love and affection, makes a settlement of his remainder in fee upon certain trusts; one of these trusts is, that upon the death of the then tenant for life, without issue inheritable under the limitations in tail, an account should be taken of all sums then due from C to O, and that, by means of a term which was to commence then, the trustees should keep down the interest of the debt, and pay off the principal by instalments. By the same deed, large beneficial interests in the estates are limited to O and his heirs: Held, that though the security created by the deed could not be made effectual till a future period, there was neither an express nor an implied contract for forbearance in the meantime on the part of O, and therefore, that there was no pretence for impeaching the deed as usurious: Held also, that, there being no evidence that the agreement of the parties was not truly stated in the deed, the Court could not, though in a suit for specific performance, listen to the objection, that extrinsic evidence might hereafter shew that the real agreement of the parties was usurious. *Huntley* v. *Arkwright*, 3 Law J. Chanc. 181.

The use of the word "interest" in an instrument, will not, of itself, make a transaction usurious, with reference to the rate of per-centage. The Court will look to the substance of the dealing; which will not, therefore, be decided by the use or the absence of the word "interest." *Beete* v. *Bidgood*, 6 Law J. K.B. 35, s. c. 7 B. & C. 453, s. c. 1 M. & R. 143.

(F) ACTION FOR.

The venue in an action on 12 Anne, c. 16, for usury, must be laid in the county in which the money is paid, and not in the county in which the contract is made. *Pearson* v. *M'Gowran*, 3 Law J. K.B. 95, s. c. 3 B. & B. 700, s. c. 5 D. & R. 616.

In a declaration for usury, stating the exact day from which the period of forbearance is to commence, is indispensable. *Partridge* v. *Coates*, 1 C. & P. 534, s. c. 1 R. & M. 153. [Abbott]

## VARIANCE.

(A) WHEN IMMATERIAL.
(B) BETWEEN PLEADING AND PROCESS.
(C) ——— RECORD AND ISSUE.
(D) ——— PLEADING AND EVIDENCE.
(E) IN CRIMINAL PROCEEDINGS.

(A) WHERE IMMATERIAL.

Where the defendants had been properly named in the bill, but one of their christian names had been omitted in the *postea*: Held, that the judgment being, "that the plaintiff do recover against the said defendants," was sufficient, and therefore the omission of the name was immaterial. *May* v. *Pige*, 1 Bing. 314, s. c. 8 B. Mo. 297.

By an agreement, the defendant undertook to let to the plaintiff, certain apartments, including fixtures, which were specifically enumerated in the agreement. In an action of assumpsit, the declaration was, for not giving the plaintiff possession of certain apartments in the defendant's house, agreed to be let by him to the plaintiff, in consideration of rent: Held, that, although the declaration did not state the agreement to have been, as it was in fact, an agreement to let apartments and fixtures, the variance was immaterial. *Ward* v. *Smith*, 11 Price, 19.

Where the action is not founded on the record stated in the declaration, but merely used for the purpose of reference, it is sufficient if the description be intelligible. *Bennett* v. *Isaac*, 10 Price, 154.

The omission of the word "notice" in declaring upon a contract, where the alleged breach is the not giving of "three months' notice," is not a material variance, if the word is necessarily implied in the context. *Holland* v. *Webb*, 6 Law J. K.B. 92.

(B) BETWEEN PLEADING AND PROCESS.

A defendant is not entitled to oyer of an original writ, and therefore the Court refused to set aside

a declaration, on the ground of a variance between the writ and declaration in the christian name of the defendant. *Gainer* v. *Weller*, 4 Law J. C.P. 180.

Where the *ac etiam* in a writ was, "in a plea of trespass, on the case upon promises," and the declaration was delivered in debt, the Court held the variance fatal, and would not permit the declaration to be amended by filing it in assumpsit. *Maberley* v. *Benton*, 5 B. Mo. 483.

It is not a variance to declare simply on the money counts, where the affidavit of debt states that the plaintiff accepted a bill of exchange for the honour of the defendant, and that he was obliged to pay it himself. *Brooks* v. *Clark*, 1 Law J. K.B. 29, s. c. 2 D. & R. 148.

In an action against the sheriff for an escape, the declaration set out a writ of our Lord the King; and on its production the writ was found to be entitled by mistake 7 Geo. 3, but was tested in the name of Best, Chief Justice, and indorsed with the date of 1826: Held, not to be a variance, or, at all events, not one that the sheriff could take advantage of, he having recognized the writ by making a return to it. *Elvin* v. *Drummond*, 5 Law J. C.P. 172, s. c. 4 Bing. 278.

### (C) BETWEEN RECORD AND ISSUE.

In an action of trespass, for breaking and entering a close, the Court refused to grant a new trial on the ground of a variance between the Nisi Prius record and the issue delivered, the error being in the issue, and the record agreeing with the declaration. *Jones* v. *Tatham*, 8 Taunt. 634.

Where, in an action of assumpsit on a special agreement, the record differed from the declaration and issue, as to the description and prices of goods on which the agreement was founded: The Court refused to set aside a verdict found for the plaintiff, on the ground of a variance between the issue and record, as the mistake might have been amended at the trial. *Berney* v. *Green*, 5 Law J. C.P. 49.

### (D) BETWEEN PLEADINGS AND EVIDENCE.

[See MALICIOUS ARREST.]

A in his declaration stated, that he and another person gave a licence to C for a term of years, to continue to open a channel through the bank of a navigable river, that the waste water might turn his mill, at an annual sum, which was unpaid.

In the deed, A and the other person were described as persons having the greatest share in the profits of the navigation.

The Court considered that, on the face of the declaration, they must be held to have the sole ownership of the navigation, and hence that there was a variance between the declaration and the deed given in evidence.

The Court also held, that by the declaration it seemed that A had an estate in a real hereditament, but by the deed it appeared he had not any legal or equitable estate in the real hereditament. *Earl of Portmore* v. *Bunn*, 1 Law J. K.B. 196, s. c. 1 B. & C. 694.

Where B averred in an avowry, founded on a distress for rent, that A held certain *strata* or *veins* of ironstone, under a lease, which contained a proviso that, "if the stone should not be wholly gotten or wrought out, within the term of eight years from the commencement of the demise, the rent in respect of such as should then remain ungotten, should be paid to the lessor." On the lease being produced, it contained a further proviso, "If the same should be found to be getable:" Held, that this was a fatal variance, and that the plaintiff was entitled to recover on *non est factum*;—and, *semble*, that he would only be liable to pay for such stone as could be gotten, and not for that which was not getable. *Adam* v. *Duncalfe*, 5 B. Mo. 475.

The declaration in *quare impedit*, in the statement of the plaintiff's title, alleged, that R S, being seised of a purparty, or fourth part, of an advowson, conveyed the same, by deed, to L S; and, on the production of the deed, it was found to be a conveyance of the *whole* advowson, although R S was proved to have possessed only the fourth part: Held, no variance. *Gully* v. *the Bishop of Exeter*, 5 Law J. C.P. 178, s. c. 4 Bing. 290.

If in an action of covenant the declaration state that the deed was made between the plaintiff of the first part; J C of the second part; and A B of the third; and the deed, when produced, appear on the face of it to be by the plaintiff, as trustee of J C, of the first part; G C of the second; and A B of the third part; and the deed be executed by G C. This is a fatal variance, although the breaches assigned do not in any way affect the party who is intended to be described as of the second part. *Meyelstea* v. *Lord Palmerston*, 2 C. & P. 474, s. c. 1 M. & M. 6. [Abbott]

Declaration in debt for rent stated a demise of a messuage, land, and premises, with the appurtenances. The proof was of a demise of a messuage and land, together with the furniture, utensils, and implements: Held, that as the rent issued out of the real property, and not out of the furniture, it was sufficient for the plaintiff to allege and prove a demise of the real property, and, therefore, there was no variance. *Farewell* v. *Dickinson*, 5 Law J. K.B. 154, s. c. 6 B. & C. 251.

In an action of covenant, if the word "an" is written, instead of "one," and the name "Burl" instead of "Burt," in setting out the deed, these are not fatal variances. Nor is the stating a lease to be for twenty-one years, and proving it to be for twenty-one years determinable, at the option of either party, at the end of seven or fourteen years. If the defendant alleges a seisin in fee by A, and the plaintiff in the replication traverse that plea, he is at liberty to shew that A had only an estate for life, and need not reply that specially. *Hill* v. *Sanders*, 1 C. & P. 80. [Gifford]

A declaration stated the condition of a replevin bond to be, that the defendant should prosecute with effect his action against the plaintiff, for taking and unjustly detaining defendant's goods and chattels, in the said condition hereinafter mentioned, and should make return thereof, if return should be adjudged, and should indemnify the sheriff and his officers for replevying the said goods and chattels; but the condition of the replevin bond was, that the defendant should prosecute with effect his action against the plaintiff, for taking and unjustly detaining the goods and chattels of the defendant, in the dwelling-house, farm-lands, and premises of the defendant, viz. in the parlour a carpet, &c., growing crops of corn in a field called S, &c., and should make return

thereof, if return should be adjudged, and should indemnify the sheriff and his officers for replevying the said goods and chattels: Held, no variance between the declaration and the condition of the bond. *Glover* v. *Coles*, 1 Bing. 6, s. c. 7 B. Mo. 251.

A landlord distrained the effects of his tenant, for rent, who replevied them in the usual manner. The sheriff took the usual bonds to prosecute the replevin suit with effect, or to return the goods. The tenant failed in his suit, but did not return the goods, and the sureties became insolvent.

The landlord brought his action against the sheriff, for taking insufficient pledges. In setting out the record of the suit in the county court, the names of the suitors, before whom the plaint was entered, were called A, B, and C, but, on producing the record, it appeared that their names were D, E, and F.

The Court held, that their names were surplusage, and might be rejected. *Draper* v. *Garratt*, 1 Law J. K.B. 219, s. c. 2 B. & C. 2, s. c. 3 D. & R. 226.

A bail-bond was conditioned for the appearance of the principal "before our Sovereign Lord the King, at W., on &c., to answer &c., and also to answer the plaintiff according to the custom of the King's Court of Common Bench." In an action against the sureties, the declaration stated the condition to be for the debtor's appearance in the said Court, "according to the exigency of the said writ": Held, that this was no variance. *Crofts* v. *Stockley*, 6 Law J. C.P. 212, s. c. 5 Bing. 32, s. c. 2 M. & P. 81, s. c. 2 C. & P. 281.

The averment of a record of a *ca. sa.* returnable "at Westminster," is not supported by the production of the record of a *ca. sa.* returnable "wheresoever, &c." *Bayley* v. *Pottinger*, 6 Law J. K.B. 112.

Where, in ejectment to recover premises forfeited by non-payment of rent, there was a variance between the amount of rent stated in the particulars of the demand of the lessors of the plaintiff, and the amount proved to be due on the trial: Held, that such variance was not material. *Tenny* v. *Moody*, 3 Law J. C.P. 122, s. c. 3 Bing. 3.

If a declaration profess to set out the terms of a reservation of rent, in an action of debt for the rent, it is a variance to omit an exemption referring to a subsequent proviso, by which a deduction is to be made if a certain event happen, although that event have not happened. *Vavasour* v. *Ormrod*, 5 Law J. K.B. 172, s. c. 6 B. & C. 430.

In an action for not accepting a lease for twenty-one years, according to agreement, the plaintiff, in some counts of his declaration, stated, "that he was possessed of a house for a certain term of years to expire on the 25th of December 1856," and in others, "that he was entitled to the term, under and by virtue of a certain contract"; and it appeared in evidence, that he was only possessed of a term of twelve years; and he failed in proving that he was entitled to any further term under any contract; although it was found that he did afterwards obtain a term such as that described in the declaration: Held, that the variance was fatal. *Routledge* v. *Grant*, 6 Law J. C.P. 166, s. c. 4 Bing. 653, s. c. 1 M. & P. 717, s. c. 3 C. & P. 267.

The defendant agreed, in writing, "to remain with the plaintiff's wife for two years, for the purpose of learning the business of a dress-maker": Held, that proof of this agreement did not support an allegation in the declaration—that, in consideration that the plaintiff, at the request of the defendant, would receive her into his service, and cause her to be taught by his wife the business of a dress-maker, she agreed to remain in such service for the space of two years. *Lees* v. *Whitcomb*, 6 Law J. C.P. 213, s. c. 5 Bing. 34, s. c. 2 M. & P. 86.

An agreement by which A B agrees "to remain with" C D for two years from the date of it, "for the purpose of learning" a particular business, will not support a declaration stating the consideration to be, that C D would "receive" A B "into his service."—*Semble*, also, that such an agreement is not available, on the grounds of there being no mutuality, and no consideration appearing on the face of it. *Lees* v. *Whitcomb*, 3 C. & P. 289. [Park]

An allegation of a judgment of non-performance of certain promises and undertakings, is not supported by proof of a judgment upon one promise and undertaking. *Edwards* v. *Lucas*, 4 Law J. K.B. 265, s. c. 5 B. & C. 339, s. c. 8 D. & R. 98.

An allegation in a declaration, that one of the links of a warranted chain-cable broke, and that in consequence the chain-cable and anchor were wholly lost, is supported by proof that, a link of the chain-cable being broken, the pilot, for the preservation of the ship and crew, slipped the cable, and that the anchor and chain-cable were thereby lost; and that under the warranty, the plaintiffs might recover, in addition to the value of the cable, the value of the lost anchor to which the cable was attached. *Borradaile* v. *Brunton*, 8 Taunt. 535, s. c. 2 B. Mo. 582.

A declaration that the plaintiff had lent a *horse*, was holden to be supported by proof that it was a *mare*. *Ware* v. *Juda*, 2 C. & P. 351. [Best]

An allegation of a right of common for all cattle, *levant* and *couchant*, is substantiated by the production of evidence, that the common is not more than sufficient to feed the cattle for a short time. *Willis* v. *Ward*, 2 Chit. 297.

Declaration by the payee against the maker of a promissory note to the order of the payee for "value received" generally, is not disproved by evidence of a note payable to the plaintiff's order for "value received in Mrs. L's estate." *Bond* v. *Stockdale*, 7 D. & R. 140.

In an action on a bill of exchange, the declaration alleged "for value received by R H;" but the one produced was "for value received" generally: Held, that the variance was fatal. *Highmore* v. *Primrose*, 2 Chit. 333.

If, in an action for slandering the plaintiff's title to leasehold premises, the declaration avers, that the plaintiff's interest in the said premises, for all the remainder of a term of 99 years then unexpired, was put up to sale, but that by means of the said slander divers persons, who were desirous of purchasing, were deterred from so doing, &c., and it appears in evidence, that the interest actually put up to sale was an under-lease for 22 years, to be granted by the plaintiff to the purchaser—the variance is material. *Millman* v. *Pratt*, 2 B. & C. 486, s. c. 3 D. & R. 728.

In an action for not setting out tithes of hay, an immemorial custom for setting out such tithe was averred to exist "within the parish, and the limits

bounds, and titheable places thereof," and it appearing in evidence that one township of the parish was covered by a modus for hay tithe: Held, no variance from the custom alleged. *Piggott* v. *Bayley*, 9 D. & R. 12, s. c. 6 B. & C. 16, s. c. as *Piggott* v. *Sillitoe*, 5 Law J. K.B. 42.

In an action on the case for negligently removing a wall, adjoining a wall of plaintiff's cellar, whereby the roof of the cellar fell in, and destroyed a quantity of wine, it appeared that the proximate cause of the damage was occasioned by placing a quantity of bricks on the roof of the cellar: Held, that this was no variance, and need not be set out in the declaration to support the action. *King* v. *Williamson*, 1 D. & R. N.P.C. 35. [Abbott]

If a declaration against a coach-proprietor, for negligently driving, whereby &c., states that the defendant's servant negligently *drove, conducted, and managed* the coach, it is not supported by proof, that there was only negligence, in using an insufficient coach. *Mayor* v. *Humphries*, 1 C. & P. 251. [Littledale]

In an action on the case for taking an excessive distress, the premises were averred to be in the parish of St. George the Martyr, Bloomsbury, and proved to be in the parish of St. George, Bloomsbury: Held, a material variance. *Harris* v. *Cook*, 8 Taunt. 539, s. c. 2 B. Mo. 587.

In ejectment, the premises being laid to be in the parish of St. Luke, in the county of Middlesex, there being two parishes of St. Luke in that county, the one St. Luke, Chelsea, and the other St. Luke, Old Street, or more commonly called St. Luke, Middlesex, is not a fatal variance. *Doe d. Boys* v. *Carter*, 1 Y. & J. 492.

Where, in case, the declaration stated that plaintiff delivered a trunk to the defendant, to be put into a coach at Chester in the county of Chester, to wit, at &c., and safely carried to Shrewsbury, and that through the defendant's negligence it was lost; and it appeared in evidence that the trunk was delivered to the defendant at the city of Chester, which is a county of itself, separate from the county of Chester at large, but within its ambit: Held, that this was not a material variance; but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called Chester. *Woodward* v. *Booth*, 6 Law J. K.B. 115, s. c. 7 B. & C. 301.

In a declaration against a coach-proprietor for an injury to a passenger, it was averred, that the defendant was the owner of a stage-coach for the carriage and conveyance of passengers from London to Blackheath; that the plaintiff, at the request of the defendant, *agreed* to become an outside passenger on the said coach, to be carried from London to Blackheath, and that the defendant *agreed* to receive the plaintiff as such outside passenger. The proof was, that the coach was licensed to run from Charing-Cross to Blackheath; that the words "London to Blackheath" appeared on the coach-doors; and that the plaintiff was taken up at the Elephant and Castle in St. George's Fields: Held, that the evidence was sufficient to support the allegation, and that this was no variance. *Ditcham* v. *Chivis*, 6 Law J. C.P. 176, s. c. 4 Bing. 706, s. c. 1 M. & P. 735.

A declaration for trespass in breaking and entering the plaintiff's dwelling-house, is not proved by evidence of a trespass in the adjoining yard, and within the curtilage; although the place in question might pass in a grant by the word "house," without any additional word of description, and without the word "appurtenances." *Mudie* v. *Bell*, 6 Law J. K.B. 325, s. c. 3 C. & P. 331.

In an action for killing a cow, the declaration stated, that the defendant struck the plaintiff's cow divers blows, by reason whereof she died. The evidence proved, that, the defendant having beaten the plaintiff's cow unmercifully, the plaintiff, in order to put an end to the animal's sufferings, put her to death: Held, after verdict, that the evidence supported the declaration, and consequently, there was no variance. *Hancock* v. *Southall*, 4 D. & R. 202.

Where a count stated that A B supplied the poor of the parish of W with provisions, and the evidence was, that he supplied the poor of the parish of W and other parishes in the work-house: Held, first, that it was no variance, the proof being larger than the allegation. Secondly, that, the objection as to a variance between the allegation of a supply of the poor and a proof of a supply of the poor in the work-house, not being taken at Nisi Prius, could not be afterwards available. *West* v. *Andrews*, 1 B. & C. 77.

The plaintiff having commenced an action against the defendant, it was agreed in writing that he should discontinue it, and the defendant engaged to pay the legal costs incurred by the plaintiff in the suit, as between party and party. In an action to recover the amount of such costs after taxation, it was averred in the declaration, that the plaintiff had discontinued the action: Held, that such averment could not be supported without proof of a rule to discontinue. *Fanshawe* v. *Heard*, 6 Law J. C.P. 52, s. c. 1 M. & P. 191.

### (E) IN CRIMINAL CASES.

[See PERJURY.]

Proof that a party stole *two dead turkies*, does not support an indictment for stealing *two turkies*. *Rex* v. *Halloway*, 1 C. & P. 128. [Hullock]

*Evidence* that a brass furnace was stolen in the county of A, does not support an indictment for stealing "a brass furnace" in the county of B and bringing it into the shire of A. *Rex* v. *Halloway*, 1 C. & P. 127. [Hullock]

The prisoner was indicted for manslaughter—the indictment stated that the prisoner *did compel and force* A B and C D, who were working at a certain windlass, to leave the same, and by such compulsion and force the said A B and C D were obliged to desist, by means whereof a basket fell on the head of A B and killed him. The evidence was, that A B was working with the prisoner and C D, when the prisoner left his work, and A B and C D not being sufficient to hold the windlass, let go, in consequence of which the basket fell on the deceased: Held, that the evidence did not support the indictment, inasmuch as the words *did compel and force*, must be construed to mean an entire force. *Rex* v. *Lloyd*, 1 C. & P. 302. [Garrow]

An indictment for manslaughter described the deceased, who was a Peer of Ireland, as "H S, Baron M of C, in the county of R, in that part of the United Kingdom called Ireland." It was proved that H was his christian name, S his family surname,

and Baron M &c. his title: Held, no variance, and that the Court was not bound to construe H S to be one christian name. *Rex* v. *Brinklett*, 3 C. & P. [Vaughan]

Where an indictment for perjury professed to set out in proper terms an information before magistrates, for an offence committed by a brewer, under the 4 Geo. 4, c. 51, s. 20; and charged the perjury to be committed on the hearing of the information, and the information given in evidence did not state the fact of the person charged being a brewer; this was held to be a variance. And that it could not be cured by giving in evidence the conviction which had passed on that information, and which conviction supplied the defect in the information.—That the evidence was inadmissible for such a purpose. *Rex* v. *Leigh*, 6 Law J. K.B. 327, s. c. 2 M. & R. 119.

An indictment for a conspiracy stated, that an issue was joined at the *general sessions* of our Lord the King, holden for the county of G, before his Majesty's justices of the court of great sessions: Held, that it was not supported by shewing that such an issue was joined at the great sessions of that county; and if it be laid that the issue was joined in an ejectment, in which "John Doe, on the demise of W R and D T, was the plaintiff;" and it appears that John Doe was plaintiff on the joint demise, and also on two several demises of the same lessors: this will be a fatal variance. *Rex* v. *Thomas*, 1 C. & P. 472. [Park]

## VENDOR AND PURCHASER.

[See CONTRACT, FRAUDS, STATUTE OF, PRINCIPAL AND AGENT, and SPECIFIC PERFORMANCE.]

(A) VENDOR.
(a) *Rights.*
(b) *Duties and Liabilities.*
(c) *Lien.*
(B) PURCHASER.
(a) *Rights.*
(b) *Duties and Liabilities.*
(C) SALE.
(a) *Particulars and Conditions.*
(b) *Biddings.*
(c) *Where complete.*
(d) *Where void or set aside.*
(e) *Re-sale.*
(D) PURCHASE-MONEY AND INTEREST.
(E) TITLE.
(F) ACTIONS.
(G) PRACTICE.
(H) COSTS.

### (A) VENDOR.

#### (a) *Rights.*

The assignees of a bankrupt, who sell property considerably under its value, from an ignorance of circumstances of which the vendee was cognisant, will be relieved. *Turner* v. *Harvey*, 1 Jac. 169.

The vendor of goods may re-sell them if the purchaser refuse to accept them; and, if any loss accrue to him on such re-sale, he may recover the amount in an action for the breach of contract. *Maclean* v. *Dunn*, 6 Law J. C.P. 184, s. c. 4 Bing. 722, s. c. 1 M. & P. 761.

#### (b) *Duties and Liabilities.*

Upon a sale of a copyhold estate, the vendor will be compelled to surrender it in person, if that can be conveniently done. *Noel* v. *Weston*, 6 Mad. 50.

The vendor of a horse who rescinds the contract, is liable to the purchaser for the keep of the horse during the time he kept it from the day of the contract. *King* v. *Price*, 2 Chit. 416.

It seems that the vendor of goods should, at the time of making the contract of sale, have the ownership in the thing sold: therefore, if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods which he has contracted to deliver, he cannot maintain an action for damages for non-performance of the contract. *Bryan* v. *Lewis*, 1 R. & M. 386. [Abbott]

#### (c) *Lien.*

A contract was entered into for the purchase of an estate, and part of the agreement was, that the purchase-money should be secured by the bond of the purchaser, with interest, and should remain so secured during the life of the vendor: the conveyance was executed, and the purchaser let into possession; the conveyance stated the price to have been paid, and a receipt for it was indorsed on the deed; but, in fact, only a part of it had been paid, and a bond was given for the payment of the residue within twelve months after the decease of the vendor, with interest thereon in the meantime: Held, by the Lord Chancellor, (reversing the decree of the Vice Chancellor, 1 S. & S. 434,) that the vendor had a lien on the estate for the amount of the bond. *Winter* v. *Anson*, 6 Law J. Chanc. 7.

On the sale of certain premises, a deed was executed by the vendor, vendee, and A, B, and C, who undertook to advance a portion of the purchase-money, and D, E, and F, who became sureties for the residue. Part of the sum agreed for, was paid with the money advanced by A, B, and C, and the remainder was discharged by bills given by the vendee, on a third person, which being dishonoured, and vendee becoming insolvent, it was agreed among the parties, that the property should be re-sold, and the proceeds appropriated to pay all persons having claims in respect of the original sale: Held, that the vendor had no lien on the purchase-money arising from the second sale, entitling him to be paid thereout what remained due to him on the first sale, in preference to the lenders of the part of the purchase-money advanced to enable the original vendee to complete his contract. *Cood* v. *Pollard*, 9 Price, 544.

A party who, having lent money to enable a vendee of property sold to pay the vendor part of the consideration for the purchase, a bond with sureties being executed to him for the remainder, takes a security for re-payment by assignment of the subject-matter, with the privity and knowledge of the vendor, the whole matter being recited in the original deed: Held, that on a second sale by the

vendee, to satisfy all demands, the original vendor had not such a lien on the purchase-money, for what remains due to him, as would defeat, or as would be preferred to, that of a mortgagee. *Cood* v. *Cood*, 10 Price, 109.

*Semble*, That a vendor by retaining, under a special agreement, possession of the title-deeds of the estate, does not waive or exclude his lien. *Wreforde* v. *Lethern*, 2 Law J. Chanc. 173.

If a vendor and vendee covenant that the purchase-money shall be repaid within two years after re-sale, the lien of the vendor is discharged. *Ex parte William Parkes*, 1 G. & J. 228.

An agreement between vendor and vendee of a chattel, that the former may resume the possession if the price be not duly paid, is a personal contract, not binding on alienee, or personal representative of vendee. *Howes* v. *Ball*, 6 Law J. K.B. 106, s. c. 7 B. & C. 481, s. c. 1 M. & R. 288.

## (B) PURCHASER.

### (*a*) *Rights.*

A purchaser gives the vendor's bankers, in whose hands the title-deeds of the estates are, an undertaking to give them his acceptance, at a specified time, for a certain sum then due to them from the vendor, after the period specified; but before he has given his acceptance, he has notice of incumbrances on the estate: Held, that as against the incumbrancer, he is not a purchaser for a valuable consideration without notice. *Reid* v. *Tait*, 1 Law J. Chanc. 6.

A purchases from B a share in a concern, and gives for it a price which he understands to be four times the amount of the yearly profits, but which, in consequence of a mistake made by B in the estimate of the profits, turns out to be more than that; the deed of assignment purports to be for an absolute sum; there is evidence that B never intended to sell for less than that absolute sum, and no evidence to the contrary: Held, that a court of equity will not decree the sum, which A alleges he has overpaid, to be refunded to him. *Stewart* v. *Stuart*, 1 Law J. Chanc. 61.

A conveys lands to trustees, in trust to sell, if the unsatisfied debts of a partnership in which he had been concerned, should at a given time exceed 40,000*l.*; the trustees sell and convey to the purchaser, by a deed, which recites, that the debts of the partnership exceeded the specified amount, and that A had died intestate as to his real estates; and the heir-at-law of A joins in that deed, and enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, and a covenant for further assurance: it afterwards appears to be uncertain whether A had not devised his real estate; and the purchaser files a bill to have protection against, or remedy of the alleged defect in his title, which this discovery created: Held, first, that the purchaser is not entitled to have an account taken of the debts of the partnership, in order to establish the fact of their having, at the time named, exceeded the specified amount; secondly, that he is not entitled to have the documents connected with the accounts of the partnership delivered to him, or deposited for safe custody; and, lastly, that he is not entitled to a covenant, either from the heir or from any other person, for the production of these books and papers. *Hallett* v. *Middleton*, 1 Russ. 243.

Executors sell by auction, in nine lots, sundry houses, which the testator, during his life, held by lease under the Crown, and of which they, after his death, obtained a new lease, subject to one entire rent of 243*l.*; the printed particulars mention that the sale is by executors, and that the nine lots are all held under one lease, and at one entire reserved rent: Decreed, upon a bill filed by the vendors, and an answer, submitting to perform the contract upon an indemnity being given,—that the purchaser of one lot, with respect to which the particulars stated that the apportioned rent for it was 52*l.*, was entitled to have an indemnity from the executors against his liability for the whole reserved rent, and the breach of any of the covenants in the original lease. In such a case the defendant is entitled to have his costs, up to and including the hearing. *West* v. *Wild*, 3 Law J. Chanc. 15.

An estate sold in the Master's office, may be purchased by the residuary legatee, tenant for life, or reversioner. *Williams* v. *Attenbrough*, 1 Turn. 76.

Where a purchaser of real property of a remainder-man, having expended money in discharge of incumbrances upon the whole estate, of which he has been let into possession, and had considered himself to have purchased: Held, to be entitled to such a lien on the estate as a court of equity will protect, by enjoining the tenant for life from proceeding against him by ejectment, until the equity of the case shall have been determined by the Court. *Ludlow* v. *Grayall*, 11 Price, 58.

A is employed for some time by Messrs. B as their attorney, and in the course of such employment a considerable debt becomes due to him; Messrs. B contract to sell an estate to C, who pays to them a part of the purchase-money, and A is employed in preparing the contract and making out the title. The solicitor of C prepares the draft of the conveyance, which is sent to A, and approved by him, on behalf of Messrs. B, and the engrossment is afterwards executed by Messrs. B, and delivered by them to A, for the purpose of being handed over to C on payment of the remainder of the purchase-money. Before this is done, Messrs. B become bankrupts, and the contract is rescinded: Held, that A has no lien on the deeds for the debt due to him from Messrs. B, but that C is entitled to have the deeds delivered to him. *Oxenham* v. *Esdaile*, 2 Y. & J. 493.

A purchases an estate from B, and pays part of the purchase-money; it is afterwards discovered that B has no title to it, or interest in it, except that, under the trusts of a will, he is to have a share of the money arising from the sale of it: Held, that a court of equity cannot give the purchaser any relief beyond directing an account of B's share of the proceeds of the estate. *Williams* v. *Bignell*, 6 Law J. Chanc. 125.

### (*b*) *Duties and Liabilities.*

As a general rule, the vendee is not bound to give the vendor information as to the value of the property. *Turner* v. *Harvey*, 1 Jac. 178.

The purchaser of an estate devised subject to the payment of the testator's debts and legacies in

general, is not bound to look to the discharge of them. *Walker* v. *Flamstead*, 2 Ken. 57, Chanc.

A mortgagee or purchaser from the executor of the personal or real property of the testator, has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence that the executor, on the sale or mortgage, is not acting in the execution of his duty, such mortgagee or purchaser, being considered a party to the breach of trust, will not hold the property discharged from the payment of debts and legacies. *Watkins* v. *Cheek*, 2 S. & S. 199.

A testatrix having directed that a leasehold should be sold, and the money divided among five persons, the administrator alleging that he had become entitled to it by an arrangement with the legatees, assigned it over for valuable consideration: Held, that at his death it remained assets unadministered, and that the vendee must be directed to convey it to the administrator *de bonis non*. *Cubbidge* v. *Boatwright*, 1 Russ. 549.

A person purchasing lands under a decree, is bound to see that the directions of the decree are observed. *Colclough* v. *Sterum*, 3 Bligh, 181.

A purchaser of lands, in a register county, is not bound to search the register. Search of the register up to a particular date, will not operate as notice of incumbrances registered at an earlier date. Search of a register, admitted or proved generally, fixes a party with notice of all the contents of the register. *Hodgson* v. *Dean*, 3 Law J. Ch. 95, s. c. 2 S. & S. 221.

On a bill by a vendor for specific performance, where the purchaser had, in 1814, entered into possession under the agreement, and pending the suit, continued in possession until 1823, the plaintiff, in consequence of a defect in the title, failing in his attempt to compel the performance of the contract, the Court refused to decree, under the prayer for general relief, an account of rents and profits against the purchaser, though he had stated by his answer that he was willing to pay a fair rent. *Williams* v. *Shaw*, 3 Russ. 178.

By an agreement entered into with executors for the purchase of a leasehold public house, and the good-will and licences connected with it, stock in trade, and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th of September 1821; the valuation was made, but, on the 29th of September, the purchaser, alleging that there was a defect in the title to the leasehold, refused to perform his contract; the executors filed a bill for specific performance, but in the meantime remained in possession of the house and carried on the business: Held, that, though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since September 1821:

That he could not be compelled to take that portion of the stock in trade on the premises at the time of the decree, which was not there at the date of the agreement, but had been substituted for such parts of the old stock, as had been consumed in the usual course of the business:

That the purchaser ought to be charged with rent, taxes, and other outgoings, paid by the executors since September 1821, and with interest on the sums so paid them:

That the purchaser was not entitled to any occupation-rent, or other allowance for the use of the house and furniture by the executors during the period that elapsed after the 29th of September 1821. *Dakin* v. *Cope*, 2 Russ. 170.

### (C) SALE.

#### (*a*) *Particulars and Conditions.*

Vague and indefinite words in particulars of sale ought to be considered by a purchaser merely as a ground of inquiry; and their inaccuracy does not form a sufficient objection to a suit for specific performance.

A piece of land, imperfectly watered, was described in the particular as uncommonly rich water meadow: Held, that this was not such a misrepresentation as would avoid the sale. *Scott* v. *Hanson*, 5 Law J. Chanc. 67, s. c. 1 Sim. 13.

The particulars of sale at a public auction described two houses as Nos. 3 and 4, and stated, that the taxes of No. 3 were paid by the tenant. The houses ought to have been described as Nos. 2 and 3, but the names of the occupiers were correct; and it should have been stated that the taxes of No. 3 were farmed by the landlord. The houses, Nos. 2 and 4, were of the same rate: but No. 4 was in the best state of repair: Held, that these misdescriptions were not cured by a condition, which provided, that if any error or mis-statement should be found in the particular, it should not vitiate the sale. *Leach* v. *Mullett*, 3 C. & P. 115. [Best]

#### (*b*) *Biddings.*

Where a colliery is the subject of sale, the rules, which regulate the practice of opening biddings upon the sale of landed estates, do not apply; hence, upon an offer to give 10,000*l.* for a colliery, sold for 8850*l.*, a motion for that purpose was refused. *Williams* v. *Attenborough*, 1 Law J. Chanc. 138, s. c. 1 Turn. 70.

It is irregular to move to confirm the Master's report of the purchase, after and pending a motion to open the biddings.

On a motion for opening the biddings on five lots, and that these lots may be sold in one lot, an advance of 50*l.* on 400*l.*, which was the sum total of the prices for which they were sold, is not sufficient.

*Semble*—Where a purchaser has bought several lots, if the biddings are opened on the prior lots, he ought not to be held to his purchases of the subsequent lots.

The biddings will not be opened on the application of a person, who, in making the application, is the agent of a person who was present at the sale. *Price* v. *Price*, 1 Law J. Chanc. 184, s. c. 1 S. & S. 386.

Where, on a sale, the vendee has only obtained his report to be affirmed *nisi*, service of a notice of motion to open bidding, suspends its being absolute. *Vansittart* v. *Collier*, 2 S. & S. 608.

The consent of the owner of property, sold under a decree, is necessary to a motion to annul a bidding. *Rex* v. *Brickdale*, 8 Price, 630.

Incumbrancers will be allowed to bid at the sale of the premises charged; but the sale must not be

under their direction. *Ex parte Slack*, 1 Law J. Chanc. 70.

It is not an universal rule that biddings shall not be opened in favour of parties present at the sale. *Williams* v. *Attenborough*, 1 Law J. Chanc. 138, s. c. 1 Turn. 76.

Biddings will be opened at the instance of a person present at the sale, if he offers an advance. *Tyndale* v. *Warre*, 1 Jac. 525.

Biddings opened on the application of a person who was present at the sale, though the advance offered was less than 5 per cent. on the price. *Lefroy* v. *Lefroy*, 2 Russ. 606.

The additional bidding of 500*l.* on the sum of 8950*l.* is a sufficient advance to induce the Court to order biddings under a sale before the Master, directed by a decree, to be re-opened. *Pearson* v. *Collett*, 13 Price, 213, s. c. M'Clel. 82.

Where an advance of 350*l.* upon 5300*l.* is made, biddings will not be opened although at the suit of a creditor. *Garstone* v. *Edwards*, 1 S. & S. 20.

(*c*) *Where complete.*

Though an estate, at law, passes by a conveyance expressing that the purchase-money is paid, contrary to the fact,—yet, in equity, it does not pass until actual payment. *Winter* v. *Anson*, 1 S. & S. 445.

The risk of accident to goods must be with the buyer, if the right of property has passed to him, though the possession be with the seller.

The right of property remains in the seller so long as any act remains to be done as between him and the buyer.

Accordingly—where a stack of hay was sold, and by agreement was to remain on the premises of the buyer until a given day; and was not to be cut by the seller until he paid for it; and before the day of payment arrived it was accidentally burned: Held, that the loss must fall on the buyer; the right of property being complete in him, though the possession remained in the seller, no act remaining to be done by the latter. *Tarling* v. *Baxter*, 5 Law J. K.B. 164, s. c. 6 B. & C. 360.

The risk of accident to goods must remain in the seller until the right of property passes to the buyer.

In ordinary cases, the seller has the right of lien until payment; and unless he do some act to shew that he means to divest himself of the property, the right in the property is concurrent with the lien.

The property remains in the seller so long as any act remains to be done by him to divest it.

Therefore, where a contract was made for the sale of all the goods at a particular place, at so much per ton, to be paid for at a certain day, and before the goods had been weighed an accident happened to them—it was held, that the risk lay upon the seller; and that, although a partial delivery had taken place, that partial delivery could not alter the liability, because the seller had still the right of lien. *Simmons* v. *Swift*, 5 Law J. K.B. 10, s. c. 5 B. & C. 857.

(*d*) *Where void, or set aside.*

On a sale of a reversionary interest, with the usual condition, that no error of description &c. should vitiate the sale, but a compensation be allowed; the reversion was described as absolute, on the death of a person aged sixty-six. In fact, the person was only sixty-four, and the reversion was not absolute, as the property would be divided if he left more children than one: Held, that the sale was void, and that the offer of a compensation would not support it: but if it had been a mere difference of the age, *semble*, that it would have been otherwise. *Sherwood* v. *Robins*, 3 C. & P. 339. [Tenterden]

A party, who has covenanted to remove and pay off an incumbrance, on premises which are subject to a trust for sale, will not be allowed to raise an objection to the sale of the property, on the ground of the existence of that incumbrance. *Roberts* v. *Boson*, 3 Law J. Chanc. 113.

Inadequacy of price is no ground for setting aside a private sale. *Headen* v. *Rosher*, 1 M'Clel. & Y. 89.

It is no objection to a sale in court, in execution of a will, that there are infants interested under the will, who cannot join in the conveyance. *Powell* v. *Powell*, 6 Mad. 53.

A purchase under a decree is void if the directions of the decree are not observed.

Lands in strict settlement, with a power to grant leases, being subject to prior incumbrances, are, by a decree in a suit instituted by the incumbrancers, directed to be sold, subject to the charges prior to the deed of settlement. Pending the suit, the tenant for life under the settlement grants leases not authorized by the power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges.

Held, (reversing the decree of the Court below,) on a suit by the remainder-man in tail, that the sale subject to charges not warranted by the decree is void. *Colclough* v. *Sterum*, 3 Bligh, 181.

A transaction of sale, made upon a false or mistaken consideration, between parties in the relation of brothers in law, the vendor being an heir succeeding to the estate sold, and the purchaser executor of the will of the vendor's father; and where the party selling is under circumstances of great pecuniary embarrassment and distress, will not be impeached if fairly made: but if the consideration for the purchase was the balance of an account, which appears to be erroneous, the whole transaction must be so far investigated as to correct the accounts. *M'Neill* v. *Cahill*, 2 Bligh, 228.

Agreement between vendor and purchaser, of a copyhold estate, in which they covenant for themselves and their representatives to fulfil the contract, and to refer the question of value. One of the parties dying, the representatives cannot annul the decision of the referee, by shewing an error in his estimate, or compel the acceptance of the penalty, under which the agreement was secured, in satisfaction of their breach of contract. *Belchier* v. *Reynolds*, 2 Ken. 87, Chanc.

A man, possessed of the lease of a public-house which he kept, employed a broker to sell it for him, and instructed him as to the amount of spirits, porter, &c. which were consumed in the house. The lease was bought on those representations. It turned out that the quantity of spirits and porter sold in the house, was much less than that represented by the broker. The jury were directed to consider, whether the representation was false and fraudulent; and they found a verdict for the purchaser. The Court would not disturb that verdict, on the suggestion that the purchaser had the means of ascertaining whether the

representation was true or not. *Dobell* v. *Stevens*, 3 Law J. K.B. 89, s. c. 3 B. & C. 623, s. c. 5 D. & R. 490.

On the sale of an estate by auction, the name of the owner did not appear in the particulars or conditions of sale, and the agreement signed by the purchaser did not mention the owner's name, and was not signed either by him or the auctioneer: *semble*, that the seller cannot maintain an action for the non-completion of the contract. *Wheeller* v. *Collier*, 1 M. & M. 123. [Tenterden]

Where certain articles were put up to sale by auction, at which the vendee and his friend were the only bidders, as the rest of the company were deterred from bidding by the vendee's stating to them, that he had a claim against those articles, and that he had been ill-used by the late owner: Held, under such a sale, that the vendee did not acquire any property. *Fuller* v. *Abrahams*, 6 B. Mo. 316, s. c. 3 B. & B. 116.

A person authorized his servant to sell sixty sheep for ready money. The servant sold them to a man, who gave him a cheque on a banker, telling him, that it was as good as ready cash. The cheque, when presented on the next day but one, was not paid. On the day after the sale, the property of the vendee, together with the sheep, were taken in execution by the sheriff. The original owner of the sheep contrived to gain possession of them, and the sheriff brought an action to recover the value, and obtained a verdict. The Court held, that the question, whether the vendee ever intended to pay for the sheep, or whether the whole transaction was not a fraud, ought to have been left to the jury; for in the latter case no property passed, and the owner had a right to retake them even from the possession of the sheriff. *Earl of Bristol* v. *Wilsmore*, 1 Law J. K.B. 179, s. c. 1 B. & C. 514, s. c. 2 D. & R. 755.

### (*e*) *Re-sale.*

One of the conditions of sale was, that if, at the time of sale, the purchaser did not comply with the conditions, the vendor might declare his purchase void, and might thereupon put up the property again at the bidding immediately before the bidding of the defaulting purchaser; the premises were knocked down at the price of 16,800*l.* to a purchaser who made default; his purchase was declared void, and they were again put up at 16,750*l.*, the bidding next to his; but that bidder and others having refused to abide by their former offers, the property was put up at 13,200*l.* and sold for 15,400*l.* to the same person who had before offered 16,750*l.*—*Semble*, that the vendors, after declaring the first purchase void, could not at that sale put up the premises at less than 16,750*l.* *Roberts* v. *Beson*, 3 Law J. Chanc. 113.

If, at the re-sale of an estate, the person who opened the biddings is outbid, he is discharged. *Williams* v. *Attenborough*, 1 Turn. 77.

Where there are two lots, they will be ordered to be re-sold in one, if the advance offered on the smaller lot is not sufficient to authorize the opening of the biddings for that lot separately. *Brookfield* v. *Bradley*, 1 S. & S. 23.

A purchased for B, but without authority, an estate sold under a decree. B died without adopting the purchase. The order *nisi* was nevertheless obtained: The Court refused to order B's executors to pay the purchase-money; and, on the heir declining the purchase, discharged the order *nisi*, and directed a re-sale. *Lord* v. *Lord*, 1 Sim. 503.

## (D) PURCHASE-MONEY AND INTEREST.

The vendee will be ordered, on motion before answer, to pay the purchase-money into court, where he has taken possession without the privity or consent of the vendor. *Blackburn* v. *Stace*, 6 Mad. 69.

But a purchaser who is not in possession and has not accepted the title, will not be ordered to pay his purchase-money into court. *Anon.* 1 Law J. Chanc. 177.

If the executors of a purchaser under a decree, refuse to pay the purchase-money, they cannot be compelled to pay it, unless a suit be instituted by the heir. *Lord* v. *Lord*, 1 Sim. 503.

Where by a contract for the purchase of an estate, a deposit is paid, and a day is fixed for the completing of the purchase, but it afterwards turns out that the purchase cannot be completed by that day, and the vendor continues in possession of the estate after it, the vendor will not be made to pay the deposit into court, if the delay is occasioned by the conduct of the purchaser. *Wynne* v. *Griffith*, 1 Law J. Chanc. 110, s. c. 1 S. & S. 147.

Money paid in by purchasers of mortgage property, cannot be paid to the mortgagee under any circumstances, until he has actually executed a proper conveyance to the vendee. *Rex* v. *Adam*, 11 Price, 660.

Where an estate has been sold under the direction of the Court, and the purchasers have paid the money into court, no part of the purchase-money will be ordered without the consent of the purchasers to be paid, even in the discharge of incumbrances affecting the estate, till conveyances to them have been executed, although the delay in executing the conveyances should have arisen from their own negligence. *Beven* v. *Beven*, 1 Law J. Chanc. 159.

When a purchaser pays into court part of his purchase-money, and it is invested in stock, the vendor sustains the loss, and enjoys the benefit of subsequent variations in the price of the funds. *Hibberson* v. *Fielding*, 2 S. & S. 371: s. P. *Gell* v. *Watson*, 3 Law J. Chanc. 199, s. c. 2 S. & S. 402.

Where a power authorizes trustees to give receipts for the purchase-money of land directed to be disposed of, and such produce to be expended in the purchase of other lands, to be settled in the same manner as the lands sold; a vendee having paid the purchase-money *bonâ fide* to the trustees, and the parties having given their receipts to the vendee, cannot be affected by any misapplication of the money by the trustees. *Roper* v. *Halifax*, 8 Taunt. 845.

Where a testator, being, at the time of his death, a trader subject to the bankrupt laws, charges his legacies on his lands, a purchaser from the heir or devisee is bound to see to the application of his purchase-money in payment of the legacies. *Horne* v. *Horne*, 4 Law J. Chanc. 52, s. c. 2 S. & S. 448.

A vendor shall not have interest, except from the time of a good title shewn. *Monk* v. *Huskinson*, 5 Law J. Chanc. 163, s. c. 1 Sim. 280.

By an agreement for the purchase of an estate, the

title is to be completed and possession given to the purchaser on the 11th of October 1821; in a suit instituted by the vendor to compel a specific performance, the Master reports, that a good title was not shewn till the 15th of January 1827: Held, that the purchaser is to pay interest on his purchase-money, and to have an account of the rents and profits, not from the time mentioned in the agreement, but only from the time when, according to the Master's report, a good title was shewn. *Jones* v. *Mudd*, 6 Law J. Chanc. 27.

Where it is provided by condition of sale, that interest shall be paid from a specified day, if the purchase is not then completed, the purchaser cannot relieve himself from payment of interest by asserting that the delay in completing the contract was caused by the vendor; but where there is no specified stipulation, it is otherwise. *Esdaile* v. *Stephenson*, 1 S. & S. 122.

A purchaser will be charged with interest on his purchase-money, only from the time when, with reasonable diligence on his part, the conveyance might have been completed.

Though a purchaser has the benefit of the increased value of ornamental timber, by reason of its growth during the years that have intervened between his agreement and the time from which he is considered as in possession of the land, he will not, in respect of that benefit, be charged with interest on any part of the purchase-money. *Boehm* v. *Wood*, 1 Law J. Chanc. 234.

A purchaser, who has taken possession under the contract, keeps always (except on four days), during a delay of nine months spent in investigating the title, a balance at his banker's exceeding 14,000*l.*, the amount of the purchase-money, and gives notice to the vendors that it is ready, and that he will invest it as they please: Held, that he is not chargeable with interest on so much of the purchase as is equal to the excess of his average balances at his banker's during these nine months, over his average balances for the preceding three years, but that he is chargeable with interest on the residue of it. *Winter* v. *Blades*, 4 Law J. Chanc. 81, s. c. 2 S. & S. 393.

The amount of deterioration of an estate pending a suit for specific performance, having been ascertained by an issue, the purchaser was allowed it out of his purchase-money, which he had paid into court under an order, with interest from the time when he paid in his money. *Ferguson* v. *Tadman*, *Ruck* v. *Tadman*, 1 Sim. 530.

By conditions of sale, the purchase-money was to carry interest, a deposit of 20*l.* per cent. was to be paid, and the auction-duty was to be borne equally by the purchaser and the vendor; the purchaser paid only the amount of the deposit, and out of it the auctioneer paid the whole of the auction-duty: Held, that the portion of the deposit, applied in discharge of the purchaser's moiety of the auction-duty, was to be considered as an unpaid part of the purchase-money, and that the vendor was entitled to interest on it. *Townshend* v. *Townshend*, 2 Russ. 303.

It had been agreed, that after the expiration of a certain credit, interest upon the price of goods sold should be paid: The Court, after a verdict for the plaintiff, (upon a declaration containing the indebitatus counts for goods sold, and interest,) giving him interest, refused to set aside the verdict, or to reduce the damages. *Harrison* v. *Allen*, 2 Law J. C.P. 97, s. c. 2 Bing. 4, s. c. 9 B. Mo. 28.

## (E) TITLE.

A vendor is bound to use all reasonable diligence to make a good title; nor will the Court without the consent of the purchaser, excuse the vendor from making a good title, on the terms of discharging the purchaser from his contract. *Hawkins* v. *Shewen*, 1 Law J. Chanc. 148.

Where an agreement for the sale of leasehold property is silent in specifying the terms, on the part of the vendor, that he intends to sell his interest only in the residue of the term, and that he will not warrant his lessor's title, it is incumbent on him to shew, to the satisfaction of the purchaser, that his lessor, or the original grantor of the term, was entitled to grant the lease: therefore, if he fails in substantiating that, he cannot compel the vendee to complete the purchase. *Purvis* v. *Rayer*, 9 Price, 488.

A purchaser, who has paid a deposit under a prior engagement, and taken possession, contracts to pay the residue of the purchase-money on a day certain, upon the vendor making a good title to the premises; or, otherwise, if such title shall not be complete, upon the vendor's executing a bond to complete the title, and to convey the estate as soon as the same can be completed: Held, that the vendor is bound to shew that he can make a good title, and that the purchaser is not to rely merely on his bond. *Clerke* v. *Vaux*, 6 Law J. Chanc. 17.

A purchaser under the decree of the Court, is never let into possession till he has approved the title.

A purchaser under a decree, who takes possession without the order of the Court, by an arrangement with the solicitor in the suit, accepts the title. *Wilden* v. *Andrews*, 4 Law J. Chanc. 206.

Consent to accept a title given under the influence of representations made on the part of the vendor, which turn out to be inaccurate, will not bind a purchaser.

If a purchaser, entitled by his agreement to possession, exercises acts of ownership, under the persuasion that the title is perfect, and that nothing will intervene to prevent the completion of the agreement, he is not thereby precluded from having a reference on the question of title, as to objections not appearing on any abstract delivered to him prior to the exercise of the acts of ownership. *Johnes* v. *Claughton*, 2 Law J. Chanc. 113.

A purchaser, who under the agreement took possession in 1814, admits by his answer, that in that year an abstract of title was delivered to him, and approved by his counsel: Held, that he has a right to a reference of the title to the Master, though he has all along continued in possession, and never taken any objection to the title. *Boxhall* v. *Jackson*, 3 Law J. Chanc. 100.

A purchaser, by taking possession of property and acting as the owner of it, does not waive objection to the title, when the contract, under which such possession is taken, proceeds on the supposition that he is to have possession, and provides, at the same time, that a title shall be made to the property.

The vendor of a share in a partnership, in a bill filed for specific performance of the contract of sale, charged, as a ground for insisting that all objections

to the title had been waived, that the purchaser had mismanaged the trade: the vendor, not being able to make a title to certain lands and hereditaments, which formed an essential part of the property with which the partnership was carried on, could not have a decree for specific performance; and he then asked to have an inquiry as to the compensation which he might be entitled to in respect of the injury done to the property by the purchaser, while acting as owner: Held, that, upon a bill so framed, the vendor was not entitled to have compensation for any loss alleged to have been sustained in consequence of the conduct of the defendant. *Stevens* v. *Guppy*, 6 Law J. Chanc. 164.

A vendee, who has purchased from an heir-at-law, who claims upon the supposition that his ancestor's will was void, is entitled to have the will produced. *Stevens* v. *Guppy*, 4 Law J. Chanc. 59, s. c. 2 S. & S. 439.

A purchases of B a close of land, parcel of a larger estate, and takes a conveyance of it, with a covenant for further assurance, but without the delivery of any title deeds, or any covenant for their production; afterwards, A contracts to sell the close to a third person: Held, that A has an equity to compel B to produce the title deeds.

*Quære*—Whether, under the covenant for further assurance, a purchaser, who takes a conveyance without a covenant for the production of title deeds, can afterwards call upon the vendor to execute such a deed of covenant. *Fair* v. *Ayres*, 4 Law J. Chanc. 166, s. c. 2 S. & S. 533.

Action by vendee, against vendor of a lease, for the deposit: Held, that the vendor was not bound to produce his lessor's title, without an express agreement to that effect. *George* v. *Pritchard*, 1 R. & M. 417. [Abbott]

A plaintiff, who has not established his title, has a right to the production of documents in the defendant's custody, by which he alleges that his title will be established. *Moons* v. *Bernales*, 1 Law J. Chanc. 185.

A purchaser, who agrees not to require an abstract of title, has nevertheless a right to inspect the deeds which constitute the vendor's title. *Harding* v. ——, 4 Law J. Chanc. 213.

Purchaser not compelled to take a doubtful title. *Price* v. *Strange*, 6 Mad. 159.

A purchaser is not bound to accept a title depending upon a recovery suffered by a tenant in tail of lands, the reversion of which had vested in the crown by attainder of the reversioner. *Blosse* v. *Clanmorris*, 3 Bligh, 62.

A trustee under a will, who takes a trust clothed with an interest, contracts to sell lands of the testator, in order to pay off charges. In a suit for the administration of the testator's estate, to which the purchaser is not a party, an order is made, with his consent, referring it to the Master to inquire whether a good title can be made to the premises sold. The Master reports, that a good title can be made; but the purchaser objects to the title, on the ground that all that can be given him is an equitable estate, because two commissions of bankrupt had been issued against the trustee, under which, though they had not been proceeded in, any future assignees would have the legal estate: Held, that such a purchaser is not to be considered as a purchaser under the decree of the Court, and will not be compelled to take an equitable title. *Cann* v. *Cann*, 1 Law J. Chanc. 219, s. c. 1 S. & S. 285.

The inability to make a good title to one lot, does not authorize the vendee's refusing to complete his purchase as to the other, provided a legal title can be shewn. *Lewin* v. *Guest*, 1 Russ. 325.

An act of bankruptcy, committed by the vendor, though no commission of bankrupt issue, is a valid objection to the title. *Foster* v. *Gould*, 3 Law J. Chanc. 200.

A, the wife of a bankrupt, her husband being abroad, without the consent of her husband, or a legal ratification by herself, conveys to trustees under his sequestration, lands of which she was seised to her and her heirs. Upon a sale of these lands by public roup, the vendor undertakes to execute a valid irredeemable disposition. Upon a suit by the vendor to enforce the payment of the purchase-money, and a proceeding for suspension by the vendee: Held, on appeal, reversing the judgment below, that it is not such a title as a purchaser is bound to accept. *Dick* v. *Donald*, 1 Bligh, N.S. 655.

A contract for the purchase of a farm, described it as containing "349 acres or thereabouts, be the same more or less;" and stipulated that the premises should be taken at the quantity above stated, whether more or less: in fact, the farm consisted of only 349 customary acres, which were less than the same number of statute acres by about 100 acres or upwards. On a bill being filed for specific performance, the purchaser, admitting that he had been for several months in possession of the property, and had exercised acts of ownership over it, on the faith that a good title to 349 acres would be shewn, insisted, that, in the contract, "acres" meant statute acres, and that he was not bound to perform the contract, unless 349 statute acres were conveyed to him: Held, that in such a case, a reference of title would not be directed on motion.

*Semble*—The stipulation, that the premises should be taken at the quantity before stated, be the same more or less, would not cover so large a deficiency as existed here. *Portman* v. *Mill*, 2 Russ. 570.

An entail in the prohibitory clause provided that it should not be lawful to sell, alienate, or put away the lands, &c.; nor to alter the course of succession; nor to contract debts, &c.; nor to do or commit any fact or *deed*, civil or criminal, whereby the lands, &c. might be adjudged, evicted, or forfeited, &c.; nor to permit the estate to be adjudged or affected by any debts or deeds contracted or committed by the grantor or the heirs of entail;—it contained an irritant clause in the following words: "All which debts, *deeds*, and contractions, are hereby declared null and void, &c." The resolutive clause provided that the heir in possession, if he should not redeem any adjudication which might be led against the estate, for and upon the debts and *deeds* of, &c. should forfeit, &c.:

Held, that the word "deeds" in the irritant clause, does not apply to all the things enumerated in the prohibitory clause, but it is restricted by the context to such deeds as are of a nature to create a debt or burden; that it refers especially to the debts and deeds previously prohibited, and cannot be extended to the prohibition against selling.

Upon a sale, therefore, by the heir in possession,

an objection to the title by a purchaser, on the ground that the irritant clause struck at alienation, was held invalid. *Barclay* v. *Adam*, 3 Bligh, 275.

Where an estate is sold free from incumbrances, and, upon production of the abstract of title, it appears that the estate is subject to a mortgage or other charge or incumbrance, the incumbrance does not afford an objection to the title, but is matter of conveyance only. And such is the rule, even if the amount of the incumbrance be greater than the purchase-money. *Townsend* v. *Champernown*, 1 Y. & J. 449.

Contract for the sale of the borough, lordship, and manor of H, with the rights, royalties, members, and appurtenances; and all the messuages, lands, tenements, and other hereditaments, and their rights, members, and appurtenances, to the said borough, lordship, and manor belonging, as set forth and described in a particular referred to in the contract. The vendors derived their title under a conveyance in 1809, by the general description of the borough, lordship, and manor of H, with all and singular the rights, members, and appurtenances thereunto belonging or appertaining, with a reference to preceding deeds, containing the same description, through which the title was traced, in the same general manner, to 1744. The purchaser objected that the identity of the several lands mentioned in the particular, as forming part of the manor, was not made out, and it appeared that some of them had been purchased since 1744, and, therefore, could not pass under the ancient and general description. The vendors thereupon produced abstracts of the title to such lands, and showed by stewards' books, that the lands, ever since they had been purchased, had been annexed to and treated as part of the manor; and contended that they passed under the general words "appertaining or belonging," in the conveyance of 1809. To obviate the difficulty, they also obtained a confirmation of that conveyance, with a declaration that the lands in question were intended to be passed by it, under the general words. Exceptions to the Master's report of a good title were overruled, principally, as it should seem, on the ground of the deed of confirmation; the Court declaring, that if it were of opinion that a good title could be made, it would hesitate to decree a specific performance, unless that deed were delivered to the purchaser.

Where a deed, dated sixty years back, contains a recital of the creation of a mortgage term, and a subsequent assignment of it, in trust to attend the inheritance, and the term is not subsequently noticed in the title, it will be presumed to have been surrendered, and it is no objection to the title, that the vendor cannot produce the deed creating the term, nor the assignment of it.

It seems to be no objection to a title, that a person, who, sixty years back, was the survivor of three trustees, appointed by will for sale of an estate, did not execute a conveyance, purporting to be made by him and the parties beneficially interested; possession having gone under that conveyance, and the estate in equity being converted into personalty. *Townsend* v. *Champernown*, 1 Y. & J. 538.

Upon a contract for a sale of the sublease, the objection to the title, arising from the possibility of a future breach of the covenant by the representative of the original lessee, may be cured, either by an insurance, in the name of that representative, for the whole residue of the term created by the sublease, or by making that representative join in a covenant, that the purchaser shall be at liberty to insure in his name, and to deduct the annual premiums out of the rent. *Montresor* v. *Williams*, 1 Law J. Chanc. 151.

In a suit for specific performance, where the vendor cannot make a good title, when the cause comes on to be heard on further directions, the Court will not allow the cause to stand over, in order that he may be able to cure the defects in his title.

No counsel having appeared for the plaintiff at the hearing on further directions, and the bill having been dismissed, a petition to have the cause again heard will be refused, with costs, where the ground of application is, that the counsel were instructed on the very day of the hearing, and that, if they had obtained further time from the Court, the defect of the title could have been cured. *Bassell* v. *Mendham*, 1 Law J. Chanc. 160.

If the vendor, at the time of contracting to sell, has no title, and has no title when he calls upon the purchaser to fulfil one of the terms of the contract—*Semble*, that the purchaser may abandon the purchase, and demand back his deposit.

A deficiency in the smallest portion of interest, in the subject of sale, either as to quantity or duration, is, at law, a total want of title.

Accordingly—a seller contracted to grant a lease for 21 years at a premium, part of which was to be paid on a given day; and on that day, he required payment, and he was then, on the other hand, required to shew his title. He did not then shew it; whereupon the purchaser abandoned the contract; and, it turning out that a term of only five days was outstanding, of which the seller was not aware,—it was held, that the purchaser might recover back his deposit; though the title in other respects was good, and though the seller could, no doubt, have gotten in the five days term. *Roper* v. *Combes*, 5 Law J. K.B. 223, s. c. 6 B. & C. 34.

It seems that a contract to sell, implies a promise that the seller has title; and if it turns out that he has not, he is liable in damages to the purchaser, not only to the amount of his expenses actually incurred, but to the value which the bargain would have been to him, if it had been completed.

But, at all events, a person who has not even an equitable interest, but who contracts to sell, in the fair expectation that he will be able to do so, is liable to pay the value which the bargain would have been to the intended purchaser. *Hopkins* v. *Grazebrook*, 5 Law J. K.B. 65, s. c. 6 B. & C. 31, s. c. 9 D. & R. 22.

Recitals in deeds 33 years old, are not evidence of pedigree against third persons, unless supported by extrinsic evidence. *Fort* v. *Clarke*, 1 Russ. 601.

A vendee will be compelled to complete his purchase where there has been an undisputed possession for sixty years, and under such circumstances, the loss of a deed recited creates no reasonable doubt as to the validity of the title.

The recital of a deed is constructive notice of its contents. *Prosser* v. *Watts*, 6 Mad. 59.

A reference of the title will not be ordered upon the coming in of the answer, if the purchaser, in his

answer, objects to the performance of the contract on the ground that the premises are subject to a right of foot-path, and that the vendor represented to him that no such right of foot-path existed. *Anon.* 1 Law J. Chanc. 177.

It is unsettled, whether the Master has, or has not, a right to call on the parties to give him, upon a question of title, the opinion of a conveyancer. *Flower* v. *Walker*, 1 Russ. 408.

(F) ACTIONS.

To support an action for goods bargained and sold, it is necessary that there should have been a specific appropriation to the buyer of the particular goods, and that appropriation have been expressly or impliedly assented to by the buyer.

Thus, A having a patent for certain spinning machinery, received an order from B to have some spinning-frames made for him. A employed C to make the machines for B, and informed the latter that he had so done. After the machines had been completed, A ordered them to be altered. They were afterwards completed according to this new order, and packed up in boxes for B, and C informed B that they were ready, but he refused to accept them: Held, that C could not recover the price from B in an action for goods bargained and sold, or for work and labour, and materials. *Atkinson* v. *Bell*, 6 Law J. K.B. 258, s. c. 8 B. & C. 277, s. c. 2 M. & R. 292.

As a trader, by keeping goods, supplied to him on sale or return, after the credit has expired, makes them his own, the price of them may be recovered under the common count for goods sold and delivered. *Harrison* v. *Allen*, 1 C. & P. 235. [Park]

If one order a certain machine, *e. g.* a thrashing-machine, which, when sent to him, turns out to be unfit for use, he should either return it immediately, or else give immediate notice to the vendor to fetch it away; for, if he keep it a long time without doing either, he will be taken to have waived all objections to its goodness. *Cash* v. *Giles*, 3 C. & P. 407. [Park]

If a person purchases an article, and suffers it to remain on his premises for two months without examination, and then finds it to be unfit for use, he cannot, after that length of time, avail himself of the objection in answer to an action for the price, unless some deceit has been practised with regard to the article. *Percival* v. *Blake*, 2 C. & P. 514. [Abbott]

If the vendor of goods sold at a specific price, sends goods which do not correspond with the sample, he is not entitled to recover more than the actual value of the goods. *Germaine* v. *Barton*, 3 Stark. 32. [Bayley]

A plaintiff cannot recover for goods sold which he knows are to be applied to an illegal purpose, though he be not active himself in their being so applied, and be no sharer in the advantage to be derived therefrom. *Hutton* v. *Wry*, 5 Law J. K.B. 220.

One who has an interest in goods at the time of their being ordered, is liable for their payment; though the vendor may not know of his interest at the time, nor have supplied the goods upon his credit.

And an inchoate interest at the time is sufficient. Therefore, where a person was to have an interest in goods, if they arrived safely, and in good condition, which they afterwards did, he was held to be liable for their payment. *Melhuish* v. *Pearson*, 5 Law J. K.B. 78.

Where a brewer delivers beer to be used in a particular public house, he cannot make any person except the licensed keeper of the house *primarily* liable for it, so as to maintain an action for goods sold and delivered against him. *Meux* v. *Humphreys*, 1 M. & M. 132. [Tenterden]

Where, under a warranty, plaintiff delivered a horse to the defendant, for which he was to be paid partly by another horse belonging to the defendant, and partly by money; and the defendant delivered his horse, but refused to pay the money, on the ground that the plaintiff's horse was unsound: It was holden, that the money might be recovered under a common count for horses sold and delivered; though the plaintiff had failed in proving the agreement, as stated in the special count. *Sheldon* v. *Cox*, 5 D. & R. 277, s. c. 3 B. & C. 420.

If bills of exchange be given in payment of goods, and be dishonoured, the vendor may, though he has them in his possession, recover in assumpsit for goods without delivering up those bills, and the defendant must seek relief in equity, if they are not forthcoming. *Hadwen* v. *Mendisabel*, 2 C. & P. 20. [Best]

The defendant, being indebted to the plaintiff for goods sold, gave him two bills of exchange, which the plaintiff indorsed, and paid to B & B. These bills having been dishonoured by the defendant, the plaintiff sued him for his original demand; and at the trial, it appeared, that when the action was commenced, the bills were still in the hands of the indorsees, and that, about a fortnight before the trial, the plaintiff had sent a clerk to them for the bills, which they returned to him; but it did not appear that any money passed: Held, that the plaintiff was entitled to recover. *Burden* v. *Halton*, 6 Law J. C.P. 61, s. c. 4 Bing. 454, s. c. 1 M. & P. 223.

Receiving a commission on the sale of goods, does not render the party an incompetent witness, in an action for goods sold and delivered. *Murley* v. *Langrick*, 1 C. & P. 216. [Abbott]

In an action for goods sold and delivered, the plaintiff proved the possession of the goods by himself, and that the defendants had removed them; it appeared that the goods consisted of spar lying on the lands of A, and that the plaintiff claimed under A, by a written agreement, not produced: Held, that the proof of the title to the goods was insufficient, and therefore a contract between the parties could not be implied. *Les* v. *Shore*, 1 Law J. K.B. 48, s. c. 2 D. & R. 198, s. c. 1 B. & C. 94.

In an action for an engraver's bill, the Court will not compel the defendant to produce the copper-plate for the inspection of the plaintiff. *Dell* v. *Taylor*, 3 Law J. K.B. 225, s. c. 6 D. & R. 388.

Where it appeared that the goods were sent to be sold on commission, and it was alleged in a special count, that, although the defendant afterwards had sold them, he had not accounted: It was held, that some evidence of the sale was necessary. *Elbourn* v. *Upjohn*, 1 C. & P. 572. [Best]

Where a purchaser abandons the contract by requiring more title than he ought, or more than he bargained for, *semble*, that it is not necessary to tender him a draft conveyance previously to bring-

ing an action against him for damages, by reason of the breach of his contract. *Wilmot* v. *Wilkinson*, 5 Law J. K.B. 196, s. c. 6 B. & C. 506.

Where a purchaser has given notice of his intention to abandon the contract by reason of a defect in the title, he may maintain an action against the vendor to recover damages for breach of the contract, although his deposit-money, with interest, has been paid into court; and although he had been let into possession, and had not tendered any conveyance for execution by the vendor. *Pearson* v. *Upton*, 6 Law J. K.B. 285.

In an action to recover the deposit on the purchase of an estate, on the ground of a defect in the vendor's title, specified on rescinding the contract, no objection can be insisted on at the trial which was not stated as a reason for refusing to complete the contract, if it be of such a nature that it might, if stated, have been removed. *Todd* v. *Hoggart*, 1 M. & M. 128. [Tenterden]

On the sale of an estate by auction, the name of the owner did not appear in the particulars or conditions of sale, and the agreement signed by the purchaser did not mention the owner's name, and was not signed either by him or the auctioneer: *semble*, that the seller cannot maintain an action for the non-completion of the contract. *Wheeler* v. *Collier*, 1 M. & M. 123. [Tenterden]

Where the plaintiff, having agreed by parol for the purchase of an interest in houses, sold the bargain to defendant for 40*l.* and the premises were subsequently conveyed to his nominee, but not in trust for him: Held, that a count upon a promise, in consideration of plaintiff's relinquishing and giving up the bargain to defendant, being proved, the action was maintainable, although there was no legal obligation in the original vendor to convey. *Seaman* v. *Price*, 1 R. & M. 195, s. c. 1 C. & P. 586, s. c. 2 Bing. 437, s. c. 10 B. Mo. 34.

A vendee, having agreed to purchase a certain number of trees for a specific sum, and pay for the same according to the condition of sale, afterwards cut down and carried away part of the trees without making any such payment, and refused to discharge the debt until the remainder of them had been delivered: Held, that although the executors of the vendor had failed in establishing a count on the special contract, yet they might recover the value of the trees felled by the vendee, under the counts for goods sold and delivered, as the defendant, by such taking, had disaffirmed the entirety of the contract. *Bragg* v. *Cole*, 6 B. Mo. 114.

An averment in a declaration, that the defendant *himself became the purchaser*, is supported by proof, that a conveyance was executed to a person nominated by the defendant. *Seaman* v. *Price*, 1 C. & P. 586. [Best]

The defendants, in the month of September, undertook to deliver tallow to the plaintiff, "in all next December," at a fixed price *per cwt.* In October they informed him, that they had disposed of the tallow, and therefore could not perform the contract: Held, that, tallow having risen in price, the plaintiff was entitled to recover damages according to the market-price on the last day on which the contract would have been performed, viz. 31st day of December, as he had not acquiesced in its being rescinded when the defendant refused to perform it. *Leigh* v. *Paterson*, 8 Taunt. 540, s. c. 2 B. Mo. 588.

### (G) PRACTICE.

[See *ante*, E.]

Where under a decree an interest was sold, the Court, on petition, suffered the vendee to attend the Master for the purpose of making inquiries. *Toosey* v. *Burchell*, 1 Jac. 159.

It is regular for a purchaser to confirm absolutely the report finding him to be the purchaser, even after he has received notice of a motion for opening the biddings. *Vansittart* v. *James*, 3 Law J. Chanc. 205.

The vendor may confirm an order *nisi* obtained by the purchaser, if the latter neglect to do so. *Chillingworth* v. *Chillingworth*, 5 Law J. Chanc. 147, s. c. 1 Sim. 291.

Upon a bill filed by creditors, whose debts are charged upon the real estate, no decree for the sale of the real estate can be made, unless by consent, until the Master has reported that the personal estate is insufficient, even though its insufficiency should be admitted by the executors. *Owen* v. *Pugh*, 3 Law J. Chanc. 194.

The Court will compel the vendor to permit a valuation, where there is a contract to sell at a valuation by A B and C, and the time of valuation is according to the contract; but the defendant cannot take advantage of it, if he improperly occasions delay. *Morse* v. *Merest*, 6 Mad. 26.

Old buildings which have been pulled down, and which are incapable of repair, are to be valued as old materials only, on estimating the value of lasting improvements. *Robinson* v. *Ridley*, 6 Mad. 2.

Upon a bill by the vendor, seeking to rescind the sale on the ground of fraud and oppression in the transaction, and error in the accounts, although the prayer to rescind the sale was refused, the account was opened after a considerable lapse of time. *M'Neill* v. *Cahill*, 2 Bligh, 228-9.

Where a sum of money (part of the price of an estate) is set apart in the hands of the trustees, as a security to the purchaser against the claims of judgment creditors of the vendor, who have a general equitable lien on the estate sold, the judgment creditors must be parties to a bill which seeks to have this money disposed of. *Anon.* 1 Law J. Chanc. 16.

### (H) COSTS.

Interpretation of a subsequent correspondence, in reference to the original contract.—The agreement is not impaired or altered by proposals which the purchaser makes subsequently, with a view to an amicable arrangement. Such proposals may have an influence on costs. *Bunning* v. *Bunning*, 1 Law J. Chanc. 56.

A contract being entered into for the sale of certain lands, with a weir, reservoirs, and the privilege of using the water of an adjacent river, and the vendor being unable to make a good title to all the rights in their full extent, which he had agreed to convey, the purchaser gives him notice that he will no longer be bound by the contract, and thereupon the vendor files his bill. If, at the hearing of the cause, it appears that the vendor could not make a good title, either then, or at the time of the bill filed, or at the time of the notice given, an opportunity of

mending his title in the Master's office will not be given him, but his bill will be dismissed with costs. *Wright* v. *Howard*, 1 Law J. Chanc. 94.

If, however, the purchaser in his answer, besides insisting on the want of title in the vendor, sets up a defence that he was seduced into the contract by fraud and misrepresentation, and that defence is not supported by evidence, he will be loaded with so much of the expense of the suit as was occasioned by those improper allegations.

If the defendant, in such a cause, files a cross bill to have the agreements cancelled, not relying merely on the vendor's want of title, but charging him with fraud and misrepresentation (which charges are disproved); though the agreements will be decreed to be cancelled, yet no costs will be given. *Wright* v. *Howard*, 1 Law J. Chanc. 94, s. c. 1 S. & S. 190.

A purchaser under a decree, who succeeds on exceptions to the Master's report approving the title, cannot then have the costs of the reference on title; but must obtain the report in his favour, and then present a petition to be discharged from his purchase and to have his costs. *Hyde* v. *Hyde*, 3 Law J. Chanc. 130.

Objections to a title being taken by a purchaser under a decree of the Court, the Master reports against the title, no person having appeared to support it. The purchaser, on moving to be discharged from his purchase, cannot have costs as between solicitor and client. *Anon.* 3 Law J. Chanc. 83, s. c. as *Reynolds* v. *Blake*, 2 S. & S. 117.

Where, on a reference of title, the property having been sold under the decree of the Court, the Master reports against the title, the purchaser is entitled to his costs, even when there is no fund standing to the credit of the cause. *Smith* v. *Nelson*, 4 Law J. Chanc. 175, s. c. 2 S. & S. 557.

A purchaser brought into court upon a doubtful title, ought to be discharged with costs. *Blosse* v. *Clanmorris*, 3 Bligh, 62.

One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time; the counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation, was dismissed with costs: and an application, afterwards made by the plaintiff, that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. *Williams* v. *Edwards*, 2 Sim. 78.

## VETERINARY SURGEON.

The certificate of a veterinary surgeon having attended lectures at the Veterinary College, and signed by the professor and others, cannot be received in evidence, inasmuch as it does not come from any body known to the law.

Although an usage, that a veterinary surgeon shall charge for attendance when there is not much medicine required, is too uncertain, yet if there be a general custom applicable to a particular profession, parties employing an individual in that profession are supposed to deal with him according to that usage. *Sewell* v. *Corp*, 1 C. & P. 392. [Best]

## VENIRE.

[See PRACTICE.]

A *venire* issued against one of several partners, who is abroad, for a separate debt, cannot be served at the counting-house of the partnership. *Petty* v. *Smith*, 2 Y. & J. 111.

Where the plaintiff elects to proceed by *venire* and *distringas*, according to the ancient practice of this Court, a personal service of the *venire* is not requisite. *Kemp* v. *Summer*, 2 Y. & J. 405.

## VENUE.

(A) WHERE LAID.
(B) WHEN CHANGED.
(C) WHEN NOT.
(D) RULE FOR CHANGING.

### (A) WHERE LAID.

[See ARBITRATION.]

The venue in a penal action for non-residence must be laid in the county in which the living lies. *Whitehead* v. *Wynne*, 2 Chit. 120.

The plaintiff, in transitory actions, has a right to elect in what county he will bring his action. *Jenkins* v. *Hulton*, 7 B. Mo. 520.

### (B) WHEN CHANGED.

Where the Vice Chancellor directed an action to try the validity of a commission of bankruptcy, it being sworn by the defendant, without contradiction by the plaintiff (the bankrupt), who had laid the venue in M, that, previously to the issuing of the commission, the plaintiff resided in Y; that all his dealings had taken place in Y, and its vicinity; and that the defendant's witnesses resided there: and the plaintiff not having disclosed by affidavit that he had any material evidence to give in M, the Court permitted the defendant to change the venue to L, on payment of costs. *Parker* v. *Eastwood*, 8 Taunt. 635.

The Court granted a rule *nisi* to change the venue from Y to L, the witnesses being Greenland fishermen, who would be absent at the time the assizes where held at Y. *Atkinson* v. *Sadler*, 2 Chit. 419.

The Court granted a rule *nisi* to change the venue from London to York, four witnesses living at Leeds, and only one of the facts occurring in London. *Anon.* 2 Chit. 418.

The Court allowed a declaration, in an action for a penalty in a road act, to be amended by changing the venue. *Griffith* v. *Hollier*, 1 Ken. 368.

Where the London agent of a Lancashire attorney laid the venue at Lancaster, a judge, upon the production of the letter, containing the instructions to lay the venue in London, ordered the declaration to be amended, and the Court refused a rule to set that order aside. *Gardner* v. *Whiteside*, 1 Law J.K. B. 55.

The venue, in an action on a specialty, cannot be changed until issue has been joined between the parties. *Weatherby* v. *Goring*, 3 B. & C. 552, s. c. 5 D. & R. 441.

The Court directed the venue to be changed, in an action by a clergyman against a person for not setting out tithes, where anonymous letters had been inserted in provincial papers reflecting on the

plaintiff's character as a clergyman, although the cause had been once tried, and the jury had found a verdict for the defendant. *Walker* v. *Ridgway*, 4 Law J. C.P. 186.

The venue may be changed upon the common affidavit made by the defendant's agent, if he think proper to make it; and the Court will not inquire as to the means of his knowing the fact to which he swears. *Greenwood* v. *Moore*, 6 Law J. K.B. 328.

In an action for a libel, contained in a letter written in Buckinghamshire, where it did not appear that it had been circulated elsewhere, the Court allowed the venue to be changed from London to that county, on the usual affidavit, that the cause of action (if any) arose there, and not elsewhere. *Tallent* v. *Morten*, 6 Law J. C.P. 51, s. c. 1 M. & P. 188.

### (C) When not.

Where it is convenient for the plaintiff to proceed to trial in one county, and for the defendant that the trial should be had in another, the plaintiff has the right of election; and having exercised that right, the Court will not interfere in changing the venue. *Jenkins* v. *Hutton*, 1 Law J. C.P. 28.

In an action upon a promissory note, the Court will not permit the venue to be changed, if it appear that the note does not still exist. *Hart* v. *Taylor*, 2 D. & R. 164.

In an action on a breach of covenant, the Court will not grant a rule to change the venue, although there was a view prayed, unless special circumstances be shewn of its necessity. *Anon.* 2 Chit. 419.

In covenant on a policy of insurance, the Court will not change the venue. *Smith* v. *Stanfield*, 1 M'Clel. & Y. 212.

The Court refused to allow the venue, in an action for the infringement of a patent, to be moved from London to Lancashire. *Brunton* v. *White*, 7 D. & R. 103, s. c. *Anon.* 4 Law J. K.B. 36.

In an action on the case for infringing on the plaintiff's patent right, the defendant cannot be allowed to change the venue upon the common affidavit. *Crompton* v. *Ibbotson*, 6 Law J. K.B. 138.

Although the Court will generally, in an action for a libel written in one county and opened in another, change the venue to the former county,—yet, it is not a sufficient reason to change the venue in Middlesex, that the letter was written in the country. *Harris* v. *Boddenham*, 2 Law J. K.B. 79.

The Court will not change the venue in an action for a libel, unless upon special grounds. *Cumming, clerk*, v. *Naylor*, 2 Y. & J. 110.

The Court will allow the venue to be changed in an action on a written contract, if it does not appear on the face of the declaration, that such contract is in writing. *Pickard* v. *Featherstone*, 5 Law J. C.P. 37, s. c. 4 Bing. 39.

The venue cannot be changed in an indictment for conspiracy to destroy foxes and other vermin, on an affidavit, stating that the gentry of the county in which the indictment was found, were addicted to fox-hunting. *Rex* v. *King*, 2 Chit. 217.

The Court would not allow the venue to be changed from London to Bristol, or the two adjoining counties of Gloucester or Somerset, on an affidavit which stated that the cause of action was an assault, committed on the plaintiff at Bristol, and that all the witnesses resided in that city. *Gibbons* v. *Mutter*, 5 Law J. C.P. 32.

The Court would not allow the venue to be changed in an action for an escape, although all the witnesses for the plaintiff, as well as defendant, resided in the county to which it was sought to be removed; and the officer who permitted the escape had offered to pay the plaintiff any reasonable sum for his negligence in having permitted the escape. *Jenkins* v. *the Sheriff of Gloucestershire*, 5 Law J. C.P. 63.

In an action of seduction, the defendant moved to change the venue from London to Worcester, on the usual affidavit: Held, that the application was answered by a counter affidavit, that the plaintiff's daughter was so ill, that it was expected she could not live until the assizes at Worcester were held. *Wing* v. *Jenkins*, 7 B. Mo. 62.

To induce the Court, in an action of debt on bond, to change the venue from London to Worcester, the affidavit should state the nature of the defence to the action; since merely stating that all the witnesses reside at the latter town, is insufficient. *Ladbury* v. *Richards*, 7 B. Mo. 82.

The defendant having moved to change the venue from London to Lancashire, on an affidavit that the cause of action arose in that county, and not elsewhere, the plaintiff swore that the action was brought on a contract entered into for the purchase of goods, to be shipped abroad, and conveyed to and delivered at Liverpool; and the plaintiff also undertook to give material evidence in London: Held, to be a sufficient answer to the application. *Wilkinson* v. *Tattersall*, 4 Law J. C.P. 135, s. c. 3 Bing. 428.

Venue cannot be changed after plea in abatement any more than after plea in bar. *Wigley* v. *Dubbins*, 4 Bing. 18.

The defendant cannot change the venue, when under terms to take short notice of trial for the adjourned sitting after term. *Nun* v. *Taylor*, 1 Law J. C.P. 46, s. c. 1 Bing. 186, s. c. 7 B. Mo. 598.

The venue must be retained after an undertaking to plead "on all the usual terms." *Bristergh* v. *Deardon*, 1 M'Clel. & Y. 106.

The Court will not permit the venue to be changed by one of three defendants, without the assent of the other two. *Anon.* 2 Chit. 417.

In an action for an escape, the issuing of the writ is material evidence, in order to enable the plaintiff to bring back the venue to Middlesex on the usual undertaking; and, therefore, in such actions the venue cannot be changed from Middlesex to N, on a rule *nisi*. *Anon.* 2 Chit. 418.

The Court will not change the venue from the county of Gloucester to the city of Bristol, in Hilary term, on the usual affidavit, although the defendant swear to merits, and offer to pay into court the debt, and a sum of money to cover costs.

A rule obtained on such an application discharged with costs. *Broadrick* v. *Clark*, 11 Price, 742.

The Court will not grant a rule to shew cause why the venue should not be changed from the county palatine of L to that of C, unless the defendant undertakes not to assign the want of an original for error. *Johnson* v. *Booth*, 13 Price, 52.

### (D) Rule for changing.

Rule for changing the venue in an action of assault, is absolute *instanter*. *Shepherd* v. *Hall*, 2 Chit. 417.

## VERDICT.

[See JURY, NEW TRIAL, PRACTICE, and VARIANCE].

Upon immaterial issues, it is not necessary that verdicts should be given. The jury may be discharged from giving such verdicts without consent of the parties. *Powell* v. *Sonnet*, 1 Bligh, N.S. 545.

When it is wished that the verdict should be entered on any particular count of the declaration, the application must be made to the judge who tried the cause, for the Court will not make any such order. *Anon.* 1 Law J. K.B. 155.

The Court in bank have no power to direct the mode in which the verdict of the jury shall be applied to the issue. Such a power is in the judge at Nisi Prius alone, as it is he that returns the *postea*. *Mayor of Queenborough* v. *Shey*, 6 Law J. K.B. 50.

A record was taken down by proviso. The plaintiff did not appear, and a verdict was taken instead of a nonsuit. The Court would not set aside the verdict generally, but only on condition of the plaintiff consenting to a nonsuit. *Hodgson* v. *Forster*, 1 Law J. K.B. 35, s. c. 1 B. & C. 110, s. c. 2 D. & R. 221.

Where a *similiter* to the plea of *nil debet* in a *qui tam* action, was entered in the name of the defendant instead of the plaintiff, the Court, after verdict, ordered it to be amended. *Wright* v. *Horton*, 6 M. & S. 50.

A verdict against an adulterer may be pleaded in a suit for a divorce by reason of the wife's adultery. *Best* v. *Best*, Add. 438.

Where mutual promises are laid, the omission of a special request is aided by verdict. *Seymour* v. *Gartside*, 1 Law J. K.B. 12, s. c. 2 D. & R. 55.

Where, in an action for a libel, a verdict had been entered up at Nisi Prius on a particular count, wherein the libel professed to be set out, but was stated with a material variance,—the Court permitted the verdict to be entered up on other counts which were not justified, and in which the libel was correctly alleged. *Cooke* v. *Smith*, 13 Price, 499, s. c. M'Clel. 250.

## VESTRY AND VESTRYMEN.

It is no objection to a custom for a select vestry, that the numbers who are to compose the vestry are indefinite, although new members are to be elected by the present members, and not by the parish at large. But the number must be reasonable; and the question of reasonableness of number must, in such a case, be decided with reference to the population of the parish, and the previously-established usage.

Such custom is not abrogated by the acceptance of and long acquiescence in a faculty, by which the Ordinary grants and confirms a select vestry, fixes the number at forty-nine, and appoints certain individuals, amongst whom are some of the former vestry, to be vestrymen. *Golding* v. *Fenn*, 6 Law J. K.B. 178, s. c. 7 B. & C. 765, s. c. 1 M. & R. 647.

The poor-rates were, according to an ancient custom in the parish of St. Mary, Whitehall, not payable in respect to the annual value of the property in the parish, but according to the supposed ability of the party assessed: Held, that the persons so rated were not within the meaning of the 3rd section of the 58 Geo. 3. c. 69, as to the plurality of votes, although rated in respect of property exceeding 50*l.* in amount. *Nightingale* v. *Marshall*, 2 B. & C. 313, s. c. 3 D. & R. 459.

The consent of a select vestry for the care and management of the concerns of the poor, constituted and established according to the provisions of the statute 59 Geo. 3, c. 12, is sufficient to render valid a contract under the statute 9 Geo. 1, c. 7, s. 4, for the lodging, keeping, and maintaining the poor of a parish. *Clarke* v. *King*, 2 Y & J. 525.

Where churchwardens have neglected to make a prospective rate for raising a sum of money, necessary to the completion of repairs to the church, ordered by them pursuant to resolutions entered into at a vestry meeting, they are liable for the payment of them, and are not entitled to contribution from the parishioners attending the meeting, and signing the resolutions sanctioning the repairs being made. The attendance of those persons at such meeting, and their signatures to such resolutions, is only to be considered as given by them in their character of vestrymen, and not in their individual capacity. *Lanchester* v. *Tricker*, 1 Law J. C.P. 56, s. c. 1 Bing. 201, s. c. 8 B. Mo. 20.

Vestrymen who signed a resolution, ordering the parish surveyor to take steps for defending an indictment for repairing a road, were held not to be responsible for the payment of the attorney employed by the surveyor. *Sprott* v. *Powell*, 3 Bing. 478.

A party will be restrained from interrupting an incumbent, presiding at a meeting of his parishioners, in vestry. *Wilson* v. *M'Math*, 3 Phil. 67.

## VIEW.

[See JURY.]

## VISITOR.

The visitor of an ancient college is entitled to be visitor also of an engrafted foundation, unless a special visitor be appointed. *St. John's College, Cambridge*, v. *Toddington*, 1 Ken. 443, s. c. 1 Burr. 158, s. c. 1 Blac. 71.

The addition of a new foundation is to be visited by the same visitor. *Attorney General* v. *Master of Catherine Hall*, 1 Jac. 400.

## WAGER.

The judge at Nisi Prius, will not try an action against a stakeholder, brought to recover the wager on a dog-fight, the plaintiff's dog having gained the battle. *Egerton* v. *Furseman*, 1 R. & M. 213, s. c. 1 C. & P. 613. [Abbott]

Refusal to try an action for money had and received, to recover back a deposit paid to abide the event of a wrestling-match, which did not take place. *Kennedy* v. *Gad*, 3 C. & P. 376. [Tenterden]

The judge at the assizes tried a cause, in which the question was, as to which party the stakes of a cricket match ought to have been paid. It was objected, that it was beneath the dignity of a court of justice to try such a cause. The Court said, that it was in the discretion of the Judge, whether he would try it; and, if he thought proper to do so, they could

not set aside the verdict. *Walpole* v. *Saunders*, 4 Law J. K.B. 130, s. c. 7 D. & R. 130.

A bets B (the plaintiff) 30*l.* to 20*l.* that the "Maid of the Mill" beats "Queen Mab" at Carlisle races. The race was, in fact, won by a third horse; the "Maid of the Mill" being second, and "Queen Mab" last. It being disputed between A and B, which of them had won the bet; B demanded back the amount of his bet from C, (the stakeholder) before it was paid over; and on C's neglect to pay, recovered against him in this action. Assuming that the race was legal within 18 Geo. 2. c. 34, s. 11, the wager was illegal within 9 Anne, c. 14, s. 2, being for more than 10*l.*: and the Court, under the above circumstances, refused to disturb the verdict. *Robinson* v. *Mearns*, 3 Law J. K.B. 125, s. c. 6 D. & R. 27.

A paid B 7500*l.*, in consideration that B should pay A 10,000*l.* or such proportion of that amount, say 10,000*l.*, as C paid his legal general creditors: Held, after verdict, that the declaration which alleged that C had paid his legal general creditors 10,000*l.* for the purpose of shewing that A had won the wager, was warranted by the construction of the wager.

It is no ground for arresting the judgment after verdict, that the subject-matter of the action was a wager between A and B upon the solvency of C, in which they had no interest.

*Semble*, That the judge may refuse to try a cause upon a wager, where the parties have no interest. *Thornton* v. *Thackray*, 2 Y. & J. 156.

Where A and B deposited money in the hands of a stakeholder to abide the event of a boxing-match between them; and after the battle, A claimed the whole sum from the stakeholder, and threatened him with an action if he paid it over to B, which he nevertheless did, by the direction of the umpire: Held, that A was entitled to recover from him his own stakes as money had and received to his use. *Hastelow* v. *Jackson*, 6 Law K.B. 318, s. c. 8 B. & C. 221, s. c. 2 M. & R. 209.

If a plaintiff brings an action against a stakeholder, it is incumbent on him to shew the exact amount which is due. *Robson* v. *Andrade*, 2 Chit. 263.

## WAGER OF LAW.

The Court will not make an order fixing the number of *compurgators*, which a defendant shall produce to wage his law in an action of debt. *King* v. *Williams*, 2 Law J. K.B. 77, s. c. 2 B. & C. 538, s. c. 4 D. & R. 3.

A plea, in which the defendant intends and offers to wage his law, must not conclude with a verification. *Glover* v. *Thompson*, 4 Law J. K.B. 298.

## WAGES.

[See SHIP, and SHIPPING].

## WALES.

The 13 Geo. 3, c. 51. being repealed by the 5 Geo. 4, c. 106, which gives costs only where a verdict for 50*l.* is obtained in Welch causes tried in England,—it has been holden, that in all cases tried after the passing of the latter act, and before the 6th of November 1824, when it began to operate, the plaintiff, in case of verdict, would be entitled to full costs, because, during that period, neither of the statutes apply. *Moore* v. *Williams*, 1 C. & P. 468.

The courts at Westminster have jurisdiction to grant a new trial, under the 3 Geo. 4, c. 106, s. 2, although the party moving may not have entered into the recognizance required by sec. 4, that section being intended merely to prevent a stay of proceedings in the court below, but not to take away the jurisdiction previously given to the superior courts. *Howell* v. *Howell*, 5 Law J. K.B. 210, s. c. 6 B. & C. 427, s. c. 2 M. & R. 448.

Where the judge at Nisi Prius refuses to certify, under the Welsh Judicature Act, that the defendant at the time of the service of the writ, or other mesne process, was resident in Wales, the Court have no power to order such fact to be suggested on the roll, in order that judgment of nonsuit may be entered against the plaintiff. *Anon.* 5 Law K.B. 246: s. p. *Jones* v. *Kendrick*, 6 Law J. K.B. 329, s. c. 8 B. & C. 337.

Held, by Lord Tenterden, C. J. at Nisi Prius, that it lies upon the defendant to shew that he was residing in Wales at the time when the writ or mesne process was served on him in the action; and that general evidence that his usual place of residence, both before and subsequent to the commencement of the action, was in Wales, is not sufficient. *Jones* v. *Kenrick, Esq.* 6 Law J. K.B. 329, s. c. 8 B. & C. 337, s. c. 2 M. & R. 448.

## WARD.

[See GUARDIAN AND WARD.]

## WARD IN CHANCERY.

Though a female ward of court may, when of age, make whatever settlement of her property she pleases; yet, whilst the property remains in court, it is under the protection of the Court, and consequently if the ward marries, the Court will order a proper settlement, or reform an improper one—unless she personally consents in court, or under a commission for the purpose. *Austen* v. *Halsey*, 2 S. & S. 123.

## WARRANT.

[See BANKRUPT, CONSTABLE, and JUSTICES OF THE PEACE.]

A warrant being directed to "A B, to the constables of W, and to all other His Majesty's officers": Held, that the constables of W could not execute it out of their district, as their names were not inserted in the warrant. *Rex* v. *Weir*, 2 D. & R. 444, s. c. 1 B. & C. 288.

Where a warrant of commitment, after reciting several examinations, omitted to mention that the bankrupt, who had been committed, was discharged on one of the examinations, it was held not objectionable on that account. *Bromley's case*, 2 J. & W. 453.

## WARRANT OF ATTORNEY.

(A) EXECUTION OF.
(B) DEFEASANCE IN.
(C) FILING.
(D) JUDGMENT.
(E) WAIVER AND SETTING ASIDE.

### (A) EXECUTION OF.

A warrant of attorney and joint bond were executed by A (as surety) and B to secure an annuity to C. It was subsequently discovered that A's christian name had been omitted; it was afterwards inserted, and he executed them without B's knowledge. To an action in K.B. on the bond against B, he pleaded a judgment recovered against him and B. He afterwards applied to set aside the judgment, on the ground of the irregularity in the execution of the securities, but the Court refused—holding, 1st, that the nature of the securities was not defeated by the insertion of the name, to which A was a party; and, 2nd, because he had afterwards recognized the judgment as legally entered up, and availed himself of it in the action brought on the bond. *Coke* v. *Brummell*, 8 Taunt. 439, s. c. 2 B. Mo. 495.

### (B) DEFEASANCE IN.

A proviso in a warrant of attorney, that execution might be sued out after the expiration of a year and a day, without reviving the same by *scire facias*, is legal and binding. *Morris* v. *Jones*, 2 B. & C. 242, s. c. 3 D. & R. 603.

B executed a warrant of attorney to enter up judgment with the usual release of errors and defeasance, and signed an undertaking written under the defeasance, that no writ of error should be brought. A revived the judgment by *sci. fa.*, to which B pleaded, and A had judgment, whereupon B brought a writ of error, which the Court on motion set aside. *Baddeley* v. *Shafto*, 8 Taunt. 434.

A warrant of attorney was given to compromise an action upon an annuity deed, with a proviso, that "if within a certain time the annuity was not paid, he should be at liberty to take out execution for the sum specified, together with all costs incurred for or by reason of the non-payment of the annuity:" Held, that he was not authorized under this clause to take out execution for the costs of the action. *Delane* v. *Mott*, 2 Chit. 423.

On the defeasance of a warrant of attorney being to secure the payment of a certain sum "on demand": Held, that it must be shewn, that an actual demand has been made: the attorney of the plaintiff having waited on the defendant to induce him to settle it amicably, is not a sufficient demand. *Nicholl* v. *Bromley*, 5 B. Mo. 307.

### (C) FILING.

The Clerk of the Warrants may refuse to file a warrant until the arrear of termage fees, due from the attorney employed by the parties, has been paid. *Blackburn, dem.*; *Brown, def.*, 1 Law J. C.P. 102, s. c. 1 Bing. 277, s. c. 8 B. Mo. 229.

The acts 3 Geo. 4, c. 39, and 7 Geo. 4, c. 57, s. 33, relative to the filing warrants of attorney and cognovits, are confined to cases between the judgment creditor and the assignees of the defendant, if he become bankrupt or insolvent—according to Lord Tenterden, Mr. Justice Bayley, and Mr. Justice Littledale.

But, according to Mr. Justice Holroyd, they extend also to cases between conflicting judgment creditors, although the defendant has not become either bankrupt or insolvent. *Morris* v. *Mellon*, 5 Law J. K.B. 211, s. c. 6 B. & C. 446.

### (D) JUDGMENT.

The Court will not order judgment to be entered up on an old warrant of attorney of more than twenty years, unless the affidavit in support of the rule repels the presumption of payment. *Hulke* v. *Pickering*, 2 B. & C. 555, s. c. 4 D. & R. 5.

In an affidavit to enter up judgment upon an old warrant of attorney in term, it must be stated that the defendant was alive within the term. *Anon.* 2 Law J. C.P. 1.

When a warrant of attorney has been given a great number of years ago, and nothing has been done with it, the Court will examine the fact, and be satisfied that it was given for a good consideration, before they will give leave to enter up judgment upon it. If they have any doubt, they will direct an issue; but if they have not, and think that it is a very questionable security, they will not permit judgment to be entered up on it. *Solari* v. *Clements*, 2 Law J. K.B. 35.

Judgment on a warrant of attorney may be entered up in the defendant's absence out of the country. *Pemberton* v. *Browning*, 2 Bing. 204, s. c. 9 B. Mo. 389.

The Court permitted judgment to be entered up on an old warrant of attorney, where the party resided in New South Wales. *Hopley* v. *Thornton*, 2 D. & R. 12.

Where a judgment upon a warrant of attorney has been revived by *scire facias*, a *fieri facias* sued out upon the judgment after it has been revived, must recite the *scire facias*. *Davis* v. *Norton*, 1 Law J. C.P. 33, s. c. 1 Bing. 133, s. c. 7 B. Mo. 499.

Where a warrant of attorney stated, that on default of payment the judgment might be entered up "severally against us." One of the parties being dead, it was held, that the words were sufficiently explicit to shew that judgment might be entered up against each party severally. *Anon.* 1 Law J. K.B. 56.

Upon a warrant of attorney to confess judgment to two, the Court will, upon the death of one, permit judgment to be entered up by the survivor. *Spong* v. *Tucker*, 1 Y. & J. 206.

Entering up judgment by husband and wife on a warrant of attorney, given to the wife sole, cannot be done without leave of the Court. *Metcalfe* v. *Booty*, 3 Law J. K.B. 140, s. c. 6 D. & R. 46.

On an application to enter up judgment on a warrant of attorney, given by a feme before marriage, if the affidavit in support of the application be sworn before the attorney in the cause, it is irregular; and it seems, that in future the attorney in such a case will be liable to the repayment of costs. *Fowler* v. *Tomlinson*, 3 Law J. C.P. 198.

Where a person had been arrested for a debt under 20*l.*, and defended the action until the debt and costs amounted to almost 100*l.*, and then gave a warrant of attorney for the debt and costs, under which war-

rant of attorney judgment was entered up, and the defendant was taken in execution: Held, that under the 48 Geo. 3, c. 123, the defendant was not entitled to his discharge, although he had been in prison for a longer period than twelve months, as it did not appear that the warrant of attorney had been improperly obtained, nor that he was in prison at the time he gave the warrant of attorney. *Robinson* v. *Sundell*, 6 B. Mo. 287.

(E) WAIVER AND SETTING ASIDE.

A warrant of attorney is not waived by a subsequent assignment of goods for the sum secured by the same. *Anon.* 2 Chit. 423.

A divorce *à mensâ et thoro* does not authorize a feme covert to give a warrant of attorney. *Fairthorne* v. *Blaquire*, 6 M. & S. 73.

The Court will not set aside a judgment signed on a warrant of attorney, given by a married woman in conjunction with her husband and others, unless it appear that the other defendants did not know she was married at the time. *Nisbet* v. *Henley*, 5 Law J. K.B. 167.

Where a term has elapsed after the execution has been had on a warrant of attorney, the Court will not set it aside, however irregular it may have been. *Bassett* v. *Hooper*, 1 Law J. K.B. 87.

The defendant, being indebted to the plaintiff, gave him in 1823 a bill of exchange for 2500*l.*, and a warrant of attorney to secure its payment; in 1825, by a deed, reciting that he was indebted to the plaintiff in the sum of 5000*l.*, he gave a mortgage to secure that sum and any future advances not exceeding 10,000*l.* In 1826, the estate mortgaged was sold for 3600*l.*, and the amount of the proceeds paid to the plaintiff; and afterwards, in an account stated between the parties, the bill of exchange was mentioned as an existing debt, and other property was mortgaged to the plaintiff for further security, the bill not being mentioned in the recital of the second mortgage-deed:—the plaintiff having afterwards signed judgment, and issued execution on the warrant of attorney, the Court refused to set it aside. *Stoveld* v. *Eade*, 5 Law J. C.P. 142, s. c. 4 Bing. 154.

The Court will not set aside a judgment on a warrant of attorney, on an affidavit stating that it was given to secure a debt arising out of an usurious contract, if the affidavit be completely answered by the grantee, nor will they direct an issue to try its validity. *Cole* v. *Gill*, 7 B. Mo. 353.

The Court will not set aside a judgment on a warrant of attorney, given for an illegal consideration, where the parties are *in pari delicto;* though the plaintiff, if left to his action, could not have supported it. *Anon.* 4 Law J. K.B. 130.

If a deed be executed for the purpose of securing a bond, as a contrivance to evade the Warrant of Attorney Act, 3 Geo. 4, it is void as against the other creditors of the obligor, who had become bankrupt; and the obligee having entered up judgment, in pursuance of the deed, and taken out execution without assigning breaches, and executing a writ of inquiry, —the case was holden to be within the 8 and 9 Wil. 3, and the execution was set aside. *Hurst* v. *Jennings*, 5 B. & C. 650, s. c. 8 D. & R. 424.

The Court will exercise a summary jurisdiction over judgments obtained by warrant of attorney, where the judgment is impeached on the ground of fraud, although the party applying is no party to the judgment. *Harrod* v. *Benton*, 6 Law J. K.B. 270, s. c. 8 B. & C. 217, s. c. 2 M. & R. 130.

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## WARRANTY.

It seems there is no rule of law that the seller of goods of a fixed and known price for a particular purpose, must be understood to engage that the commodity sold was fit and proper for the intended use. Therefore, where a declaration in assumpsit alleged, that in consideration that plaintiff would buy a quantity of sheathing copper at a certain price, defendant undertook that it should be sound, substantial and serviceable: Held, that this action could not be supported in the absence of an express warranty. *Gray* v. *Cox*, 4 B. & C. 108, s. c. 6 D. & R. 200.

A fraudulent representation, at the time of the sale of a horse, vitiates the contract, though it be not a breach of the warranty. *Stewart* v. *Coeswelt*, 1 C. & P. 23. [Burrough]

A warranty of a horse in these terms, "To be sold, a black gelding, five years old; has been constantly driven in the plough, warranted:" only applies to the soundness of the animal. *Richardson* v. *Brown*, 2 Law J. C.P. 7, s. c. 1 Bing. 344, s. c. 8 B. Mo. 333.

Although a person may disclaim against making a warranty of a horse, yet, if he give him a character for a particular quality—as by saying, that he is quiet in harness—and do it in such a manner as reasonably to make an impression on the mind of the buyer, that he is generally quiet in harness, he will be bound by that representation; and if it is not true, an action will lie to recover back the price of the horse. *Sir Walter Hart, bart.* v. *Lord Nenry*, 1 Law J. K.B. 237.

The warranty of a horse will be inferred from these letters: "You well remember that you represented the horse as a five year old," &c.; to which the defendant answers, "The horse is as I represented it." *Salmon* v. *Ward*, 2 C. & P. 211. [Best]

The seller of two horses told the buyer that one of them had a cold, but agreed to deliver both at the end of a fortnight, "sound and free from blemish;" and at the expiration of the fortnight the horses were delivered, but the one had still a cough, and the other a swelled leg; and the seller brought an action to recover the price, and a verdict was found for the buyer. The Court refused to disturb it, or grant a new trial, as the warranty applied not only to the time of the sale, but to the end of the fortnight. *Liddard* v. *Cain*, 3 Law J. C.P. 246, s. c. 2 Bing. 183, s. c. 9 B. Mo. 356.

A temporary cough is not an unsoundness in a horse. *Sillitoe* v. *Claridge*, 2 Chit. 425.

A horse which has been nerved must be deemed unsound. *Best* v. *Osborne*, 1 R. & M. 290. [Best]

Not necessary to give in evidence all the words of a warranty of a horse, if the substance of it be proved. *Coltherd* v. *Puncheon*, 1 Law J. K.B. 2, s. c. 2 D. & R. 10.

In an action of a warranty, proof that the animals were affected with an hereditary disease, which was incapable of discovery until its fatal appearance, is admissible to prove an unsoundness existing in their constitution at the time of the sale, though the

symptoms do not appear until two months after sale. *Joliff* v. *Bendell*, 1 R. & M. 137. [Abbott]

A declaration in assumpsit stated generally, that the defendant warranted a horse to be sound. It was proved, that at the sale a mark of a kick on his leg being noticed by the plaintiff, the defendant warranted him sound every where else, except that kick on his leg: Held, that this was a qualified, and not a general warranty as laid; and that a variance was therefore made out between the warranty laid and that proved, so as to nonsuit the plaintiff. *Jones* v. *Cowley*, 3 Law J. K.B. 263, s. c. 4 B. & C. 445, s. c. 6 D. & R. 533.

In an action of assumpsit on the warranty of a horse, the declaration stated, that, in consideration that the plaintiff would purchase him of the defendant, at and for a certain sum, to wit, the sum of 55*l.*, the defendant undertook the horse was sound; and it was proved that the defendant said he would take 55*l.* for the horse, but that it was agreed that he should return the plaintiff 1*l.* if he did not gain 4*l.* or 5*l.* by the horse: Held, that this was a fatal variance, the contract being declared on as absolute, and proved to be conditional only. *Blythe* v. *Bampton*, 4 Law J. C.P. 157, s. c. 3 Bing. 472.

In an action on the case for a breach of an express warranty, that a horse was quiet; if the declaration allege that the defendant well knew him to be unquiet, this is an unnecessary averment, and need not be proved. *Gresham* v. *Postan*, 2 C. & P. 540. [Best]

In an action on a warranty of a horse, it is no ground for a new trial that the defendant was taken by surprise by the proof of a particular kind of unsoundness of which he had no previous notice. *Atterbury* v. *Fairmanor*, 1 Law J. C.P. 63.

Where a receipt was given, containing the warranty of a horse, to the vendee's servant, which by a fraudulent representation by the vendor's son, was procured from the servant,—it was holden, first, that the son having been in his father's business, but never known to have sold a horse himself, and only present at the bargain in question, was not sufficient to prove him an agent, to fix the father with a fraudulent act; and lastly, it not being proved that the receipt was ever afterwards in the father's hands, the plaintiff could not give parol evidence of its contents. *Best* v. *Osborn*, 1 C. & P. 632. [Best]

Where a warranted horse proves unsound, and the defendant refuses to take him back, the plaintiff is entitled to recover the expenses for so long a time as might reasonably be occupied in endeavouring to sell the horse to the best advantage. *M'Kenzie* v. *Hancock*, 1 R. & M. 436. [Littledale]

## WARREN.

Grouse is not a bird of warren. *The Duke of Devonshire* v. *Lodge*, 5 Law J. K.B. 319, s. c. 7 B. & C. 36.

## WASTE.

(A) WHAT CONSTITUTES.
(B) INJUNCTION AGAINST.
(C) ACTION OF.

### (A) WHAT CONSTITUTES.

Equitable waste consists in cutting either timber planted for ornament or shelter, or saplings and young trees, before they are fit for timber. It is not equitable waste, to cut trees which have not attained their full growth and maturity. *Potts* v. *Potts*, 3 Law J. Chanc. 176.

A clause in a lease, that the lessor might re-enter upon the lessee's committing 10*l.* waste, means a waste producing an injury to the reversion. Therefore, where lessee pulled down buildings worth 10*l.* and substituted others, it was left for the jury to say, whether such waste had been committed to the amount of 10*l.* *Doe d. Darlington* v. *Bond*, 5 Law J. K.B. 68, s. c. 5 B. & C. 855, s. c. 8 D. & R. 783.

### (B) INJUNCTION AGAINST.

An injunction against committing waste will not be granted against a mortgagee, even though he make no affidavit denying the waste, if it appear by the affidavit of the actual occupier of the land, that the alleged waste is not committed by the mortgagee, or by his authority. *Anon.* 1 Law J. Chanc. 119.

If a vendee under a decree, who has not paid his purchase-money, enters and commits waste, the Court will grant an injunction. *Casmajor* v. *Strode*, 1 S. & S. 381.

Bill will lie to restrain a tenant for life from cutting down underwood of an insufficient growth. *Brydges* v. *Stephens*, 6 Mad. 279.

An injunction to restrain a tenant for life, unimpeachable of waste, from cutting trees which have not attained their full growth and maturity, cannot be sustained.

The Court will not maintain an injunction against equitable waste, unless it be proved that equitable waste either has been committed, or is threatened. *Potts* v. *Potts*, 3 Law J. Chanc. 176.

If one act of waste be established as well in equitable as in legal waste, the Court will restrain the equitable waste generally. *Coffin* v. *Coffin*, 6 Mad. 17.

Where equitable waste of one kind only has been done or threatened, the injunction is not to be extended to equitable waste of other kinds. *Semble*—Usual injunctions, in cases of equitable waste, are not extended to trees which protect the premises from the effect of the sea. *Coffin* v. *Coffin*, 1 Jac. 70.

An injunction to stay waste, will not be granted where it is doubtful whether the acts complained of are waste; the plaintiff must first try the question of waste or no waste, at law. *Lyon* v. *Wilkinson*, 1 Law J. Chanc. 155.

The Court will not grant an injunction to stay waste, at the instance of a judgment creditor, in a suit by him against the heir and administrator of the debtor. *Leake* v. *Beckett*, 1 Y. & J. 339.

The defendant having appeared, motion for an injunction in respect of waste, without notice, was refused. *Collard* v. *Cooper*, 6 Mad. 190.

Affidavits, in support of an injunction to stay waste, must be filed, and the office-copy produced with the certificate of the bill. *Reg. Gen.* 9 Price, 88.

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cuted before two witnesses, or without witnesses. Where the land is already vested, even the witnesses to the will may take as legatees to the whole value of the land, but not one particle of the land can be devised but by a will in the presence of three witnesses. *Craufurd* v. *Coutts*, 2 Bligh, 680.

Several instruments giving distinct different amounts to the same persons, were holden valid. *Gillespie* v. *Alexander*, 3 Law J. Chanc. 52, s. c. 2 S. & S. 145.

Absurd and irrational expressions are not sufficient to avoid a will on the ground of uncertainty. *Mason* v. *Robinson*, 2 S. & S. 295.

Nothing added to a will after the testator's death can be established, even though it be clearly proved to have been the testator's intention to have given a legacy, if not reduced into writing in the lifetime of the testator. *Nathan* v. *Morse*, 3 Phill. 529.

A will may appoint one executor for general purposes, and another for particular purposes. *Lynch* v. *Bellew*, 3 Phill. 424.

In order to make a will fraudulent and void as against creditors, under the statute (3 W. & M. c. 14, s. 2 and 3), there must be a debt existing at the time of the death of the testator. *Morrant* v. *Gough*, 6 Law J. K.B. 14, s. c. 7 B. & C. 206, s. c. 1 M. & R. 41.

If a mariner gives a will as a security for a debt, it will be set aside. *Zacharias* v. *Collis*, 3 Phill. 190.

Testamentary papers which are conditional in their terms, may be established by subsequent recognitions. *Strauss* v. *Schmidt*, 3 Phill. 209.

### (b) *Testator's Capacity.*

A married woman has no title to make a will: if she claims the right, she must at least shew by what power she has gained it, because such right is contrary to the general law of the land. *Temple* v. *Walker*, 3 Phill. 394.

The rules as to the question of the capacity of a testator, apply less strictly to cases of delirium, than to those of insanity:—where the evidence in proof of the alleged incapacity was very equivocal, and the disposition proper without any ground of imputation on the conduct of the executor,—the Court pronounced in favour of it. *Brogden* v. *Brown*, 2 Add. 441.

Partial insanity is good in defeazance of a will, founded immediately (so to be presumed) in or upon such partial insanity. If A, then, make a will, plainly inofficious, in respect to B, and is proved, at the time of making it, to have been under a morbid delusion as to the character and conduct of B, the Court of Probate will relieve against, by pronouncing this will to be invalid, and holding A to have died intestate, in law; how sane soever, in other particulars, or even generally, A, at the time in question, of making the will, may be proved to have been. *Dew* v. *Clark*, 3 Add. 79.

Meaning of the expression "partial insanity." *Dew* v. *Clark*, 6 Law J. Chanc. 186.

On a widow's impeaching the validity of her testator's will, on the ground that he was incapable of making one, being insensible at that time, the executors under the will proved by the surgeon who attended him, that his capacity was good, and that the latter even recommended the deceased to make a will, and settle his affairs. To controvert this statement, the widow called the subscribing witnesses to the instrument, who swore that he was in a state of total insensibility; but the Court, giving more credit to the testimony of the first witness than to the two last, pronounced the will to be valid. *Landon* v. *Nettleship*, 2 Add. 245.

### (c) *Attestation.*

To constitute a good attestation of a will of lands, it is not necessary that the testator should actually see the witnesses sign the attestations; it is sufficient if he were in such a situation that he might see them attest his will.

If, on the evidence, it appear that the testator was too weak to get out of bed, and it be doubtful whether the attestation was signed in the same room in which he was, or in the next room, the door being open; it will be for the jury to say, whether the will was attested either in the same room, or in such a part of the next room that the testator might see them sign the attestation: in either of those cases the attestation is good. But if the jury should think that the attestation was signed by the witnesses at a part of the next room where the testator could not see them, that is not a good attestation, notwithstanding the door between the two rooms was open, and the testator might hear what the witnesses said in the next room, if they spoke in the ordinary tone of voice. *Todd* v. *Earl of Winchelsea*, 2 C. & P. 488, s. c. 1 M. & M. 12. [Abbott]

A testamentary paper bearing an attestation clause, to which no subscribing witnesses appear, is not invalid on that ground, if it be perfect in other respects. *Doker* v. *Goff*, 2 Add. 42.

Where a testamentary paper contained an attestation clause without witnesses, but was sealed up, —the Court held it sufficient, because the sealing up shewed that the testator did not mean the paper to be witnessed. *Buckle* v. *Buckle*, 3 Phill. 323.

## (B) PROBATE.

### (a) *Granting.*

A Court of Probate, in deciding what instruments the testator meant to operate as, and compose his will, draws its conclusion from all the circumstances of the case. *Greenough* v. *Martin*, 2 Add. 239.

The death of a testator before he could prepare his will, is a sufficient ground to authorize the Ecclesiastical Court to grant probate of unfinished instructions. *Musto* v. *Sutcliffe*, 3 Phill. 104.

Instructions for a will, will be pronounced for, if it appears the testator was prevented from executing the will by the act of God. *Allen* v. *Manning*, 2 Add. 490.

Where testamentary papers are headed "Instructions for a will," and indorsed, however imperfect they may be in themselves, yet if proved to have been signed by the deceased (even many years before death,) with an intention to render them operative, *pro tanto*, in the event of her dying without any further act done, they are entitled to probate. *Popple* v. *Cunison*, 1 Add. 377.

The Court will not permit intricate and incomplete papers to probate, where the sudden death of an alleged testator prevents their completion as a will; therefore, it must be shewn that they were in progress towards completion at that time, so as to

warrant an inference, that the testator was prevented from completing them by that event alone. *Warburton* v. *Burrows*, 1 Add. 383.

The omission by a solicitor, through inadvertence, to insert a bequest of residue in a testamentary disposition, will preclude it from being admitted to probate. *Rockell* v. *Youde*. 3 Phill. 141.

Probate granted of instructions, for a codicil given to a third person, who was to transmit them to a solicitor. *Lewis* v. *Lewis*, 3 Phill. 109.

If the intention to appoint an executor according to the tenor be clear, he is entitled to be joined in the probate with an executor expressly appointed. *Grant* v. *Leslie*, 3 Phill. 116.

Before the probate of a fictitious will has been deemed unavailable, the next of kin cannot claim. *Bennett* v. *Cradock*, 1 Ken. 131.

The Prerogative Court of Canterbury will not receive a responsive allegation to a *condidit* suggesting the will of an Englishman to be unsupportable by the laws of a foreign country, where it was made, and where he died, he being, as it alleged, a *domiciled inhabitant*, as a ground for the Court not to grant probate thereof. *Curling* v. *Thornton*, 2 Add. 6.

If there be alterations in a will, probate will not be granted in the common form. *In the goods of Rolls*, 2 Add. 316.

Where probate, in common form, is sought to be had of a testamentary paper, which the Court is convinced could never be established, by proof in solemn form, as a will, the Court may feel itself bound to withhold probate, in common form of that testamentary paper, even though this be assented to by the only party or parties who have any apparent either right or interest to contest it. At all events, under circumstances, it will require more stringent proof that the party or parties so assenting, are conusant of the full import of their act, than is furnished by the mere exhibiting of a formal "proxy of consent," executed by such party or parties. *In the goods of John Tocher, Esq.*, 3 Add. 16.

Where an allegation, propounding a testamentary paper, did not plead facts of a nature to satisfy the Court, that if they were proved, they could shew the testator's capacity equal to the act; it was rejected. *Montefeiore* v. *Montefeiore*, 2 Add. 354.

If there be no person before the Court who has an interest in supporting the document propounded, —the Court will not proceed until all the parties interested be called before the Court, either by notice or by formal process. *Redmill* v. *Redmill*, 3 Phill. 410.

### (b) *Recalling.*

A codicil with various interlineations and erasures, not dated, signed, nor concluded, was deemed inoperative, and probate recalled after a lapse of thirteen years. *Finucane* v. *Gayfere*, 3 Phill. 405.

Residuary clause not being co-extensive with the heads and instructions given for the will, is a ground for recalling probate. *Fawsett* v. *Jones*, 3 Phill. 434.

Where probate had been granted of instructions for a will,—the Court, after the lapse of eight years, reluctantly granted a rule to shew cause why it should not be revoked, on the ground that the deceased was delirious at the time they were given. *Evans* v. *Knight*, 3 Phill. 413.

## (C) PROOF.

### (a) *In general.*

Where the subscribing witnesses were creditors of the testator, their debts having been paid, they were admitted to prove the will. *Wyndham* v. *Chetwynd*, 2 Ken. 121, s. c. 1 Burr. 414, s. c. Blac. 95.

Legatees cannot be witnesses to prove a will. *Tucker* v. *Sanger*, 1 M'Clel. 435, s. c. 13 Price, 607.

In establishing a will, the attestation of all the witnesses must be proved if they are abroad or dead, and the proof must be positive; but in proving a will, for some purposes, it is sufficient to adduce what will satisfy the Court. *Wood* v. *Stent*, 8 Price, 613.

A will more than thirty years old may be read, notwithstanding possession has not followed, because, until it has been stated to the Court, the judge cannot know what the will directs. *Doe d. Lloyd* v. *Persingham*, 2 C. & P. 440. [Burrow]

Where a will, thirty years old, is brought from the Ecclesiastical Court, the mere fact, proved by the party against whom the will is produced, that one of the attesting witnesses is living, does not render it necessary for the party producing the will to call that witness, although the testator has not been dead thirty years. *Doe d. Oldnall* v. *Woolley*, 6 Law J. K.B. 286, s. c. 8 B. & C. 22, s. c. 3 C. & P. 402.

Doctrine of presumption as to the attestation of wills in the presence of the testator. *Earl of Winchelsea* v. *Wauchope*, 5 Law J. Chanc. 167, and see *Todd* v. *Earl of Winchelsea*, *ante*.

If witnesses prove the attestation of the will, but no question be asked as to the testator's sanity, the cause will be adjourned, with liberty to exhibit an interrogatory as to the sanity. *Abrams* v. *Winship*, 1 Russ. 526.

In a suit to establish a will, and for the administration of real and personal assets,—if the heir at law of the testator be abroad, it seems, the Court does not, as in other cases, declare the will well proved, or establish the same, but merely directs the trusts of the will to be carried into execution. *Thompson* v. *Topham*, 1 Y. & J. 556.

### (b) *In the Ecclesiastical Court.*

It is not necessary that a will appointing testamentary guardians should be proved in this court. *Gilliat* v. *Gilliat*, 3 Phill. 222.

A will made by a naval officer in favour of an agent, on the advance of money, requires very strong proof of the *animus testandi*, and it will be invalid if executed as a mere security for debt. *Zacherias* v. *Collis*, 3 Phill. 176.

A nuncupative will requires to be proved by evidence much more strict and stringent than that of an alleged unwritten will. *Le Maux* v. *Bennett*, 1 Add. 389.

Where a will has nothing doubtful or incongruous on the face of it, suggesting itself the probability of some casual error, to account for this, in the body of the will; extrinsic evidence to the testator having meant other than the will expresses, is inadmissible; for the Court, after, and notwithstanding such evidence, would still be bound to pronounce for the will in its actual state.

But there being some absurdity, or ambiguity, on the face of the will; probably owing, and so, probably to be ascribed to some casual error in the body of the will; the fact of some casual error in the body of the will may then be pleaded, in order to its being proved by extrinsic evidence. And in the event of such evidence being satisfactory, both to the fact of some casual error, and to the error suggested being, precisely, that error; the Court is bound to pronounce for the will, not in its actual state, but with that error first reformed or corrected, in manner suggested.

An allegation, pleading the casual omission, by the testator, in his will, of a legacy of 5000*l.* to a nephew, admitted to proof on this principle. *Bayldon* v. *Bayldon*, 3 Add. 232.

A dies, leaving a will and codicil, whereby he appoints B residuary legatee for life; two other codicils (so styled), propounded by the executors, and opposed on the part of C, one of the contingent residuary legatees, substituted in the will, and a legatee in the (first) codicil. Part of an allegation, setting up that B had no interest, in consequence of A's property being insufficient to pay the legacies bequeathed in his will and (first) codicil, (in order, this, to make out B's competence as a witness against the second and third codicils, so styled), admitted to proof. But the Court said, that, howsoever proved, it would pay little respect to B's evidence; unless she also qualified as a witness, in the usual mode, by releasing; which she, B, could have no difficulty in doing, if in effect, she had no interest. *Byrne* v. *Dalzell*, 3 Add. 61.

An allegation pleaded that a testator, in executing certain papers [marked A] as and for his will, [such papers consisting of 33 sheets, numbered from 1 to 19, and from 21 to 34] verily believed a paper [marked B] itself, or a transcript or copy thereof, to be in its place [as the 20th (missing) sheet, supplied from the draft will,] in and among such papers; and that if a transcript or copy of B were not in its place, in and among papers A, when so executed by the testator, its omission was purely by mistake or accident; or, lastly, that if a copy or transcript of B were in its place, in and among papers A, when executed by the testator, as and for his will, it had since been detached from the same, (and lost or mislaid) unknown to, and contrary to the meaning and intention of the testator; for that the testator meant and intended to give, will, bequeath, &c., in all things, as in papers A and B (propounded as together containing his will) together contained. The Court deemed this allegation proved, pronounced for papers A and B, (B inserted as, or in supply of, the 20th sheet of A,) as together containing the will of the testator—on what principles, vide case of *Bayldon* v. *Bayldon*. *Travers* v. *Miller*, 3 Add. 226.

Although the next of kin has acquiesced in probate, taken in the common form, and has even received a legacy due to him, under the will, still he is at liberty to dispute such probate, and put the executors thereof on proof, *per testes*, of that identical will, upon his bringing in the legacy so received. *Bell* v. *Armstrong*, 1 Add. 365.

When the probate of a will once taken, is called in by the next of kin, though in the common form, and he puts the executor on proof, *per testes*, of his will, he does it at his peril as to costs. *Bell* v. *Armstrong*, 1 Add. 365.

Before a next of kin, who has received a legacy under a will of which probate has been obtained, can be permitted to put the executor on proof *per testes* of that will, he must bring in such legacy to the registry of the Court. *Core* v. *Spencer*, cited 1 Add. 374.

A person benefited by a former will, will not be allowed to put an executor on proof of an existing will, unless such former will be produced. *Thompson* v. *Waldram*, 3 Phill. 584.

A, as executor of B, cited to bring in the probate, taken in common form, of her will, seven years before, by A; and to prove the will, *per testes;* at the instance of C, as the representative of D, the mother, the sole next of kin of B.

A, who appeared under protest, dismissed with costs; the Court holding, that it was only competent to C to do, in the premises, what D, if living, could have done; that D, if living, could not have cited A, in effect, as cited by C finally, that the grounds suggested, in objection to the protest, [being the same meant, in the end, to be relied on, in opposition to the will,] were unavailing in objection to the protest, [and would in the end, be equally so, in opposition to the will]. *Braham* v. *Burchell*, 3 Add. 243.

## (D) REVOCATION.

[See *Sparrow* v. *Hardcastle*, 1 Ken. 67—*ante*, ADVOWSON, and *Grantley* v. *Garthwaite*, 2 Russ. 90.]

Marriage and issue are a presumptive revocation of a will, but such will is established by a codicil republishing it. *Gibbens* v. *Cross*, 1 Add. 455.

Questions of revocation of a will are all, to a certain extent, questions of intention; therefore testamentary instruments (regularly executed) are hardly to be deemed revoked by mere inference and implication, under any circumstances; but certainly not under circumstances tending to shew that the testator's intention was not to revoke them. Upon this principle, where A, by a sixth codicil to his will, "confirmed and republished" his said will, and the several codicils thereto (specifying two, by their dates, and omitting any mention of, or reference or allusion to, either of the other three.) The Court held, that this did not amount to a revocation of either of the other three. *Smith* v. *Cunningham*, 1 Add. 448.

On the question, whether, on setting aside a deed of conveyance on a clear manifest fraud, a will, previously made to the grantee under the deed, has been revoked by it, and is rendered again valid by annihilating the deed: Held, that any deed shewing an intent to make a different disposition, is a revocation of a will, and that, in the present case, the whole being one transaction between the same parties, the Court would not set up the will. *Hick* v. *Mors*, 2 Ken. 117, Chanc., s. c. Ambl. 215.

Where a lease has been renewed, the question, whether it amounts to a revocation of a previous will, depends on the intention apparent in the will. *Colegrave* v. *Manby*, 6 Mad. 72.

A subsequent conveyance of property devised is, in law, the revocation of a devise. *Doe d. Smith* v. *Smith*, 6 Law J. K.B. 64.

A fine passed after the making of a will is, in law,

a revocation of the will, as to whatever is passed by the fine. *Denn d. Bulkeley* v. *Wilford*, 4 Law J. K.B. 295; s. c. 8 D. & R. 549: s. P. *Parker* v. *Biscoe*, 8 Taunt. 699.

By deed of the 4th of November 1800, (being the settlement made on the marriage of A and B,) the intended wife B, in exercise of a general power of appointment vested in her by a previous deed of the 4th of May 1799, appointed certain freehold houses to the use of trustees, during the joint lives of herself and her husband, for her separate use, with remainder, in the event of her dying in the lifetime of her husband (which happened), as she should appoint by will, attested by three witnesses, with limitations over. Shortly after her marriage, B, by will duly attested by three witnesses, devised the houses to her husband in fee; afterwards, in 1811, she and her husband executed a deed, attested by two witnesses, by which, after reciting the indenture of the 4th May 1799, but not mentioning the marriage-settlement, B, in exercise of the power given her by the deed of 1799, and of all other dowers, &c. appointed the messuages to the use of her husband for life, remainder to the use of herself for life, remainder to the use of the children of the marriage, as she should appoint; and, in default of appointment, to all the children equally, in tail, with remainder to her husband in fee: Held, that the deed of 1811 did not operate as a revocation of the previous will. *Kilbeck* v. *Wood*, 1 Russ. 564.

A will of real estate is revoked by a conveyance to trustees, upon trust to sell and pay debts, and, until the sale, to pay an annuity to the separate use of the grantor's wife, which annuity was not previously a charge upon the property. *Hodges* v. *Green*, 6 Law J. Chanc. 32.

A will had been duly executed, devising a real estate; subsequently, the testatrix, by a deed enrolled under the Mortmain Act, appropriated the estate before devised to charitable uses, and executed a codicil to be taken as part of her will. The testatrix died before the expiration of the twelve months limited by the statute; the deed consequently became inoperative, and was held to be no revocation of the devise of the real estate. *Matthews* v. *Venables*, 2 Law J. C.P. 124, s. c. 2 Bing. 136, s. c. 9 B. Mo. 286.

J H, seised, amongst other estates, of certain copyhold premises, by will devised all that his copyhold premises, &c. to the use of trustees, in trust for his wife during her life or widowhood, or so long as she should reside upon the premises; and in either of those events, to the same trustees in trust to follow the disposition of the residue of his real estates, regard being had to the nature of the copyhold tenure; he devised to the same trustees a freehold estate, charged with an annuity to his daughter for life, after her death to the use of her children, and in default of such issue, to follow the disposition of the residue of his real estates; and further devised to the same trustees certain freehold premises, and all the residue of his real estates, in trust for his son, charged with an annuity to his wife, remainder in tail male to the issue of his son; on failure of such issue, a further annuity being thereupon payable to his wife, to the use of his grandson for life, remainder to the sons of his grandson in tail male; and on failure of such issue, to the [illegible] sons of his daughter in tail male, remainder to his right heirs: he bequeathed to his wife certain personal property absolutely, and to the same trustees all the personal property in and upon the copyhold premises in trust for his wife, during such time as she should be entitled to the copyhold premises, and on the determination of her estate therein, for the devisee of the residuary real estate: and to his son all the residue of his property. The testator, by his first codicil, referring to his will, and reciting the death of his son, devised to the husband of his daughter, after her death, the freehold estate devised by his will to her; charged his residuary real estates with a further annuity to his wife, over and above those already limited thereout for her benefit; bequeathed two further annuities to his daughter and to her husband, and revoked the bequest of his personal property in and about his copyhold premises, giving the same and the residue of his personal property absolutely to his wife, and in the event of her death before him, to his nephew. By a second codicil, the testator appointed his wife sole executrix, and residuary legatee of his personal property: and, by a third codicil, directed the proceeds of certain shares in the County Fire Office, to be enjoyed by his wife for life; after her death, by his daughter and her husband for life; and after their decease by his heir in possession: and by a fourth codicil, revoking and making void several of the dispositions theretofore made by his will and codicils of all his freehold, copyhold, and personal estate and effects of every kind and description, instead, and in the place of such devise, disposition, and bequest thereof, gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated, to his daughter for life, remainder to his grandson and his heirs in strict entail, and, on failure of issue, as by his will directed; ratified and confirmed the several annuities and donations by his will and former codicils bequeathed; and gave and bequeathed to his wife a further annuity, with the like restrictions as the former were payable; in all other respects confirming his will and codicils: Held, in error, that this latter codicil did not revoke the devise in the will to the widow of the copyhold premises. *Hicks* v. *Doe d. Hearle*, 1 Y. & J. 470.

15,000*l.* being charged upon certain lands by way of portions for younger children, in equal shares, subject to the appointment of it among them by the father; one of the children, in consideration of a large sum advanced to her in contemplation of her marriage, by her father, who was the then tenant of the premises, releases to him and his heirs all her interest in the lands; this does not operate as an extinguishment of her part of the 15,000*l.*, but the father will take that part as a purchaser. The father being entitled, as a purchaser, to dispose of part of the 15,000*l.*, by his will bequeaths the whole of it to his three daughters, who were not then advanced; shortly afterwards one of them, A, having married, and having received from him 10,000*l.*, he, by a codicil reciting that circumstance, revoked the appointment of the 15,000*l.* made by him in his will, so far only as respected A, and her proportion of the same, and not further: Held, that the two remaining daughters were entitled to the whole 15,000*l.*, and that the codicil was not merely a revocation of

the gift to A. *Noel* v. *Walsingham*, 3 Law J. Chanc. 12, s. c. 2 S. & S. 99.

A married woman having, in the event of her dying in her husband's lifetime, a power of appointing certain freehold messuages by will, attested by three witnesses; and, in the event of her surviving her husband, a power of appointing by deed or writing, attested by two witnesses—during the coverture made a will, attested by three witnesses, devising the messuage to her husband in fee; afterwards by deed, attested by two witnesses, she appointed them to uses and trusts altogether inconsistent with the disposition made by her will, and she subsequently died in the lifetime of her husband: Held, that the deed did not operate as a revocation of the will. *Eilbeck* v. *Wood*, 5 Law J. K.B. 194, ib. Chanc. 61, s. c. 1 Russ. 564.

A testator seised in fee of an estate disposes of it by will. After making his will, having occasion to borrow a sum of money, he conveys the estate by way of security for the money to trustees in fee; and there is a proviso in the deed of conveyance, that if the mortgage money was paid at the time fixed, the trustees were to re-convey the estate to him, his heirs and assigns, or to such person or persons, and for such estate and estates, and to and for such lawful trusts, intents and purposes, as the testator, his heirs and assigns, should by any deed or instrument in writing, direct, limit, or appoint: Held, that the direction of the additional words, "to convey to such person or persons," &c. gave no new power of conveyance to the testator beyond what he would have acquired without them, as the necessary consequence of the conversion of his legal into an equitable fee; and consequently, the conveyance, being as a mere security for money, operated only as a revocation of the will, *pro tanto*. *Brain* v. *Brain*, 6 Mad. 221.

If a party sits down, meaning to revoke a disposition of his property, and by the same act, *unico contextu*, to make a new one, if he makes the revocation, but dies before he has completed his new disposition, he shall not be held to have revoked his former disposition, because his revoking it was but part of his purpose, and his act was incomplete. But if he completed his purpose, by a new disposition, the first is revoked, however inadequate such new disposition may be to convey his property.

As if A, having made a will of land, afterwards makes another in which he revokes it, and gives his land to a monk, or an alien, the revocation is good, although the devise is void, because the purpose was complete so far as it was in his power to complete it.

If the heir is let in *pro brevissimo intervallo*, the intention or power of the grantor to give away his estate upon death-bed signifies nothing, if it is not done *habili modo*. The cases of the destruction of the *liege poustis* deed though cancelled only to execute another deed, or a revocation by indorsement, when a new deed was the next moment executed, shew, that what may be done validly in one mode cannot be so in any mode.

In the case of *Rowan* v. *Alexander* a false principle was laid down on the Bench, that because the testator could effectually have given the value of his estate in money, therefore the disposition of the estate was valid. It was said in that case, that there was no express revocation; but *semble*, that giving the estate wholly to another, was equivalent to an express revocation.

That case must now be held to stand upon this principle, that the testator did not mean the former deed to be revoked unless the second deed was found to be good, and expressing nothing as to a revocation of the former deed, must be held to have meant in effect that both should stand to accomplish the purpose he wanted, of giving the estate to the disponee in the last deed.

The case of *Rowan* v. *Alexander* has become authority from lapse of time. *Crawfurd* v. *Coutts*, 2 Bligh, 687.

The cancellation or destruction of a will, by an unauthorized person, will not prevent the Court from pronouncing in favour of it, in *substance and effect*, if its contents can be ascertained. *Foster* v. *Foster*, 1 Add. 162.

A testator, after having duly executed a will to pass his real estates, appeared afterwards to have made interlineations, immaterial as to the dispositions of the real estate, and a fair copy, unexecuted, was found in the same drawer at the residence of the testator, after his death: Held, that the latter circumstance being demonstrative only of a future intention, not carried into effect, it was inoperative; and that, the whole facts of the case shewing that revocation was not his object, such alteration did not revoke the will. *Windsor* v. *Pratt*, 5 B. Mo. 484, s. c. 2 B. & B. 650.

Where the deceased wrote a letter of "instructions" to his solicitor, concerning certain alterations to be made in his will, two months before his death. The Court rejected it as inadmissible, on the ground, that such letter did not shew the deceased to have fully made up his mind as to the proposed alterations. *Antrobus* v. *Nepean*, 1 Add. 399.

Legacies, charged solely on the real estate, having been given by a will duly attested, the testator afterwards reduced their amount by erasures of, and interlineations in the will; but the will with these erasures and interlineations was not re-executed or republished: subsequently, he made an unattested codicil, which also purported to diminish the amount of the legacies given originally by the will: Held, that the legatees were entitled to the legacies originally given by the will, and that the legacies were not reduced either by the erasures and interlineations, or by the codicil. *Kirke* v. *Kirke*, 6 Law J. Chanc. 143.

An erasure with a pencil is as effectual as ink; but it is a question whether the pencil cancellation be for deliberation or obliteration; for, where pencil lines were drawn over some legacies, and ink lines crossed over others—it was holden, that the pencil erasure was not a cancellation. *Parkin* v. *Bainbridge*, 3 Phill. 321.

Alterations written by the testator in pencil on the margin of his will, held to be, in themselves, deliberative—also held, not to result from the facts pleaded, that the testator was prevented from rendering them operative in themselves by an extrinsic circumstance—consequently, allegation propounding such, rejected. *Lavender and Churchill* v. *Adams*, 1 Add. 406.

Probate of a will, altered in various respects, by the testator, subsequent to the execution thereof, decreed to the executors, after the same had been re-

stored to the state in which it was at the time of its being executed; it appearing, by affidavits, that the testator had so altered his will, whilst of unsound mind; and there being also a proxy of consent to this from all the parties whose interests were affected by such alterations. *In the Goods of Richard Bicknell*, 3 Add. 231.

### (E) REVIVAL AND REPUBLICATION.

*Semble*, That the cancellation of a later will by the testator, amounts to the revival of a former, revoked by the one subsequently cancelled.

An imperfect, or an unfinished testamentary paper, is subject to the adverse legal presumption; but on the revival of a former will by the cancellation of a subsequent revocatory will, the legal presumption is neither favourable nor adverse; therefore the question of intention depends on the extrinsic facts and circumstances. *Usluks* v. *Bawden*, 2 Add. 116—25.

When it is known that the testator has made two wills, and one only is found, the presumption of law is, that he has destroyed one to revive the other. *Loxley* v. *Jackson*, 3 Phill. 126.

The cancellation of a will, which bears a subsequent date, will not revive a prior one. *Hooton* v. *Head*, 3 Phill. 26.

The Ecclesiastical Court seems to think the destruction of a subsequent will does not revive the former, though it is a controverted point; however, it is a question dependent on the intention, which must be collected from the circumstances. *Wilson* v. *Wilson*, 3 Phill. 543.

If a will be made before marriage, and the wife survive the husband, that will does not revive by, and upon, the mere death of the husband. But if a woman republish, in her widowhood, a will that she had made, being a *feme sole*, such will is equally good and valid, to dispose of her property, as if it had been actually, and originally made by her, in her widowhood.

*Note*, Facts and circumstances, of what nature, will amount to the republication of a will of personal estate. *Long* v. *Aldred*, 3 Add. 48.

A testator, after devising his C estate to his son in fee, gave all his O estate to N S and A G upon trust to sell the same, and appointed them his executors: he afterwards sold C estate, and became seised in fee of another, called A; and afterwards signed a codicil to his will, attested by two witnesses only, stating that the money obtained for the C estate, and to be obtained for the A estate, which he directed to be sold, should be divided amongst all his children, and he appointed his wife executrix jointly with N S and A G: and by a second codicil, attested by two witnesses only, he, after stating that one-half of O estate was sold, and giving directions as to the sale of the other half, appointed E L and J F his executors in the place of N S and A G; and afterwards made a third codicil, duly attested for passing real estates, but merely appointing B G to be his executor in the room of E L: all the codicils were written on the back sheet of the will: Held, that the third codicil operated as a republication of the first. *Guest* v. *Willasey*, 5 Law J. C.P. 101.

### (F) CODICILS.

Three several cheques, given at different times whilst the deceased was ill, worded—I give to A B, £——, in case anything should happen to me that I should die, were deemed codicillary. *Bartholomew* v. *Henly*, 3 Phill. 317.

Where a will regularly executed expressly reserved the power of giving legacies by a subsequent codicil, imperfect papers were deemed codicils. *Forbes* v. *Gordon*, 3 Phill. 614.

A codicil will be pronounced invalid, although inclosed in the testator's will, if there were no witnesses, no date, and it be in other respects incomplete. *Satterthwaite* v. *Satterthwaite*, 3 Phill. 1.

A codicil with an attestation clause, although unattested, but deposited with the will, and indorsed, shewing that the deceased considered it complete, was admitted to probate. *Thomas* v. *Wall*, 3 Phill. 23.

In the absence of a codicil, the Court permitted the contents or substance to be established by proof of—1st, that it was duly made; and, 2d, that even if cancelled, it was not revoked by the testator. *Davis* v. *Davis*, 2 Add. 223.

A bequest by a codicil of 1,000*l.* instead of 1,500*l.* given by the will, is subject to the same limitations and restrictions which affected the 1,500*l.* *Prescott* v. *Edmunds*, 4 Law J. Chanc. 111.

Where a legacy by codicil is substituted for a legacy in a will, it still retains the same qualities; but where a legacy is said to be given by a codicil, because the will has failed, it is not a substitution, but a new gift. *Chatteris* v. *Young*, 6 Mad. 30.

The rule that a codicil is revoked by the cancellation of that will to which it refers, prevails, though circumstances be shewn of a different intention of the testatrix. *Medlycott* v. *Assheton*, 2 Add. 229.

A testatrix, after making her will, made three several codicils, wherein she gave to A & B a certain increased sum by each codicil—subsequently she requests her solicitor to call, and bring her will with him, as she intends to make an entire new one. Upon this interview he suggests that a codicil to the will would effect the purpose, therefore he prepared the same, and she bequeathed to A & B a further sum, without taking notice of the intermediate codicils: Held, that the three intermediate codicils were revoked by the subsequent one, and consequently invalid. *Greenough* v. *Martin*, 2 Add. 239.

The first codicil referred to lands mentioned in the will, made a disposition of lands purchased subsequently to the will, according to directions in the will, as to the devisor's land in general, gave a legacy to the devisor's wife, and appointed her executrix in addition to the executors named in the will: it was attested by only two witnesses. The second, which also was attested by only two witnesses, referred to lands mentioned in the will, gave directions touching the sale of a portion of them, revoked a legacy given by the will, and appointed two new executors in the room of those mentioned in the will. The third merely appointed a new executor in the room of the executor named in the second codicil, and was attested by three witnesses: Held, that the third codicil operated as a republication of the first. *Guest* v. *Willasey*, 3 Law J. C.P. 114, s. c. 3 Bing. 614, s. c. 10 B. Mo. 223.

A codicil directing that the dividends only of legacies, which had been bequeathed by the will, should be paid to the legatees, and that the principal of the legacies should not be paid to them, leaving

the principal not further disposed of, is equivalent to a bequest of the whole, and is in substance a gift to that effect. *Richards* v. *Richards*, 9 Price, 219.

Where a testator by his will left his wife sole executrix and universal legatee, and a codicil to the testator's will was found after the death of the wife: Held, that the codicil might be produced on behalf of a legatee, on the wife's executor refusing to accept administration of the testator's effects left unadministered. *Dickenson* v. *White*, 1 Add. 490.

A codicil, of which probate had been granted, was ordered to be registered in Scotland, it not relating to any property in this country. *In the goods of Nicholson*, 2 Add. 333.

A devisee does not lose benefits given him by a will, in consequence of his being an attesting witness to a codicil, ratifying and confirming the will. *Dennis* v. *Wood*, 4 Law J. Chanc. 57.

A bequest and devise to A absolutely by the will, is modified by a direction in a codicil, that his share of the property shall be only for the life of himself and his wife, provided they have no issue, and that at their death it shall become part of the residue: Held, that these words mean, "provided they have no issue living at the death of the survivor of A and his wife," and, therefore, that the executory gift is not too remote. *Rackstraw* v. *Vile*, 2 Law J. Chanc. 102, s. c. 1 S. & S. 604.

A testatrix, after various specific bequests, gave to A all her other personal estate and effects; by a codicil she gave A certain specific articles, and bequeathed to B all her said property not named in her will: Held, that the gift to A, contained in the will, was altered by the codicil; that A was entitled only to the specific articles given him by the codicil; and that B took the residue not named in the will. *Bescoby* v. *Pack*, 2 Law J. Chanc. 17, s. c. 1 S. & S. 500.

## (G) CONSTRUCTION.

In construing the words in a will, the context must be taken into consideration. *Wright* v. *Atkyns*, 1 Turn. 158.

Equity cannot correct wills upon the head of mistake, but follows the rule of law, that a devisor is to be taken to mean what he has expressed; but the Court may direct an issue to inquire whether a particular expression found in the will forms part thereof. *Powell* v. *Mouchett*, and *Lichfield* v. *Mouchett*, 6 Mad. 216.

It is incompetent to the Court to strike out or expunge any part of a will (however immaterial) on mere verbal statements to the fitness of this [*i. e.* statements unsupported by any evidence, &c.] even though with the consent of all parties whose interest it can possibly affect. *Curtis* v. *Curtis*, 3 Add. 33.

Decisions ought to accord with former authorities if possible, but at all events the established rules of legal construction ought to be adhered to.

It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary amplification.

All the cases but *Doe* v. *Goff*, decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent contrary to the legal import of the former, are to be rejected.

That the general intent overrules the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear the testator meant otherwise.

In many cases, if not in all, except *Doe* v. *Goff*, it has been held that the words "tenants in common" do not overrule the legal sense of words of settled meaning.

The words "heirs of the body" mean, *primâ facie* all descendants; and it is likewise a rule of law, that all descendants shall take under these words, unless they are clearly qualified and restricted by other words. The great difficulty arises in the application of these rules to the words of each will.

In order to cut down an estate tail, it is absolutely necessary that a particular intent should be found to control and alter it as clear as the general intent expressed. The words "heir of the body" will indeed yield to a clear particular intent, that the estate should be only for life; and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator: but that must be clearly intelligible and unequivocal. *Jesson* v. *Wright*, 2 Bligh, 49—53.

Where the terms of a will are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed, extrinsic circumstances must be resorted to. *Colpoys* v. *Colpoys* 1 Jac. 451.

*Quære*, if the Court, in deciding whether a will is a good execution of a power, can look at the state of the testator's property at the time of making his will, as a guide to his intention. *Lowndes* v. *Lowndes*, 1 Y. & J. 445.

If it be doubtful whether a testatrix intended that certain premises should pass to a devisee named in the will; the Court, *on a special case* stating all the facts, will not say what was the intention of the testatrix, but will send the cause to another jury, to decide it as a question of fact. *Doe d. Holborow* v. *Perrett*, 3 Law J. K.B. 9.

The terms used by a foreigner domiciled in England, and there making a will, are to be construed according to their meaning in that country, but the principles of the English law must be applied with respect to their operation. *Anstruther* v. *Chalmer*, 4 Law J. Chanc. 123.

Construction of an obscure will. *Robinson* v. *Smith*, 6 Mad. 194.

Where the introductory part of the testator's will begins thus: "I will and direct that my just debts, funeral expenses, and testamentary expenses, be paid and satisfied," it amounts to a charge upon the real estate. *Clifford* v. *Lewis*, 6 Mad. 33.

Death, without leaving issue, is as to real estate a general failure of issue, and is not restrained from issue living at death by words of limitation superadded to issue of tenant for life. *Franklin* v. *Lay*, 6 Mad. 258.

A will, bequeathing in the body of it certain residuary property to the testator's nephews and nieces after his sister's death; and, by a codicil, giving to a great niece, (called in the codicil, his niece,) "a certain sum over and above her share, after the decease of his sister, in the body of that his will treated of more at large," cannot be so construed as to entitle the great nephews or nieces to share in the residue. *Shelly* v. *Bryer*, 1 Jac. 207.

A party to whom the residue had been bequeathed, to be applied by her discretionally for the education of her son, and who was declared unaccountable to any one for the disposal or application of it, was considered entitled to it, subject to a trust to apply a part to the education of her son during his minority. *Hamly* v. *Gilbert*, 1 Jac. 354.

A tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after the testator's decease, on such parts of the testator's estate as are invested, at his death, in the proper securities, and on such parts as are afterwards so invested within the same year; but the income, before such investment, forms part of the capital of the residue. *La Terriere* v. *Bulmer*, 2 Sim. 18.

A testator bequeaths his personal estate to his wife, relying that, if she marries again, she will make a settlement of all the property bequeathed to her; by a subsequent clause, he recommends to her to give, by her last will, to certain persons whatever she may die possessed of by virtue of his will: Held, that the words of recommendation create a trust affecting all the property comprised in the testator's will. *Horwood* v. *West*, 1 Law J. Chanc. 201, s. c. 1 S. & S. 387.

Where a testator recommended his son to continue certain parties in the occupation of their farms, &c. provided, &c.—the Chancellor held the recommendation imperative; and that the son was either bound to continue such parties, or make a compensation. *Tibbits* v. *Tibbits*, 1 Jac. 317.

A testator gave properties to his daughter and her children—"and, in default of such issue, and in case of her death," he gave them over. These are words of double contingency—default of issue, and death; and the limitation will accordingly take effect on her dying without children at any time. *Gawler* v. *Cadby*, 1 Jac. 346.

Where it was not apparent on the face of the will, that a general devise in trust to sell, was intended to include a particular estate, of which the testatrix had been wrongfully in possession up to the time of her death, the rightful owner of that estate was not put to his election in respect of an interest bequeathed to him in the money to be produced by the sale of the estate. *Blommart* v. *Player*, 2 S. & S. 597.

A testator devises leaseholds upon trust for his son T D, and all his (the testator's) children, by his then wife, who should be living at his decease, as tenants in common; but if T D should die under 21, and without leaving issue, and if the testator should have no other children by his then wife, living at his decease, who should attain 21, then upon trust for J C D for life, and after his decease, for his children in equal shares; and if J C D should die under 21, and without leaving issue, living at his decease, then upon certain trusts over. T D dies under 21, and without issue: afterwards J C D dies, having attained 21, but not leaving issue: Held, that, there being a balance of intention upon the words of the will, the Court will not change *and* into *or*; and, therefore, that the ultimate limitations over did not take effect. *Browne* v. *Walker*, 2 Law J. Chanc. 82.

Devise of a freehold estate to the testator's illegitimate son William, "To have and to hold during the term of his natural life, and in case he has issues, then it is my will they should jointly inherit the same after his decease." In a subsequent part of the will, the testator devised and bequeathed the rest and residue of his effects, real and personal, not therein-before disposed of, to his said son, "but in case my son William dies without issue, then it is my will that the whole of my property be ascertained," and (after bequeathing certain legacies and annuities), "the rest and residue of my property, together with the before-mentioned annuities as they drop off, I give in equal proportion to A and B:" Held, that the illegitimate son took an estate tail in the real estate, and an absolute interest in the personalty. *Ward* v. *Bevel*, 1 Y. & J. 512.

A testator bequeaths and devises his real and personal estate to A and B, upon the following trusts: that is to say, upon trust, in the first place, to sell an advowson, and to apply the money in discharge of his debts and legacies; and if that should not be sufficient, to fell timber for the same purpose, &c.; but he declares no trust applicable to the personal estate, and makes no residuary disposition either of it, or of the real estate; he then appoints A and B his executors, and directs that they shall retain their costs and expenses: Held, that A and B do not take the residue of the personal estate beneficially:—That the personal estate remains the primary fund for the payment of debts and legacies; and that the real estate is charged only in aid of it. *Rhodes* v. *Rudge*, 5 Law J. Chanc. 17, s. c. 1 Sim. 79.

H R being possessed of a leasehold estate, by a gratuitous deed, in 1731, limited the term to himself for life, with remainder to his son R R *quasi* in tail.

In 1739, upon the marriage of R R, then an infant, a deed, to which he was a party, was executed, whereby the term, the subject of the former settlement, was limited in trust to provide annuities to R R and his wife, till 1742, and, until that time and subject thereto, to permit H R to receive the rents, and then to raise 1200*l*. for the use of H R, and from 1742 to permit R R to receive the rents, subject to the charges; and after the deaths of H R, R R, and H R, in trust for the sons of the marriage, as R R should appoint, &c., with divers limitations over in trust to raise portions, &c.; and in case there should be no sons of the marriage, or by any future wife, &c., that the term should revert to H R, his executors, &c.; and H R, by the deed covenanted to provide for R R, his wife and children, board and lodging until 1742, and at that time to pay R R, his executors, &c., 300*l*. in money or stock, &c.

This deed was executed and acted upon by all the parties.

R R came of age in 1741, and died without issue male.

In 1743, H R made an appointment under a power in the deed of 1731. By his will also reciting and executing a power in the deed of 1731; and without noticing the limitation of the deed in 1739, he gave to his daughters A and B, (under whom the appellants claimed) the residue of his personal estates.

Held, in the court below, and on appeal, that the term did not pass by the will of H R as part of the residue, but vested in R R by operation of the deed of 1731; or by operation of the deed of 1739, vested in H R, subject to the trusts of the deed of 1731, in favour of R R.

Held, also, that it was not a case of election, as R R had no power to reject the whole of the deed of 1739. *Croker* v. *Martin*, 1 Bligh, N.S. 573.

A, being possessed of a term in lands of ninety-nine years, if she and B, and C & D, her daughters by a deceased husband, should so long live, intermarries with E, whereupon a settlement is made of the property of A, including the term which is assigned in trust for A and E, during their joint lives, with remainder to the survivor, his or her executors, &c. E dies in the lifetime of A, by his will treating as his own the term of years in settlement, and bequeathing it to A for life, with remainder to B for life, remainder to C for life, remainder to D for the residue of the term. He also, by his will, bequeaths the residue of his personal estate to A, and leaves her sole executrix. A proves the will and administers to the estate, and dies, having made a will bequeathing all her personal estate to B, whom she appointed sole executrix; B having married, X proved the will; X, in right of B, entered and held possession of the lands until her death, when he gave up the possession to Y, who took possession as in the right of C, whom he had married. But afterwards B filed a bill against Y and C, and also against D, stating that he was ignorant of the settlement when he gave up possession of the premises, and had lately discovered its existence, and the right of B, his deceased wife and testatrix, under it, and praying restoration of the possession, and an account of rents received and payment of them, or an occupation rent during the wrongful possession.

By the answer to this bill, the defendants relied upon the will of E, and the acceptance by A of benefits under it, amounting to an election. They also filed a cross bill against X, stating the will of E; and that A, being appointed executrix under it, had proved the will and acted under it, paying the debts and retaining a large residue, and praying that it might be declared that A was bound to elect, and had elected, to waive her right to the term, and to take the benefit given to her by the will of X; and that they were entitled to the residue of the term according to the will of X; but the cross bill did not make the personal representative of A in that character, a party, nor pray any account of the personal estate of E, possessed by her. Under these circumstances, it was held in the Court below and affirmed on appeal, that no election by A had been proved in the cause, and that X, in right of his wife, was entitled to the possession of the term under the will of A, supposing the term to have passed by the words of her will. *Morgan* v. *Edwards*, 1 Bligh, N.S. 401.

### (G) Costs.

If the evidence as to the *factum* of a will be corroborated by circumstances so clear and unequivocal as to entitle the same to probate, any person impeaching the same upon untenable grounds—as first, by impugning the character of the witnesses; second, attacking the probability of the depositions; and, third, denying the validity of the signature—will be condemned in costs. *Robson* v. *Rocke*, 2 Add. 53.

In the course of a cause to establish a will against an heir-at-law, if he only cross-examine the witnesses for the will, he is entitled to his costs; if he examine witnesses in chief, he is not entitled; but in no such case are the costs decreed against him. However, where he is a plaintiff seeking to set aside the will after any considerable lapse of time, he may be made to pay costs. *Tucker* v. *Sanger*, M'Clel. 445.

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## WITNESSES.

(A) Attendance.
(B) Competency.
  (*a*) *Crimes.*
  (*b*) *Relative Situation.*
  (*c*) *Interest.*
  (*d*) *Waiver of Objection to.*
(C) Credit.
(D) Commission to examine.
(E) Examination.
  (*a*) *At Law.*
  (*b*) *In Equity.*
  (*c*) *In the Ecclesiastical Courts.*
(F) Interrogatories.
(G) Depositions.
(H) Protection and Privileges.
(I) Expenses.

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### (A) Attendance.

An attorney is not bound to attend with a deed at the hearing of a cause, unless he be served with a *subpœna duces tecum*, although he be a witness to a deed, and has the same in his possession. *Busk* v. *Lewis*, 6 Mad. 29.

To obtain an attachment against a witness, being at a distance, for not obeying a subpœna, the whole expenses must be paid or tendered to him. *Ashton* v. *Haigh*, 2 Chit. 201.

A rule *nisi* for an attachment against a witness, for not obeying a subpœna, was discharged, when it appeared that the subpœna dated on the 18th June, to attend the trial of the cause on the 2nd July, was served on the 3rd July, and the cause was tried after the 3rd, of which no notice had been given to the witness. *Alexander* v. *Dixon*, 2 Law J. C.P. 22, s. c. 1 Bing. 366, s. c. 8 B. Mo. 387.

In order to found an attachment against a witness for not obeying a subpœna, the application must be made in the term succeeding the trial; and it seems that the original subpœna must be shewn to the party at the time of the service. *Thorpe* v. *Gisburne*, 4 Law J. C.P. 57, s. c. 3 Bing. 223.

An attachment against a witness for not appearing will not be granted on an affidavit, that "the defendant has been served with a true copy of the subpœna," it being too general. *Hinchliffe* v. *Graice*, 1 M'Clel. & Y. 277.

If a witness, who has been duly served with a subpœna to attend to give evidence before commissioners in the country, neglects to do so, the Court will order him to attend before the examiner in London to be examined, but will not give costs against him. *Pepper* v. *Pepper*, 4 Law J. Chanc. 213.

A rule for an attachment having been granted against a witness for not attending a trial on his subpœna, he must not only swear that he was taken ill in court, but that he did not absent himself with a view that his testimony should be withholden or kept back. *Dent* v. *Hathaway*, 5 Law J. C.P. 58.

Upon a rule for an attachment against a witness for not obeying a subpœna, which rule the Court of C.P. discharged, because it did not appear that there had been a sufficient service of the subpœna: the Court also said, a term having elapsed since the service, that for the future they would adopt the rule in the King's Bench, not to entertain such a motion after a term had elapsed. *Thorpe* v. *Graham*, 3 Bing. 223.

## (B) COMPETENCY.

### (*a*) *Crimes.*

*Semble*,—That a convict is not disqualified from giving evidence in a court of justice, if he has only been convicted for a conspiracy to commit a fraud. *Crowther* v. *Hopwood*, 1 D. & R. N.P.C. 5. [Abbott]

The evidence of a party convicted of a conspiracy to defraud, will not be rejected by the Admiralty Court as inadmissible, in the absence of any actual decision to that effect in the courts of common law. *Ville de Varsovie*, Dods. 174.

*Semble*, That a party who has been convicted of fraudulently conspiring to enhance the value of the public funds by means of unfounded reports, is a competent witness. *Crowther* v. *Hopwood*, 3 Stark. 21. [Abbott]

A person who has been convicted of keeping a public gaming-house, is not guilty of such an infamous crime as to render him incompetent as a witness. *Rex* v. *Grant*, 2 R. & M. 270. [Abbott]

A person convicted of a conspiracy, by bribing a witness summoned on an information against the revenue laws, is incompetent as a witness. *Bushel* v. *Barrett*, 1 R. & M. 434. [Gaselee]

### (*b*) *Relative Situation.*

A husband of one of a family is a competent witness to prove a pedigree. *Doe d. Northey* v. *Harvey*, 1 R. & M. 297. [Littledale]

The declarations of deceased servants and acquaintances, however intimate, are not admissible evidence, even in a question of pedigree. *Johnson* v. *Lawson*, 2 Law J. C.P. 136, s. c. 2 Bing. 86.

A woman who lives with a man, uses his name, and passes as his wife, is a competent witness on his behalf, in an action brought against him; as the mere circumstance of cohabitation only goes to her credit, not to her competency. *Batthews* v. *Gabindo*, 6 Law J. C.P. 138, s. c. 4 Bing. 610, s. c. 1 M. & P. 565, s. c. 3 C. & P. 238.

### (*c*) *Interest.*

In an action of replevin against a broker, a person who, at the time of the distress, was in partnership with such broker, but who, at the time of the trial, had ceased to be his partner, is a competent witness for him. *Duncan* v. *Meikleham*, 3 C. & P. 172. [Burrough]

If one of several partners purchase goods in his own name: Held, in an action against the others, that he is not a competent witness to prove that the purchase was made on the partnership account. *Ripley* v. *Thomson*, 5 Law J. C.P. 8.

Several creditors of a bankrupt agreed, at a public meeting, that an attorney should be appointed on their behalf, and that the expenses should be borne by such creditors in the usual way: Held, that each creditor was separately answerable; and, in an action brought by the attorney against one of such creditors for his proportion of his bill of costs, that another who had paid his proportion was admissible as a witness to prove that the other creditors had promised to contribute according to the agreement entered into at such meeting. *Taylor* v. *Cohen*, 5 Law J. C.P. 58, s. c. 4 Bing. 53.

In an action of trespass for breaking and entering a close, it was held that a person who has actually committed the trespass, is a competent witness for the plaintiff, if he be not sued as a co-trespasser, though he is not released by the plaintiff. *Morris* v. *Daubigny*, 5 B. Mo. 319.

A stage coachman is not a competent witness, in an action for an injury committed by the negligent driving of a cart, unless he be released. *Kerrison* v. *Coatsworth*, 1 C. & P. 645. [Best]

In an action on the case for negligently driving a mail-coach against the plaintiff's waggon-horse, whereby the horse was killed: Held, that the waggoner was incompetent to prove the negligence of the defendant, without a release from the plaintiff. *Morish* v. *Foote*, 8 Taunt. 454, s. c. 2 B. Mo. 508.

In an action against the captain and owner of a steam-vessel, for an injury resulting from the improper management of the vessel, if it appear that a pilot had the control, such pilot is not a witness for the defendant, without a release, although the defendant himself was on board at the time. *Hawkins* v. *Finlayson*, 3 C. & P. 305. [Best]

In an action of trover against the sheriff for taking goods, the officer who had given him security is not a competent witness for the defence, even though the officer is indemnified by the execution creditor, and does not employ the attorney. *Whitehouse* v. *Atkinson*, 3 C. & P. 344. [Tenterden]

In an action by the plaintiff against his agent abroad, for not accounting, the defendant's agent in London is a competent witness, though he has accepted a bill for the price of the goods in question, which is lying dishonoured in the plaintiff's hands. *Martineau* v. *Woodland*, 2 C. & P. 65. [Abbott]

If the signature of a co-trustee to a power for the sale of stock be forged, the co-trustee is a competent witness to prove the forgery. *Rex* v. *Wait*, 1 Bing. 121, s. c. 7 B. Mo. 473, s. c. 11 Price, 518.

Plaintiffs who are merely trustees, and have no beneficial interest in the property in dispute, may be examined as witnesses. *Hougham* v. *Sandys*, 2 S. & S. 221.

An executor is not precluded from giving evidence, although he takes a contingent reversionary interest under the will. *Lynn* v. *Beaver*, 1 Turn. 63.

A let a house to the plaintiff, who underlet to the defendant; and on the plaintiff becoming bankrupt, the assignees consented to an action for use and occupation being brought by A in the plaintiff's name. A died, and his executor directed the plaintiff's attorney to go on with the action: Held, that the executor was not a competent witness on

the part of the plaintiff. *Parker* v. *Vincent*, 3 C. & P. 88. [Tenterden]

If an assignee of a bankrupt release his claim as a creditor, he is not an incompetent witness to support the petitioning creditor's debt. *Tomlinson* v. *Wilkes*, 5 B. Mo. 172.

*Semble*—That where, in an action of trespass, a defendant has suffered judgment by default, he is incompetent as a witness for his co-defendant, if the jury have to assess damages as well as to try issues. *Mash* v. *Smith*, 1 C. & P. 577. [Best]

A person, not on the record, but chargeable jointly with the defendant, is a competent witness for the plaintiff. *Blackett* v. *Weir*, 4 Law J. K.B. 205, s. c. 5 B. & C. 385, s. c. 8 D. & R. 142.

A person who is substantially, though not nominally, the plaintiff, and for whose benefit the action is brought, cannot qualify himself to be a witness by parting with his interest in the subject-matter. *Sed quære*—whether that interest must appear on the face of the record. *Bell* v. *Smith*, 4 Law J. K.B. 140, s. c. 5 B. & C. 188, s. c. 7 D. & R. 846.

A witness may prove that the debt for which the plaintiff is suing was due jointly to him and the plaintiff, and that it is paid. *Evans* v. *Yeatherd*, 1 C. & P. 49: overruled, 2 Law J. C.P. 149, s. c. 2 Bing. 133, s. c. 9 B. Mo. 272.

Where a person, prior to being made a defendant, had been examined as a witness for the plaintiff, and was not really interested in the suit, his evidence was permitted to be read. *Cope* v. *Parry*, 2 J. & W. 539.

The erasure of a party's name from a bill, with the consent of all parties, renders him a competent witness, without a release. *Sewell* v. *Stubbs*, 1 C. & P. 73. [Gifford]

Where a ship has been captured, and it is impossible to obtain witnesses from that vessel, a claim of joint capture may be proved by the evidence of witnesses who have released their claims. *The Galen*, 2 Dods. 21.

One of several defendants, against whom no proof has been adduced, is not entitled to an acquittal so as to make him a witness, until all the evidence against the parties has been gone into. *Wright* v. *Paulin*, 1 R. & M. 128. [Best]

If, in assumpsit for work and labour, the defence be that A B was employed to do the work, and not the plaintiff, A B is a competent witness to prove this, although he is an uncertificated bankrupt, and his assignees have received the amount due for this very work as work done by him. *Wilson* v. *Gallatly*, 2 C. & P. 467. [Abbott]

In an action of trover for goods, the party who sold them to the plaintiff, on an understanding that if they were not paid for they were to be returned, is a competent witness for the plaintiff, although he has not been paid, and the plaintiff's succeeding in the action will enable him to have them back. *Banks* v. *Kain*, 2 C. & P. 597. [Best]

If A employ B to rebuild a house, and B desires C to do the bricklayer's work, A, who has not paid B, is a competent witness in an action by C against B, to prove that he has performed his work. *Goodman* v. *Love*, 1 C. & P. 76. [Gifford]

*Semble*—in an action for work and labour by the plaintiff, A is a competent witness to prove that he did the work, and not the plaintiff. *Martin* v. *Jackson*, 1 C. & P. 17. [Park]

If a witness voluntarily press money into the hands of the sheriff on behalf of a defendant instead of bail, without any inducement from the principal, he is incompetent on account of interestedness. *Lacon* v. *Higgins*, 1 D. & R. N.P.C. 46. [Abbott]

Where trover was brought for a deed, which deed the defendant had by letter admitted that he had detained at the request of W R, and in the detainer of which W R was substantially interested: Held, that the declarations of W R were properly received in evidence, in favour of the plaintiff's claim, and that W R was properly rejected. *Harrison* v. *Vallance*, 1 Bing. 45.

Upon an issue, whether a tenement which has been rated to a chapel rate, is situate within the chapelry; a person occupying rateable property in that chapelry, is a competent witness to prove the affirmative at common law.

Held also, by Mr. Justice Bayley and Mr. Justice Holroyd, (Mr. Justice Littledale *dubitante*,) that such witness is also competent under the statute 54 Geo. 3, c. 170, s. 9. *Marsden* v. *Stansfield*, 5 Law J. K.B. 159, s. c. 7 B. & C. 815, s. c. 1 M. & R. 689.

Copyhold tenants are incompetent witnesses to prove a right within the manor for the copyholders to take timber for repair. *Lady Le Fleming* v. *Simpson*, 6 Law J. K.B. 207, s. c. 2 M. & R. 169.

In ejectment, a witness on the *voir dire* stated, that the lessor of the plaintiff had many years since assigned the premises to him for a certain purpose, and that he had kept the deed for some time, and then returned it back to the lessor of the plaintiff: Held, that the witness possessed such an interest as rendered him incompetent. *Doe d. Scales* v. *Bragg*, 1 R. & M. 87. [Best]

In an action on the case by a reversioner, the tenant in possession is a competent witness, to prove any injury done to his inheritance by a stranger. *Doddington* v. *Hudson*, 1 Bing. 257, s. c. 8 B. Mo. 163.

Where an avowry in replevin was by J B that "plaintiff and one T B were joint tenants under a lease and rent, in arrear," &c. but the lease was never executed by them: Held, that T B was not a party to the record; and, it not appearing that he was so connected with the plaintiff as to be liable for the rent, that he is a competent witness to prove the description of rent agreed on. *Bunter* v. *Warre*, 1 B. & C. 689.

In an action of replevin by an under-tenant against a landlord, who towards discharging the rent due from his tenant, distrained as bailiff of his tenant for the amount of rent due from the under-tenant to the tenant, the Court held, that the tenant was not a competent witness to prove the amount of the rent due from the under-tenant. *Upton* v. *Curtis*, 1 Bing. 210, s. c. 8 B. Mo. 52.

In trover for a barge claimed by the plaintiff under a purchase from one B, and by the defendant by lien from W, who also bought it from B; B was called to prove the sale to W, when it was objected that he was interested, and therefore incompetent: Held, that a release from W restored his competency. *Radburn* v. *Morris*, 6 Law J. C.P. 152, s. c.

4 Bing. 649, s. c. 1 M. & P. 648, s. c. 3 C. & P. 254.

Where a witness is entitled to a distributive share of an intestate's estate, a release to the administrator of the intestate of all demands, &c. from the beginning of the world *up to the time of executing the release*, will not render him a competent witness in an action at the suit of the administrator against a debtor of the intestate. *Matthews* v. *Smith*, 2 Y. & J. 426.

(*d*) *Waiver of Objection to.*

If the interestedness of a witness appears, and the examiner proceeds to examine him as to the merits, it is a waiver of the objection to his competency. *Anon.* 1 Ken. 389.

(C) CREDIT.

The credit of a witness may be impeached, by shewing that he has made statements out of court contrary to those which he has sworn to. *Locke* v. *Denner*, 1 Add. 360.

An allegation exceptive to the general character of a witness, will not be admitted until the final hearing of the cause. *Chapman* v. *Whitby*, 3 Phill. 370.

(D) COMMISSION TO EXAMINE.

[See PRACTICE, IN EQUITY.]

Discretionary exercise of the jurisdiction of the Court as to granting commissions to examine witnesses abroad. *Lousada* v. *Templer*, 2 Russ. 561.

A plaintiff is not entitled to a commission to examine witnesses abroad, if the defendant is not in contempt, although his time for answering has expired, and an order for time has been obtained by him. *Cook* v. *Stephens*, 3 Law J. Chanc. 226.

A demurrer to a bill for a discovery and a commission in aid of the defence of an action for libel, being overruled, a commission to examine witnesses abroad will be granted, before answer, though the defendant in equity denies, by affidavit, the truth of the justification pleaded at law.

*Quære*—Whether, according to the strict practice of the Court, affidavits can be read in opposition to the motion for a commission. *Shackell* v. *Macaulay*, 3 Law J. Chanc. 40.

Where the defendant's witnesses have, in their examination in the cause, denied that they ever made certain declarations with respect to the matters put in issue between the parties, the plaintiff is entitled to a commission to examine the witnesses, in order to prove that the first-mentioned witnesses did make the alleged declarations.

A party is entitled to such a commission, though a considerable interval may have elapsed since the passing of publication, if the hearing of the cause will not be thereby delayed. *Piggott* v. *Croxhall*, 1 Law J. Chanc. 225, s. c. 1 S. & S. 467.

On an application for a commission to examine witnesses abroad in aid of an action at law, the Court may go into the merits: in support of such an application, it is not enough that the affidavit swear the evidence to be material; it must disclose the points to which the evidence is to go. *Semble*—that the affidavit ought to state the names of the witnesses. *Mendizabal* v. *Machado*, 4 Law J. Chanc. 142, s. c. 2 S. & S. 483.

On a bill by underwriters for a commission to examine witnesses abroad, to prove the circumstances under which a ship had been condemned and sold as not worth repair;—the Court held an affidavit of the plaintiff's solicitor, stating his information and belief that there were several witnesses abroad, whose testimony was necessary for the plaintiffs, to be sufficient, though it did not state any grounds for his belief. *Robinson* v. *Somes*, 1 Y. & J. 578.

A plaintiff in a bill for a commission to examine witnesses abroad in aid of an action at law, is entitled to move for a commission as soon as the defendant obtains an order for time. It is no answer to such a motion, that the plaintiff had previously taken out a summons before a judge of the court of law in which the action is brought, requiring the defendant to consent to the issuing of a commission—that the defendant did consent—but that the plaintiff, disliking the terms imposed by the minutes of the judge's order, had refused to draw up that order, or to act upon it. *Mendizabal* v. *Machado*, 4 Law J. Chanc. 62, s. c. 2 S. & S. 453.

Commission for the examination of witnesses directed to Bencoolen in India, notwithstanding the 13 Geo. 3, c. 93, s. 44. *Baskett* v. *Tossey*, 6 Mad. 261.

Commission for the examination of witnesses, permitted to extend to several places in the West Indies, although the affidavit mentioned only persons at one place; where it appeared by the answer, that the transactions, out of which the question arose, were in the West Indies. *Jackson* v. *Strong*, 13 Price, 312.

On a bill for a discovery and commission, a commission to examine witnesses may issue previous to answer. *Ibbetson* v. *Richardson*, M'Clel. 581.

A commission to examine witnesses may be obtained after a peremptory order to speed the cause. *Field* v. *Sowle*, 1 Russ. 82.

The Court cannot extend the time mentioned in a commission for the examination of witnesses. *Hall* v. *De Tastet*, 6 Mad. 269.

The original bill being for an account, and an injunction to restrain an action; and the injunction being dissolved on the merits nearly ten years after the bill was filed, the plaintiff filed a supplemental bill for discovery and commission to examine witnesses in aid of his defence to an action substantially the same; motion for the commission refused, with costs, on the ground of delay. *Todd* v. *Aylwin*, 1 S. & S. 271.

A commission to examine witnesses abroad refused, on the ground of the delay of the party who made the application.

*Quære*—Whether the Court will grant a commission to examine witnesses abroad in aid of the defence to an action at law, where it will not stay the trial of the action till the return of the commission. *Hart* v. *Strong*, 2 Russ. 559.

Where a commission is obtained for the examination of witnesses abroad, although returnable without delay, it need not be returned within the same time as home commissions, namely, before the end of the term, but a reasonable period is allowed, according to circumstances. *Wake* v. *Franklin*, 1 S. & S. 95.

If a commission, issued in term-time, be made returnable without delay, it is returnable the first day

of the next term; if issued in vacation, the last day of the next term. *Anon.* 2 Ken. 30. Chanc.

Where the plaintiff by his conduct renders it impossible to examine all the witnesses under the first commission, and afterwards applies for a second commission, the Court will order him to pay the extra costs occasioned by the second commission, as well as the defendant's costs of the motion, and will likewise put him under terms with respect to the time and mode of executing the second commission. *Morris* v. *Davies*, 1 Law J. Chanc. 220.

The rule as to costs of commissions to examine witnesses abroad is, that they are to be borne by the plaintiff as part of the discovery; but, if the defendant examines into his own case, he must bear a proportional share of the expense of the commission. *Jackson* v. *Strong*, 13 Price, 209.

Under a commission for the examination of witnesses abroad, the commissioners examined the witnesses for the plaintiffs; and, under an impression that the defendant had no witnesses to examine, (whether he had or had not given notice of his intention to examine witnesses, was disputed,) they closed the commission, and returned it to England. After the commission had been sent off, the defendant examined his witnesses before some of the commissioners; and the depositions of those witnesses, and the interrogatories upon which they were taken, were sealed up, and forwarded to England. On motion to annex the last-mentioned depositions and interrogatories to the commission and the depositions on the part of the plaintiff, the Court expressed an inclination to grant the defendant a new commission, unless the plaintiff would consent to the motion; and, upon such consent being given, the Court made the order.

When a commission to examine witnesses is returned, it is opened by the junior sworn clerk, for the purpose of entering the names of the acting commissioners in the commission-book; and the commission is then kept under lock and key until publication is passed. *Irving* v. *Viana*, 1 Y. & J. 416.

Under special circumstances, the Court will permit a commissioner to be examined, even after the commission has been opened, and the examination of witnesses proceeded with. *Grubb* v. *Grubb*, 1 Y. & J. 36.

## (E) EXAMINATION.

[See PRACTICE.]

### (a) *At Law.*

The examination of witnesses must be governed and directed by the presiding judge, since no fixed rule can be propounded. *Clarke* v. *Saffery*, 1 R. & M. 126. [Best]: S. P. *Basten* v. *Carew*, 1 R. & M. 127. [Abbott]

If a witness, without objecting to it, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding upon his conscience: but it is unnecessary and irrelevant to ask him, if he considers any other form of oath more binding, and such question cannot be asked. *Queen's case*, 2 B. & B. 284.

Though the mode of examining a deaf and dumb witness by means of signs made with the fingers is a mode receivable even in capital cases, yet, where the witness can write, *semble*, that it would be better to make him write his answers to the questions put to him. *Morrison* v. *Lennard*, 2 C. & P. 127. [Best]

A witness may be examined as to what one of the parties in the cause disclosed as to the contents of a paper relative to the matter in issue, without producing the document. *Sewell* v. *Stubbs*, 1 C. & P. 73. [Gifford]

The circumstances of a witness declining to answer a question, is no proof of the truth of the fact inquired into. *Rose* v. *Blakemore*, 1 R. & M. 383.

The rule sanctioning witnesses being sent out of court, does not apply to an attorney. *Pomeroy* v. *Baddeley*, 1 R. & M. 430. [Littledale]

Where a witness has been present in court during a trial, when he ought to have been out of court, under an order made for that purpose, he cannot be examined, and the Court refused to grant a new trial, on the ground of the rejection of the testimony of such a witness. *Attorney General* v. *Bulpit*, 9 Price, 4.

The plaintiff's counsel, after he has closed his case, may recall his witness in a civil case, but not upon a criminal prosecution. *Brown* v. *Giles*, 1 C. & P. 118. [Park]

The copy of an instrument made six months after the original, which is so defaced as to be unintelligible, cannot be used by a witness to refresh his memory. *Jones* v. *Stroud*, 2 C. & P. 196. [Best]

Where a witness refreshes his memory by referring to a memorandum, the adverse party is entitled to look at it. *Sinclair* v. *Stevenson*, 1 C. & P. 582. [Best]

A witness who produces a memorandum to refresh his memory, renders himself liable to be cross-examined as to other parts of the document. *Loyd* v. *Freshfield*, 2 C. & P. 325. [Abbott]

The general rule is, that no paper can be put into the hand of a witness to refresh his memory, which is not of his own handwriting; therefore, if he is asked whether he has not been imprisoned in France, the counsel asking this cannot put into his hand an authenticated copy of the sentence of the French Court. *Meagoe* v. *Simmons*, 3 C. & P. 75. [Tenterden]

A witness who cannot speak to a fact until he has refreshed his memory by referring to a paper written or signed by himself at the time in question, will be allowed to refer to it for that purpose, although the paper itself would be inadmissible in evidence for want of a stamp. *Maugham* v. *Hubbard*, 6 Law J. K.B. 229, s. c. 8 B. & C. 14, s. c. 2 M. & R. 5.

Where an issue, directed by the Court of Chancery, ordered that the defendant, if it were essential, should be examined as a witness: It was holden, that he was also liable to be cross-examined. *Clarke* v. *Saffery*, 1 R. & M. 126. [Best]

Questions tending to degrade a witness, without exposing him to punishment, may be put on cross-examination. *Cundell* v. *Pratt*, 1 M. & M. 108. [Best]

On the examination of a prosecutor on an indictment against a female for stealing from the person, he is not bound to answer whether improper inter-

course took place between him and the prisoner. *Rex* v. *Pitcher*, 1 C. & P. 85. [Hullock]

After a witness has been told that he is not bound to disclose any matter which may tend to criminate himself, if he does answer a question of that description, he is bound to answer all questions relative to that transaction. *Dixon* v. *Vale*, 1 C. & P. 278. [Best]

If a witness answers any questions on a matter rendering himself liable to forfeiture or punishment, he cannot afterwards claim his privilege, but must answer throughout. *East* v. *Chapman*, 1 M. & M. 47. [Abbott]

If several defendants appear by different counsel, each of the counsel may cross-examine the plaintiff's witnesses; but only one can examine their own joint witnesses in chief. *King* v. *Williamson*, 3 Stark. 162. [Abbott]

(*b*) *In Equity.*

If one party is examined by the other parties, his examination, though not used by those other parties, may be looked into by the Master, or the Court. *Gilbert* v. *Wetherell*, 3 Law J. Chanc. 138, s. c. 2 S. & S. 254.

Any party to the cause may be examined in the prosecution of an inquiry directed by the decree. A defendant may be examined, saving just exceptions, as well after the decree as before. *Hemmings* v. ——, 4 Law J. Chanc. 141.

A witness will not be allowed to be examined *de bene esse*, on an affidavit that she labours under a cancer, but not stating that she is in immediate danger. *Anon.* 1 Law J. Chanc. 76.

A party will not be allowed, on inquiries before the Master, to examine witnesses whom he has examined in the cause, except upon affidavit, setting forth special circumstances, and the points as to which they are to be re-examined, which points must not have been in issue in the cause.

It must appear on the affidavit that these witnesses could not, as to the points proposed, have been examined on the interrogatories exhibited before the hearing. *Campbell* v. ——, 1 Law J. Chanc. 70.

Where a witness has been examined in the cause, to prove the loss of a deed, but has not been examined so as to let in secondary evidence of the instrument, and an inquiry has been directed before the Master, the Court will give leave to re-examine the witness before the Master. *Hurlock* v. *Priestly*, 1 Law J. Chanc. 212.

A witness, who has been examined at the hearing only to prove exhibits, may be examined before the Master on interrogatories to prove other exhibits, without a special order.

The refusal of a witness to be cross-examined is no reason for suppressing his deposition, but the adverse party must at the time enforce such right of cross-examination as he has. *Courtenay* v. *Hoskins*, 2 Russ. 253.

If, after a defendant has been examined as a witness under the usual order, it is discovered that he has not effectually released his interest; and he afterwards release that interest, an order may be obtained for the suppression of his deposition, and his re-examination on the same interrogatories, saving just exceptions. —— v. *Figes*, 3 Law J. Chanc. 134.

The examiner of a witness in the Examiner's office, is bound to keep him in London forty-eight hours after his production at the seat of the adverse clerk in court, and not forty-eight hours after his examination is finished: and if the cross-interrogatories are left with the Examiner within the forty-eight hours, then the party producing him must keep him in London till his cross-examination has terminated; therefore, where a party did not comply with the above rule, they ordered him back to London at his own expense. *Whittuck* v. *Lynaght*, 1 S. & S. 446.

(*c*) *In the Ecclesiastical Courts.*

All letters which transpire between a solicitor and a witness relative to his examination, must, if required, be produced. *Atkinson* v. *Atkinson*, 2 Add. 468.

The Court will compel a witness to answer explicitly, whether he is or is not responsible in some way, for the party's expenses in whose behalf he is examined. *Hudson* v. *Beauchamp*, 2 Add. 352.

Where a witness has been repeated and dismissed long anterior, she cannot, as a matter of course, be examined upon articles of a plea which she has not been designed to at the time of her production. *Wilkinson* v. *Dalton*, 1 Add. 339.

(F) INTERROGATORIES.

[See PRACTICE, IN EQUITY.]

On the trial of an ejectment, the Court will not grant a rule to examine a material witness upon interrogatories, although the witness was so ill that he could not attend. *Anon.* 2 Chit. 199.

It is not necessary to set forth the names of the witnesses whom it is wished to be examined on interrogatories. When the motion is made in term time, no costs are allowed; but when it is made at Nisi Prius, then the opposite party has the costs of the day. *Anon.* 2 Law J. K.B. 94.

The Court will not, *in general*, give time to examine witnesses abroad, on interrogatories, in justification of a libel, but they will do it on terms, as, on the defendant admitting the fact of publication. *Brown* v. *Murray*, 2 Law J. K.B. 222, s.c. 4 D.& R. 831.

A party who omits to cross-examine a witness under a commission at the usual period, will be allowed to exhibit interrogatories for that purpose on a subsequent day. *Carter* v. *Draper*, 2 Sim. 52.

A witness who, had answered some of the interrogatories, but refused to answer the others, was ordered to answer those interrogatories within four days, or to stand committed. *Austin* v. *Prince*, 1 Sim. 348.

(G) DEPOSITIONS.

[See EVIDENCE, and PRACTICE, IN EQUITY.]

The depositions of parishioners, tending to charge the defendant with costs on an information for money received by him for the use of the parish, are admissible in evidence, where the witnesses are not relators mentioned by name in the information. *Attorney General* v. *Griffiths*, 1 Ken. 126.

### (H) PROTECTION AND PRIVILEGES.

[See *ante*, EXAMINATION.]

A witness who has absconded from his bail, may be re-taken by the bail in court, although he is attending to give evidence in a court of justice, and has received a subpœna. *Horn* v. *Swinford*, 1 D. & R. N.P.C. 20. [Richards]

The Court will restrain a plaintiff from the use of answers, in a penal proceeding, which may tend to criminate the witness. *Jackson* v. *Benson*, 1 Y. & J. 32.

The counsel in a cause have no right to object, in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture. Such objection belongs to the witness only. *Thomas* v. *Newton*, 1 M. & M. 48. [Tenterden]

It is a sufficient reason for a witness's refusing to disclose his residence, that the defendant, at whose instigation the question has been put, he believes, has a bailable writ out against him. *Watson* v. *Bevern*, 1 C. & P. 363. [Abbott]

In an action for criminal conversation, the executor of a deceased relation of the defendant is bound to state the amount of property which the defendant acquired under the testator's will. *Peter* v. *Hancock*, 1 C. & P. 375. [Abbott]

### (I) EXPENSES.

Where there is a reasonable doubt whether the evidence of a witness will or will not be admitted, the Master is justified in allowing the expenses of his attendance at the trial. *Rushworth* v. *Wilson*, 1 Law J. K.B. 113, s. c. 1 B. & C. 267.

Although a Master, in the taxation of costs, had allowed for witnesses who were not called, yet the Court refused to direct him to review his taxation. *Adamson* v. *Noel*, 2 Chit. 200.

Circumstances are the criterion which decide what witnesses are entitled to their expenses, since the fact of their being subpœnaed without being examined, has no influence. *Bagnall* v. *Underwood*, 11 Price, 510.

Men of science were held not entitled to be allowed their expenses incurred by them in travelling from London to York to inspect a building erected by the plaintiff, although he could not safely proceed to trial without such inspection. *Bayley* v. *Beaumont*, 4 Law J. C.P. 191.

A witness returning from a journey, which was intended before the subpœna, sooner than he otherwise would have done, is entitled to the expenses of that journey, though the trial is at the place of his abode. *Vice* v. *Lady Anson*, 1 M. & M. 96. [Tenterden]

If the plaintiff subpœna the defendant's attorney to produce books, the latter is not entitled to receive anything from the plaintiff for expenses or loss of time in attending as a witness. *Pritchard* v. *Walker*, 3 C. & P. 212. [Vaughan]

By the 53 Geo. 3, c. 71, (incorporated in 9 Geo. 4, c. 22,) a witness, summoned on behalf of the sitting member before an election committee, is entitled to his expenses, and to enter up judgment on the Speaker's certificate, in the same manner as witnesses summoned on behalf of the petition are entitled under that act. *Magrane* v. *White*, 6 Law J. K.B. 361, s. c. 8 B. & C. 412, s. c. 2 M. & R. 440.

Under the 58 Geo. 3, c. 70, which empowers the Court to order the county treasurer to pay the prosecutor or witnesses, who shall appear to have been endeavouring to apprehend any person, and who shall give evidence against any person accused of grand or petit larceny, &c., the costs of prosecuting and appearing before the grand jury, and compensate them for their loss and trouble in such apprehension, it was holden that persons who had travelled many miles and expended a large sum of money in tracing and endeavouring to apprehend two horse-stealers, and had succeeded in apprehending them, were not entitled to any compensation for money so expended. *Rex* v. *Austin*, 1 D. & R. N.P.C. 24. [Park]

A judge, under the 58 Geo. 3, c. 70, has no power to allow witnesses their expenses, for going to identify stolen property. *Rex* v. *Millington*, 1 C. & P. 83. [Hullock]

A seafaring man, a native and resident here, was subpœnaed as a witness before issue joined and notice of trial given. The Court held, that the master had acted properly in allowing him subsistence-money during that time. *Berry* v. *Pratt*, 1 Law J. K.B. 116, s. c. 1 B. & C. 276, s. c. 2 D. & R. 424.

Where a plaintiff brought his witnesses too early to attend a trial: Held, that the plaintiff was not entitled to the expenses. *Anon.* 2 Chit. 200.

A gentleman residing in the country was subpœnaed to give evidence at the trial of a cause in London. He proceeded part of the way, and then being from illness unable to go on, he sent a special messenger to London to inform the parties that he could not attend. In his account of expenses, he demanded 5*l.* for the messenger going to London; at the trial of an action for the amount of his expenses incurred, the jury gave him 10*l.* including the 5*l.* The Court refused to grant a new trial on the ground of excessive damages. *Bryan's case*, 1 Law J. K.B. 157.

A witness from the country, subpœnaed there by the defendant, without receiving sufficient for his expenses, and afterwards, when in London, subpœnaed by the plaintiff, and called by him on the trial, is bound to give his evidence both in chief and on cross-examination, and must seek to obtain his expenses in some other way than by objecting to be examined. *Edmonds* v. *Pearson*, 3 C. & P. 113. [Gaselee]

An attorney who takes witnesses to an inn, is *primâ facie* liable to the innkeeper for the expenses incurred. *Cariss* v. *Richardson*, 1 Law J. K.B. 11.

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## WORK AND LABOUR.

If a mechanic represents himself as an efficient and skilful workman, and undertakes to perform a particular work, which he does not accomplish, and thereby prevents his employer from deriving any benefit from his labour, the mechanic is not

entitled to any compensation. *Duncan* v. *Blundell*, 3 Stark. 6. [Bayley]

Where the owner of unwrought materials bestows his work and labour upon them, to form them into a vendible commodity, at the instance of an intended buyer, the owner cannot maintain an action for the work and labour, unless there has been a specific appropriation of the commodity to the buyer. *Atkinson* v. *Bell*, 6 Law J. K.B. 258, s. c. 8 B. & C. 277, s. c. 2 M. & R. 292.

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## WRECK.

Royal and manorial franchises considered, with reference to that subject. *Augusta*, or *Eugenie*, 1 Hag. 16.

The grantee of the privileges and royalties of the crown, is empowered to take possession of property wrecked, only until a claim is made; and when a claim is given in with a reasonable prospect of proof, his right of custody ceases, and he has no further interest in the property. *Augusta*, or *Eugenie*, 1 Hag. 20.

# ADDENDA:

## CASES OMITTED TO BE INSERTED IN THE PRECEDING DIGEST.

### ACCOUNT STATED.

Whether a conversation between the defendants and one of the witnesses, is sufficient to entitle the plaintiff to recover, on an account stated, is a question for the Court, and not for the jury. *Bishop* v. *Chambre*, 3 C. & P. 55. [Tenterden]

### ACTION.

WHERE MAINTAINABLE.

Where a tradesman in the course of business received a banker's cheque, in payment for goods sold, which had been stolen from the payee: Held, in the absence of evidence of fraud or negligence, that he might maintain an action against the drawer. *Lee* v. *Newsam*, 1 D. & R. N.P.C. 50.

### AFFIDAVIT.

TO HOLD TO BAIL.

An affidavit of debt on a bill of exchange, which stated it to be over-due, without setting forth that it is unpaid, was held by the Court to be sufficiently certain that a debt existed. *Morgan's case*, 1 Law J. K.B. 156.

An affidavit of debt stating that R S, H A, R R, and B S, were jointly indebted to the plaintiff on a bill of exchange, "accepted (in the name and firm of A C & Co.) by the said R S, H A, R R, and B S, *or one of them*:" Held, insufficient. *Harmer* v. *Ashby*, 10 B. Mo. 323.

It is sufficient if an affidavit of debt, made by one of the assignees of a bankrupt, state that the defendant is indebted, &c., *as appears by the books of the bankrupt, and as the deponent verily believes*; without alleging that the books are in the deponent's possession. *Hatton* v. *Bristow*, 11 B. Mo. 504.

### AMENDMENT.

A party had obtained a verdict in an action of ejectment. The opposite party obtained an injunction to stay execution, and nothing was done in the suit for many years; during which time the term specified in the declaration expired. The Court would not amend the declaration by enlarging the term, because it was not shewn, that by so doing they should not do injustice to the opposite party. *Bradney* v. *Hasselden*, 1 Law J. K.B. 59, s. c. 1 B. & C. 121, s. c. 2 D. & R. 227.

### ANNUITY.

MEMORIAL.

Under the statute 53 Geo. 3, c. 141, it is required, that the witnesses shall be inserted in the memorial as E F of ——, and G H of ——: Held sufficient, when the witnesses were attorney's clerks, to describe them as clerks of the attorney, adding the attorney's residence. *St. John* v. *Champneys*, 1 Law J. C.P. 5, s. c. 1 Bing. 77.

### ATTORNEY AND SOLICITOR.

LIABILITY.

Where a solicitor detained deeds, &c. and refused to deliver his bill of costs,—the Court ordered him to deliver up the deeds, together with his bill of costs, notwithstanding there were no costs incurred in respect of an action at law or suit in equity. *In re Murray*, 1 Russ. 519.

The solicitor of an administratrix receiving money belonging to the estate of the intestate, is not a trustee for the estate; and if he makes payments out of it for the use of the administratrix, which are either previously directed, or subsequently adopted by her, he will be charged only with the balance actually in his hands. *Watkins* v. *Maule*, 1 Law J. Chanc. 82.

An attorney, who has in that character received papers from a client, cannot be called to produce them in a cause, although he does not act therein as attorney of the party. *Parker* v. *Yates*, 12 B. Mo. 520.

### BANKRUPT.

In an action by the assignees of a bankrupt, the production of the assignment to the plaintiffs, duly enrolled, is sufficient without proof of its execution, unless notice has been given that it is to be disputed. *Tucker* v. *Barrow*, 1 M. & M. 137. [Tenterden]

Whether a particular payment has been made by a trader in contemplation of bankruptcy, is purely a

## DEED.

### EXECUTION.

The attesting witness to a deed stated, that he knew the defendant, one of the parties; that the attestation was in his (the witness's) handwriting; but he did not know whether or not the signature to the deed was the defendant's handwriting, but he would not have put his name to it unless he had seen him execute it: Held, sufficient proof of the execution. *Doe d. Smythe* v. *Claxton*, 11 B. & Ad. 147.

## EXECUTION.

### STAYING.

A sum of money secured by a bond, was made payable by instalments, on condition, that if any one instalment was not paid at the time it became due, then that the whole sum should be payable. The Court, in the appearance of *fraud*, in not accepting an instalment when offered, stayed execution, and ordered the judgment to stand as security. *Anonymous*, 1 Law J. K.B. 51.

## GUARANTIE.

A guarantie was given by the defendant, in consideration of the plaintiff's giving A a current credit, to make good, upon the event of his failure, any deficiency not exceeding a certain sum. A short time after the guarantie was given, a bill which had been previously given by A to the plaintiffs, was dishonoured, and the plaintiffs permitted him to renew it without giving any notice of the transaction to the defendant: Held, that this was not such a failure of the principal as to entitle the surety to a notice of the renewal of the bill. *Carr* v. *Browne*, 12 B. Mo. 32.

## HIGHWAY.

### REPARATION.

The repair of a road newly laid out under an inclosure act is to be borne, not by the owner of the inclosure made in pursuance of the statute, but by those persons to whom the former highway was [illegible]. *Rex* v. *the Inhabitants of Flecknoe*, 2 B. & Ad. s. c. 1 Burr. 461.

## IRREGULARITY.

The Court set a verdict aside for irregularity, but without costs, where an avowant in replevin had carried down the issue to trial, without adding the *similiter* to the plea in bar. *Griffiths* v. *Crackerow*, 6 B. Mo. 51, s. c. 3 B. & B. 1.

## INTERPLEADER.

Legal rights only, and not equities, will support an interpleading bill. *Barclay* v. *Curtis*, 11 Price, 662.

If, to an interpleading suit, there be several defendants, the answer by one may be read against the others. *Bower* v. *Pritchard*, 11 Price, 103.

An occupier of lands took a lease of the tithes, due from himself to a rector, at a rept reserved. The rent was afterwards assigned by the rector to another person, who claimed to be paid the arrears. The lessee, having also received notice of a further claim, from grantees of annuities previously charged on the tithes by the rector, who had, as such grantees, subsequently to the title of the rector's assignee, sued out a *fieri facias de bonis ecclesiasticis* against the rector, and judgment by them on their securities, filed a bill of interpleader against all the parties, and obtained injunctions on paying the rent due from him into court. On the answers of the defendants coming in, the priority of the several titles of the claimants being thereby clearly set out, and the rector disclaiming, the Court dissolved the injunctions, holding, first, that in such a case they could not restrain the party, who was shewn to have a preferable title, from proceeding to enforce it; nor decree that the parties should interplead in a case where the priority of right was so distinctly set forth by the answers: secondly, that if the case be not one that will support a bill of interpleader, the defendant must demur: and, thirdly, that the above lease and assignment of part of the rector's ecclesiastical property is good, and not affected by an execution sued out against the rector, after the rent had been assigned. *Bowyer* v. *Pritchard*, 11 Price, 103.

A party in possession of property subject to conflicting claims, may always protect himself by a bill of interpleader, notwithstanding the pendency of a suit commenced by one of the claimants. *Warrington* v. *Wheatstone*, 1 Jac. 202.

A testator gave a legacy of 500*l.* to trustees, upon trust to invest it in government or good security, and pay the interest to his widow for life, with remainder over: after his death, his executors (who were different persons from the trustees of the legacy,) and the trustees of the legacy stated to a debtor, who owed the testator 500*l.* on bond, that they had arranged and agreed to appropriate that debt for the legacy; and from that time, during a period of more than fourteen years, the debtor, with the privity of the trustees, and also of the executors, had paid the interest of the bond to the tenant for life of the legacy: the executors having called for payment of the bond, and proceeding to sue upon it, while, on the other hand, the surviving trustee of the legacy had given notice to the debtor not to pay it to them: Held, by the Lord Chancellor, (reversing the decision of the Vice Chancellor,) that the debtor was entitled to file a bill of interpleader. *Wright* v. *Ward*, 6 Law J. Chanc. 42.

Demurrer to a bill of interpleader overruled, where the plaintiff called on two persons claiming the possession and rent, or an equivalent for use and occupation of premises in his occupation, and one of them (the party demurring) had actually obtained a verdict for the value of the use and occupation; it being held that the plaintiff did not stand in the relation of tenant to the party demurring, who had so recovered in the action at law. *Stephens* v. *Callanan*, 12 Price, 158.

A bill of interpleader ought to be filed immediately after or before the commencement of proceedings at law, and not be delayed till after a judgment or verdict has been obtained; and therefore, where an interpleading bill was filed, after a verdict had been obtained by one of the parties, and an injunction had been granted on the money being paid into court, the Court dissolved the injunction, though the answer of only one of the parties had come in, the plaintiff not satisfactorily accounting for the delay in filing his bill. *Cornish* v. *Tanner*, 1 Y. & J. 333.

Upon the hearing of an interpleading bill, evidence is admissible to shew that the plaintiff has retained possession of the subject of the suit under an indemnity from some of the defendants. *Statham* v. *Hall*, 1 Turn. 30.

No affidavit is necessary to support a motion by a plaintiff in an interpleading suit, for liberty to pay the money into court, and for an injunction. *Walbanke* v. *Sparks*, 1 Sim. 385.

## LACHES IN PROCEEDING.

A rule of attachment against a chief bailiff of a liberty, for not bringing in the body, was obtained on the 12th of February, and the attachment not sued out till the 19th of May following; and in the interim, one of the defendants in the original action obtained his discharge under the Insolvent Debtors Act: The Court set aside the attachment. *Rex* v. *Jewison*, 12 B. Mo. 483.

## LANDLORD AND TENANT.

The defendant took premises for a year certain, but quitted at the end of the first quarter. The plaintiff then let the premises for a portion of the remaining three quarters, to another tenant at a less rate, and afterwards sued the defendant for the difference: Held, that by re-letting the premises, the plaintiff had assented to the termination of the original tenancy, and dispensed with the necessity of a legal surrender. *Walls* v. *Atcheson*, 11 B. Mo. 379.

## LEASE.

The Court will permit leases to be granted, if that course be beneficial to the parties interested, notwithstanding the testator by his will may have directed that the estate should be sold. *Jervoise* v. *Clarke*, 6 Mad. 96.

## LIMITATIONS, STATUTE OF.

To take a case out of the Statute of Limitations, evidence of a conversation in which one of the defendants had admitted the debt, and said, "that it was hard that he should be called upon individually to pay the debts of the firm when so many outstanding debts due to them were uncollected; that he had put the debts into the hands of an accountant, who would settle the business, and that he might refuse to pay altogether, but would not act in that way," was held sufficient to constitute an absolute promise to pay. *Pierce* v. *Brewster*, 12 B. Mo. 515.

## MISNOMER.

If the defendant's surname be mis-stated in a writ, the Court will not set aside the process on motion, but will leave the defendant to his plea in abatement. *Sumner* v. *Batson*, 11 B. Mo. 39.

## PAYMENT OF MONEY.

Sums below 10*l*. payable out of court to a number of persons, paid by their solicitor, to save the expense of powers of attorney. *Brandling* v. *Humble*, 1 Jac. 48.

## PLEADING.

In debt on a bail-bond, the declaration need not contain averments that there was an affidavit of debt, or that the sum sworn to was indorsed on the writ. *Dorrington* v. *Bricknell*, 11 B. Mo. 445.

## PRACTICE.

### PROCESS.

The Court refused to set aside the service of a writ of attachment of privilege, on the ground that the wrong year was stated in the English notice. *Harmer* v. *Lane*, 12 B. Mo. 522.

## PRINCIPAL AND AGENT.

The stat. 1 & 2 Geo. 4, c. 87, s. 12, does not require a corn-factor to return the name of the person to whom corn, when sold, is actually delivered. Where, therefore, cornfactors returned the name of T L as a buyer of wheat, and afterwards paid the lastage duty on the delivery of the quantity returned as sold to him: Held, that they were not thereby precluded from shewing that, although the corn was sold to T L, it was delivered to his granary keepers on the condition that they were to hold it for the factors till T L had paid them for it. *Wordley* v. *Brown*, 10 B. Mo. 201.

## PRODUCTION OF DEEDS.

A, having an imperfect copy of a deed by which his ancestor conveyed an estate and royalty to B, wishes for a copy of that deed, that he may see whether at that time the royalty and right to kill game had not been excepted, in order that the defendant, his gamekeeper, might plead to an action of trespass, brought by the plaintiff, a tenant of B's, for shooting on lands occupied by him; but the Court would not make such an order. *Pickering* v. *Noyes*, 1 Law J. K.B. 110, s. c. 2 D. & R. 386, s. c. 1 B. & C. 262.

## RECOVERY.

### PASSING.

The Court permitted a recovery to pass, notwithstanding the warrants of attorney of the several vouchers were on separate pieces of parchment. *Hicks, dem.; Dean, ten.; Crump, vouch.*, 12 B. Mo. 295.

## TRESPASS.

### EVIDENCE.

Trespass for assaulting and imprisoning the plaintiff. Plea, that the plaintiff was wilfully trespassing on the land and breaking down the hedges of the defendant, wherefore he apprehended him and took him before a justice. Replication, that the plaintiff entered the land and broke down the hedges in the assertion of a right of way; traversing that he did so wilfully or for any other purpose than in the exercise of such right. Rejoinder, that the plaintiff was in the act of committing wilful damage to the defendant: Held, that, upon this issue, the plaintiff might give evidence as to the right of way claimed by him, in order to shew *quo animo* he entered the *locus in quo*. *Looker* v. *Halcomb*, 12 B. Mo. 410.

## VARIANCE.

The Court refused to set aside a declaration on the ground of a variance between the writ and declaration: the defendant being called *John* in the former, and *James* in the latter. *Garner* v. *Weller*, 11 B. Mo. 457.

## VENUE.

In an action against a sheriff for an escape, the Court refused to allow the venue to be changed to the county in which the escape took place, although it was sworn that all the witnesses resided there. *Jenkins* v. *Lawrence*, 12 B. Mo. 230.

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THE END.

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AN

# ANALYTICAL DIGEST

OF THE CASES PUBLISHED IN

## THE LAW JOURNAL,

AND IN

## ALL THE REPORTS

OF DECISIONS IN THE

## COURTS OF COMMON LAW AND EQUITY,

IN

**The Ecclesiastical and Admiralty Courts,**

ON APPEAL BEFORE THE HOUSE OF LORDS,

*AT NISI PRIUS,*

AND IN THE

**Court of Review, and the Court for the Relief of Insolvent Debtors,**

FROM MICHAELMAS TERM 1828 TO TRINITY TERM 1831

INCLUSIVE.

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BY MONTAGU CHAMBERS, ESQ.

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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# ADVERTISEMENT.

THE former DIGEST presented to Subscribers by the Proprietors of the LAW JOURNAL having comprised the cases in the first six volumes of that work, and in all the English Reports published during the six years ending with Trinity Term 1828, the present volume contains ABSTRACTS of all the English REPORTS published between that time and the end of Trinity Term 1831, and of the cases reported in the last three volumes of the Old Series of the LAW JOURNAL. The Old Series may now, therefore, be considered as complete; but a similar DIGEST of CASES in the NEW SERIES, and in the contemporaneous Reports, will be published every three years, for the use of Subscribers and of the Profession generally.

August, 1835.

# A LIST OF REPORTS AND ABBREVIATIONS

## USED IN THIS DIGEST.

| *Abbreviations.* | *Reports.* | *Courts.* |
|---|---|---|
| B. & Ad. | Barnewall & Adolphus's Reports | King's Bench. |
| B. & C. | Barnewall & Cresswell's Reports | King's Bench. |
| Bing. | Bingham's Reports | Common Pleas. |
| Bligh, N.S. | Bligh's Reports, New Series | House of Lords. |
| C. & J. | Crompton & Jervis's Reports | Exchequer. |
| C. & P. | Carrington & Payne's Reports | Nisi Prius. |
| Cress. | Cresswell's Reports | In the Court for the Relief of Insolvent Debtors. |
| Dig. Law J. | Law Journal Digest from 1822 to 1828. | |
| Dow. & C. | Dow & Clark's Reports | House of Lords. |
| Dow. & C. A.C. | Dow & Clark's Additional Cases | House of Lords. |
| Hag. | Haggard's Reports | Admiralty. |
| Hag. Ec. | Haggard's Ecclesiastical Reports | Ecclesiastical Court. |
| Hag. Ec. Sup. | Haggard's Supplement | Ecclesiastical Court. |
| Law J. Chanc. | Law Journal Reports in Chancery | Chancery. |
| Law J. C.P. | Law Journal Reports in the Court of Common Pleas | Common Pleas. |
| Law J. Exch. | Law Journal Reports in the Exchequer | Exchequer. |
| Law J. K.B. | Law Journal Reports in the King's Bench | King's Bench. |
| Law J. M.C. | Law Journal Reports of Magistrates' Cases | King's Bench, Common Pleas and Exchequer. |
| Law J. Stat. | Law Journal Abridgment of the Statutes. | |
| M. & R. | Manning & Ryland's Reports | King's Bench. |
| Mont. | Montagu's Reports | Bankruptcy. |
| Mont. & M. | Montagu & M'Arthur Reports | Bankruptcy. |
| M. & M.* | Moody & Malkin's Reports | Nisi Prius. |
| M. & P. | Moore & Payne | Common Pleas. |
| Pea. A.C. | Peake's Additional Cases | Nisi Prius. |
| Price | Price's Reports | Exchequer. |
| Russ. | Russell's Reports | Chancery. |
| Russ. & M. | Russell & Mylne's Reports | Chancery. |
| Sim. | Simon's Reports | Chancery. |
| Tam. | Tamlyn's Reports | Chancery. |
| Y. & J. | Younge & Jervis's Reports | Exchequer. |

* The 2nd volume of Moody & Malkin's Reports is now cited as Moody & Robinson.

AN

# ANALYTICAL DIGEST

OF THE

## CASES REPORTED

## From Trinity Term 1828, to Michaelmas Term 1831,

IN THE

# LAW JOURNAL,

## AND ALL OTHER CONTEMPORARY REPORTS.

### ABATEMENT.

[See Pleas and Pleading, and Practice.]

Whether the 17 Chas. 2. c. 8. (which prevents the abating of suits by the death of either party between verdict and judgment,) extends to cases where there has been no verdict, but the plaintiff has been nonsuited—*quære*. *Dowbiggin* v. *Harrison*, 8 Law J. K.B. 75, s. c. 10 B. & C. 480.

The defendant died after a nonsuit, and after a rule *nisi* for setting it aside, but before the rule came on for argument:—Held, that the suit did not thereby abate. *Bull* v. *Price*, 9 Law J. C.P. 28, s. c. 7 Bing. 237, s. c. 5 M. & P. 2.

On the hearing of a cause, the bill was dismissed with costs as against the defendants, such costs to be taxed, and, when taxed, to be paid by the plaintiffs. Before the costs were taxed, one of the plaintiffs died; the Master proceeded with the taxation, and made his certificate, notwithstanding the surviving plaintiffs objected to the taxation, on the ground that the suit was abated. On an application to quash the certificate, the Court held that the proceedings were regular. *Meredyth* v. *Hughes*, 3 Y. & J. 188.

### ABORTION.

On an indictment for administering a drug to a woman to procure abortion, she not being quick with child, if it appear that the woman was not with child at all, the prisoner must be acquitted, although it appear that the prisoner thought that she was with child, and gave her the drug with an intent to destroy such child. *Rex* v. *Scudder*, 3 C. & P. 605. [Garrow]

### ACCORD AND SATISFACTION.

In an action in the King's Bench by bill, payment to the plaintiff of a sum in satisfaction of the debt and costs, and paid after the writ and before the declaration, may be given in evidence under the general issue; and will be an answer to the action, unless the jury find that the transaction was in fraud of the plaintiff's attorney. *Worswick* v. *Beswick*, 8 Law J. K.B. 304, s. c. 10 B. & C. 676.

It was pleaded, in answer to an action of assumpsit, that a former action had been brought for the same cause of action; that the defendant had paid a sum of money into court under a rule for that purpose; that it was therefore agreed by the plaintiff and defendant, that the plaintiff should take out the money, and have his taxed costs; that the costs were accordingly taxed and paid, and that the plaintiff received them, together with the sum paid into court, in full discharge of the cause of action. It appeared in evidence that the money had never been taken out of court; and that, the plaintiff having altered his mind, his attorney offered to return the costs, which were refused; that he then took out a rule to discontinue on payment of costs, upon which rule the defendant's costs were taxed and paid:—Held, that the plea was not proved, and that the plaintiff was entitled to judgment. *Power* v. *Butcher*, 8 Law J. K.B. 217, s. c. 10 B. & C. 329.

## ACCOUNT.

(A) Bill for.
(B) Account stated.

### (A) Bill for.

Some individuals of a class may file a bill on behalf of themselves and the others of that class, praying an account, though the plaintiffs have executed separate releases which would bar their right, the bill charging that those releases were obtained fraudulently. *Williams* v. *Smith*, 7 Law J. Chanc. 129.

A had long employed B as his steward, professional adviser, and general confidential agent; disputes having arisen between them, an agreement was entered into between B and a clergyman, acting on behalf of A, by which a gross sum was to be paid to B, in lieu of all his claims, but no accounts or vouchers were rendered or produced by A, nor was there any bill of costs delivered; that agreement will not protect B from rendering an account to his principal. *Jenkins* v. *Gould*, 3 Russ. 385.

An information alleging that a corporation had received grants of property, on condition of providing for the peace and security of the city, a bill was filed for an account of the property so held by it, in order that the surplus might be applied towards the defraying of certain public expenses; a demurrer to the bill was overruled. *Attorney General* v. *Mayor of Carlisle*, 8 Law J. Chanc. 46.

In a lease, the lessor covenanted, at the time thereinafter mentioned during the term, to cause any quantity of square oak-wood to be set out within some part of the lands or grounds then belonging to the lessor, as should be wanted for the benefit of the lessee, and to be used in the buildings intended to be made on the demised premises; and the lessee covenanted to pay and allow to the lessor, interest for the total amount or value thereof, after the rate of 4*l.* per cent. on the value, and so in proportion for a greater or less quantity. Bill by assignees of the lease, for an account of what was due under that covenant, and for an injunction to restrain an action brought for a breach of it. A demurrer, for want of equity, was overruled. *Pearson* v. *Hoghton*, 3 Y. & J. 413.

A receiver of an estate in Jamaica, appointed by the Court of Chancery there, in a suit, by a second incumbrancer, to have the proceeds of the estates applied in satisfaction of the incumbrances, was ordered, out of the first proceeds, to pay to A, the first incumbrancer, in London, the interest on her charge, and to consign the produce to B, the plaintiff, a merchant in England, for sale. The receiver on making the first consignment, sent the bill of lading to A, with directions to deliver it to B, on payment of her interest. The consignments were afterwards made, by B's direction, to other merchants, who, for several years, continued to pay A her interest, but afterwards ceased to do so; upon which she filed a bill in this country against them, the receiver and the owners of the estate, for an account of the consignments and payment of her interest, charging collusion between the consignees and the receiver. Demurrer, by the consignees, for want of equity, overruled. *Fitzgerald* v. *Stewart*, 2 Sim. 333.

Demurrer to a bill for a general account to be taken of all dealings and transactions between the parties, and for an injunction to restrain the defendant from taking out execution on a judgment recovered by him in an action at law—allowed, on the grounds that the statement in the bill did not furnish such a case of matter of account between the parties, as to entitle the plaintiff to the interference of the Court, on the principles of equity; in that it was nothing more than matter of set-off, or other defence at law, and if it had been a stronger case, the plaintiff, after having suffered the action at law to be tried and determined at Nisi Prius, had come too late to ask the interference of the Court. *Mees* v. *Lewis*, 12 Price, 502.

Where a bill for specific performance is dismissed on the ground of inadequacy of consideration, the Court will not aid a party in recovering his deposit, or giving him compensation for his loss, by decreeing an account. *Kendall* v. *Beckett*, 9 Law J. Chanc. 24.

If a possessory bill, filed for recovering an estate wrongfully retained, pray an account of the intermediate rents and profits, the general rule is, to decree the same from the time of filing the bill.

Prayer of bill decreed without costs. *Edwards* v. *Morgan*—*Morgan* v. *Edwards*, 13 Price, 782.

Although a decree direct that all accounts be taken, the Master will not take the accounts of a partnership, unless especially directed so to do. *Woolley* v. *Gordon*, 1 Tam. 11.

If an error in a settled account is discovered and corrected before suit, and a bill be subsequently filed to surcharge and falsify, the corrected error is not a ground for a decree to surcharge and falsify. *Davis* v. *Spurling*, 1 Russ. & M. 64, s. c. 1 Tam. 199.

Upon a bill by the assignee of a judgment against the conusor, stating an award, in which a certain sum was found due upon the judgment, and praying that accounts might be taken against conusor upon the foot of the award and the judgment, the defendant, the conusor, cannot by his answer impeach the award, and raise questions which had been discussed before and decided by the arbitrators, as to the state of accounts between the defendant as conusee, and the conusor of the judgment. *Hill* v. *Ball*, 2 Bligh, N.S. 1, s. c. 1 D. & C. A.C. 164.

### (B) Account stated.

[See Limitations, Statute of.]

A party may recover the amount of an I. O. U., on a count upon an account stated. *Payne* v. *Jenkins*, 4 C. & P. 324. [Tenterden]

Proof of a mere offer by the defendant, before action brought, to pay a certain sum, unaccompanied by an admission that the debt is due, is not sufficient to support a count upon an account stated. *Weyman* v. *Hillyard*, 9 Law J. C.P. 30, s. c. 7 Bing. 700, s. c. 4 M. & P. 729.

An acknowledgment of a debt, without specifying any amount, is not sufficient to entitle the creditor to nominal damages on a count upon an account stated. *Bernasconi* v. *Anderson*, 2 M. & M. 105. [Tenterden]

In assumpsit on the money counts, and an account stated, it appeared that the plaintiffs' demand arose on a promissory note for 150*l.* given by the defendants to the plaintiffs' testatrix, written on a receipt

stamp. Evidence was given of an acknowledgment by the principal defendant, that he owed the deceased 150*l.* The consideration for the note was goods sold, but the declaration contained no count for goods sold:—Held, that the defendant's acknowledgment of the debt was sufficient to support the account stated. *Ashby* v. *Ashby*, 7 Law J. C.P. 221, s. c. 3 M. & P. 186.

In the years 1758 and 1764, H had paid the sums of 400*l.* and 2,000*l.* of the debts of A, and had from time to time, and at the period of these payments, received various monies belonging to A from his agents. A bill being filed by the representatives of A, to ascertain and raise certain charges upon A's estate, H, in his answer, made no claim in respect of the payments of the 2,000*l.* or the 400*l.*; and in two successive charges, sent in by him before the Master, he did not make any such claim; but at last, in the year 1817, he produced a charge, in which those sums were claimed with interest.

Held, in the Court below, and on appeal, that under these circumstances, the claims were barred by laches and length of time, notwithstanding the pendency of the accounts; and were properly disallowed in the same account in which H was charged with monies from time to time, and during the period in question advanced to him by the agents of A. *Gore* v. *Lord Lorton and others*, 2 Bligh, N.S. 286, s. c. 1 D. & C. A.C. 190.

## ACCOUNTANT.

A deputy assistant commissary-general held to be a public accountant within the meaning of the statutes, subjecting the property of certain accountants with the Crown to seizure and sale, by satisfaction of the balance against them. *Rex* v. *Fernandez*, 12 Price, 862.

An accountant, who has been employed in a bankruptcy, has no lien on the bankrupt's certificate for the payment of his costs. *Anon.* 1 Russ. & M. 330.

## ACCOUNTANT GENERAL.

By the statute 23 & 24 Geo. 3, of the parliament of Ireland, for securing the monies of suitors of the Courts of Chancery and Exchequer, by depositing the same in the national bank, which provides for the appointment of an Accountant General for the Court of Exchequer, it is enacted that—"so long as he observes the rules thereby or by the Court to be prescribed, he shall not be answerable for any monies which he shall not actually receive, but that the bank shall be answerable for all monies deposited with them"; and regulations for the transfer of stock are specified in the Act.

Under this Act A was appointed Accountant General of the Court of Exchequer in the year 1796.

In the year 1810, A executed a power of attorney, authorizing S. B., his chief clerk, to make transfers in the bank books of any stock of which A should first have executed a transfer draft under his hand, on cheque paper, pursuant to the orders of the Court. This power was deposited at the transfer office at the bank.

Under this power S. B. producing a certificate or transfer draft, purporting to be signed by A, but, in fact, forged, and in several respects not conformable to the particulars required by the power and the statutory regulations, obtained a transfer of stock from one cause to another, for the purpose of supplying deficiencies in the stock in the latter cause, which had been caused by transfers under certificates formerly forged by S. B. Upon the discovery of this transfer from the first to the second cause, two creditors in the first cause, who had proved their debts, made a motion in the cause, calling upon A to refund the stock transferred; which, after hearing affidavits of the appellant and the Bank of Ireland, was ordered by the Court. Upon appeal against this order, it was questioned whether the Court of Exchequer had jurisdiction to make such order by a summary proceeding, not in a cause, and whether the House of Lords had jurisdiction to entertain such appeal; but eventually the order was reversed. *O'Neill* v. *Fitzgerald*, 3 Bligh, N.S. 24.

## ACTION.

(A) Where maintainable.
(B) Parties.
(C) Notice of.
(D) Commencement of. [See *Lester* v. *Jenkins*, 2 M. & R. 429, Dig. Law J. 7.]

### (A) Where maintainable.

[See Animals.]

The value of paper, made for the purpose of forging assignats upon, to be exported to France, may be recovered in our courts, although the plaintiff knew to what purposes the paper was to be applied. *Smith* v. *Marcounay*, Pea. A.C. 81.

Where the plaintiff, though he may have a *primâ facie* case against the defendant, in one form of action, would be liable over to him in another form in respect of the same subject-matter, the plaintiff, in order that circuity of action may be avoided, will not be able to recover. *Carr* v. *Stephens*, 7 Law J. K.B. 336, s. c. 9 B. & C. 758, s. c. 4 M. & R. 590.

Where a party, by his own negligent or wrongful act, deprives another of sufficient presence of mind to take advantage of a warning given to avoid any danger or accident that may happen to him from that act, such warning will not discharge the wrong-doer from liability. *Woolley* v. *Scovell*, 7 Law J. K.B. 41, s. c. 3 M. & R. 105.

Where an act of parliament gives power to a company of proprietors of water-works to open the highway, in order to put on and repair pipes for the supply of water, they are liable to answer in damages for an injury occasioned in consequence of the highway being rendered foundrous through the want of repairing one of the pipes; although, by arrangement between them and their customers, the pipe in question was one of a class which were paid for, and were the property of the customers. *Tucker* v. *the Chelsea Water-works Company*, 8 Law J. K.B. 195.

*Semble*—That a man may lawfully pull down his house adjoining to that of his neighbour, without taking means to provide, a support for his neighbour's house, equal to that which was given by his own.

But, whether it is not incumbent on him to give reasonable notice to his neighbour of his intention, in order that his neighbour may himself take means to provide adequate support for his own house—*quære*. *Peyton* v. *the Governors of St. Thomas's Hospital*, 7 Law J. K.B. 322, s. c. 9 B. & C. 725, s. c. 4 M. & R. 625.

Where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundation of a building, on part of the footing of one of the walls of which one of the walls of such adjoining premises rested:—It was held, that the party giving the notice was only bound to use reasonable and ordinary care in the work, and was not bound in any other way to secure the adjoining premises from injury, although from the peculiar nature of the soil he was compelled to lay the foundation of his new building several feet deeper than that of the old. *Massey* v. *Goyder*, 4 C. & P. 161. [Tindal]

In 1803 the plaintiff's house was built against the pine-end wall of the defendant's house, by permission. In 1829, the defendant made an excavation, in a careless and unskilful manner, in his own land, near to his pine-end wall, by which he weakened his pine-end wall, and, consequently, injured the house of the plaintiff:—Held, that an action on the case was maintainable for this injury. *Brown* v. *Windsor*, 1 C. & J. 20.

A tradesman, who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap of it be so placed and secured, as that, under ordinary circumstances, it shall not fall down; but if the tradesman has so placed and secured it, and a wrong-doer throws it over, the tradesman will not be liable in damages for any injury occasioned by it. In an action for an injury to the person, occasioned by the negligent and careless placing of such flap, the declaration of one defendant, who had suffered judgment by default, cannot be used as evidence against the other defendants. *Daniels* v. *Potter*, 4 C. & P. 262, s. c. 1 M. & M. 501. [Tindal]

A publican, who has a flap-door in the foot pavement of the street, opening into a cellar underneath his house, is bound, when he uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving any injury by it. *Proctor* v. *Harris*, 4 C. & P. 337. [Tindal]

Where a person who is charged with negligence seeks to discharge himself by shewing that there was negligence in the plaintiff, inasmuch as he had warning of the danger, the defendant must shew that such warning came either from himself, or under circumstances which rendered it the duty of the plaintiff to act upon it.

Accordingly, in an action for injury done to the plaintiff's vessel by the anchor of the defendant's vessel striking her, it appeared that one of the crew of the plaintiff's vessel had been informed by one of a third vessel that his (the informant's) vessel was about to leave her then station, because there was an anchor somewhere near her; and, this being relied upon to charge the plaintiff's party with negligence in not avoiding the danger:—Held to be no answer to the action. *Venus* v. *Pearson*, 8 Law J. K.B. 263.

If, in an action for the negligence of the defendant's servants in managing a barge, so that the plaintiff's barge was run down, it appear that the accident happened from circumstances which persons of competent skill could not guard against; the plaintiff will not be entitled to recover; nor will he, if his men had put his barge in such a place, that persons using ordinary care would run against it; nor, if the accident could have been avoided, but for the negligence of the plaintiff's own men, it not being on board his barge at a time when it was lying in a dangerous place. *Lack* v. *Seward*, 4 C. & P. 106. [Tenterden]

A person misrepresenting the credit of another, though without any intention of defrauding the party to whom he makes the representation, is liable to make good damage occasioned by that party's giving credit in consequence of the representation; but only to the whole extent of the loss in consequence of credit reasonably given on the representation. *Corbett* v. *Brown*, 2 M. & M. 108. [Tindal]

A brought an action, for an attorney's bill, against B, but only recovered a small sum for money lent, as there had been no bill delivered:—Held, that A might recover the amount of the attorney's bill in another action, brought after the bill was delivered, although this was part of his demand in the first action, and that it was not necessary that he should have been nonsuited in the first action, to entitle him to bring the second. *Heming* v. *Wilton*, 5 C. & P. 54. [Parke]

A became indebted to B in a sum not exceeding 40*s*., for the carriage of a parcel of goods; and in a month afterwards incurred another debt to B, not exceeding 40*s*., for the carriage of a second parcel. A brought two actions in the county court for the respective debts:—Held, that the causes of action were distinct, and that A was entitled to sue separately for each demand, and this Court refused a prohibition. *The King* v. *the Sheriff of Herefordshire*, 1 B. & Ad. 672.

### (B) Parties.

If one, being the owner of a shop and goods, allow A to be at this shop, and in his own name to sell and dispose of the goods as he pleases, and a portion of these goods be destroyed by the negligent driving of the coachman of B, while the servant of A is carrying them, A has such a qualified property in these goods, as will entitle him to maintain an action on the case against B. *Whittingham* v. *Bloxam*, 4 C. & P. 597. [Patteson]

### (C) Notice of.

The plaintiff was employed by a private individual in making a new road across common lands belonging to a township. The fenn-reeve, or person having the care of the town lands, finding the plaintiff thus trespassing, desired him to desist, and on his refusing so to do, caused him to be apprehended and taken before a Magistrate, who refused to receive the charge. The plaintiff thereupon brought trespass against the defendant:—Held, that the latter was entitled, under the 41st section of the 7 & 8 Geo. 4. c. 30, to a month's notice of action. *Wright* v. *Wales*, 7 Law J. M.C. 20, s. c. 5 Bing. 336, s. c. 2 M. & P. 613.

The 136th section of the 57 Geo. 3. c. 29, requiring twenty-one days' notice of action, applies to the

case of an action brought against a contractor for the removal of dust, &c. appointed by the Commissioners of Sewers for the city of London, for an alleged trespass, in seizing a cart supposed to contain dust, and assaulting and imprisoning the driver. *Breedon* v. *Murphy*, 3 C. & P. 574. [Best]

A notice of action against a Magistrate, under 24 Geo. 2. c. 44, is sufficient to warrant a writ, and proceedings against the Magistrate and a constable jointly.

Where notice was given to the Magistrate as above, and the plaintiff, after the expiration of a month, sued out a writ against the Magistrate alone, and afterwards abandoned that writ, and sued out another against the Magistrate and constable jointly:—Held, that the notice was sufficient to warrant the second writ, and proceedings thereupon. *Jones* v. *Simpson*, 9 Law J. M.C. 45, s. c. 1 C. & J. 174, s. c. 1 Tyrw. 32.

In a notice of action to a Magistrate, the residence of the plaintiff's attorney was described, at the foot of the notice, as of Half Moon-street, Piccadilly, London. *Quære*—whether it was sufficient, Half Moon-street being in Middlesex. *Mills* v. *Collett*, 7 Law J. M.C. 97, s. c. 6 Bing. 85, s. c. 3 M. & P. 242.

## ADJUSTMENT.

[See INSURANCE.]

## ADMINISTRATION.

[See EXECUTOR AND ADMINISTRATOR.]

(A) WHERE REQUISITE.
(B) WHEN AND TO WHOM GRANTED.
(C) LIMITED.
(D) REVOCATION.
(E) BOND.
(F) PRACTICE.

### (A) WHERE REQUISITE.

A, by will, directed his debts to be paid out of his personal estate, and the deficiency to be made up out of his real estate; and subject thereto, he devised his copyhold messuages. Testator died. A creditor's bill was then filed, but neither the heir-at-law nor any personal representative were parties; in fact, the will had not been proved; there was no personal estate:—Held, that *administratio cum test. annexo* must be taken out, and that the administrator and heir-at-law must be parties. Bill to be so amended. *Fordham* v. *Rolfe*, 1 Tam. 1.

### (B) WHEN AND TO WHOM GRANTED.

The Court will grant administration, with a nuncupative will annexed, as contained in an affidavit of three witnesses, holding that 29 Car. 2. c. 3. s. 23. applies to merchant seamen. *Morrell* v. *Morrell*, 1 Hag. Ec. 51.

Administration granted to the nephew, on the renunciation of his father, the brother, and sole next-of-kin of the deceased. *In the goods of Mary Keane*, 1 Hag. Ec. 692.

Administration with a will (in which was no executor nor residuary legatee) annexed, decreed to two aunts of the deceased, legatees in the will, and daughters of the grandmother, the next-of-kin, she being ninety years of age and incapable. *In the goods of William Hinckley*, 1 Hag. Ec. 477.

21 Hen. 8. c. 5. s. 3. leaves it to the discretion of the Ordinary to grant administration, to the widow or to the next-of-kin. *Dew* v. *Clarke*, 1 Hag. Ec. 318.

The next-of-kin preferred, the lunacy of the widow being shewn; but the Court called for an inventory, and directed securities to justify. *In the goods of J. Williams*, 3 Hag. Ec. 217.

On a petition respecting the grant of administration, the asserted widow having married, during the deceased's lifetime, another man (since convicted of felony), had a daughter by him, and continuing to cohabit with him, the Court granted administration to the sister, and condemned the widow in costs. *Conyers* v. *Kitson*, 3 Hag. Ec. 556.

The statute 21 Hen. 8. c. 5. applies only to such as are next-of-kin at the time of the death; therefore, the Court made the *de bonis non* grant to the executor of the administrator (the sole next-of-kin at the death), in preference to persons entitled in distribution, who had received their shares and signed releases. *Savage* v. *Blythe*, 2 Hag. Ec. Ap. 150.

Where the Court is not bound by the statute of 21 Hen. 8. c. 5, it always grants the administration to those who have the interest.

Administration *de bonis non* granted to a person entitled under a deed of gift from the first administratrix to the whole beneficial interest, in preference to one who was not next-of-kin at the time of the death, and who, consequently, had no statutable right. *Almes* v. *Almes*, 2 Hag. Ec. Ap. 155.

Estate not vested by law or equity, administration *de bonis non* to the next-of-kin. *Amhurst* v. *Bawdes*, 2 Hag. Ec. Ap. 158.

Administration *de bonis non* to a feme covert granted to the representative of the husband, administrator, in exclusion of the wife's kin. *Darley* v. *Whaddon*, 2 Hag. Ec. Ap. 165.

An original administration to a feme covert decreed to her next-of-kin, in preference to the representative of the husband, who survived her. *Hals* v. *Dalman*, 2 Hag. Ec. Ap. 165.

After the death of the husband, administrator of his wife, administration *de bonis non* granted to her next-of-kin, in preference to the husband's representative. *Kinleside* v. *Cleaver*, 2 Hag. Ec. Ap. 169.

Chose in action to wife. Husband, administrator, dies without altering property, and makes a will: his administrator, with will annexed, takes administration *de bonis* to the wife; that administration called in by her next-of-kin and revoked, the property not being altered by the husband. *Kinaston* v. *Mills*, 2 Hag. Ec. Ap. 158.

Administration of the wife's goods to the executor of the husband, who died without taking administration to her. *Rees* v. *Cart*, 2 Hag. Ec. Ap. 161.

Administration of a feme covert, granted to the daughter of the third husband, revoked, and granted to the grand-children by her first husband; it being shewn that an estate would come to them. *St. Aubyn* v. *Page*, 2 Hag. Ec. Ap. 163.

A legacy to a wife, not received by her or hus-

band, nor administration taken to the wife by the husband; his executor, and not the next-of-kin, to have administration to the wife. *Plaidel* v. *Howe*, 2 Hag. Ec. Ap. 164.

The Court will grant administration, with the will annexed, to one of two universal legatees, a decree with intimation having issued in the name of the other, who was since dead. *Law* v. *Campbell*, 1 Hag. Ec. 55.

The original will being lost, and no copy in existence, a limited administration with the will (contained in an affidavit) annexed, granted to the widow, as executrix and residuary legatee for life, on her giving security; the eldest son having been personally cited, two other children, minors and abroad, cited by a servant on the Royal Exchange, and the remaining five consenting. *Vallance* v. *Vallance*, 1 Hag. Ec. 693.

Administration *de bonis non* with a will annexed, in which was no executor, granted to one of two legatees, a decree with intimation having issued in their joint names against the residuary legatee, the sureties justifying in the amount of the surplus beyond the interest of the one legatee, or (on a proxy of consent from the other,) beyond their joint interests, and an affidavit of no outstanding debts being made. *Pickering* v. *Pickering*, 1 Hag. Ec. 480.

After the case had stood over some time for further information, the Court, on securities justifying, granted to a residuary legatee administration, (with a will of 1801 annexed,) on affidavits that the party went to Demerara in 1802, and had not been heard of since 1804; that his mother, who died in 1826, believed him to have died many years before, a bachelor, and without a later will; and that diligent inquiries had been lately made at Demerara, but without obtaining conclusive evidence of his death. *Dean* v. *Davidson*, 3 Hag. Ec. 554.

Administration *durante minoritate* formerly granted to the mother, having ceased by the minor's death, and the mother having thereby become joint residuary legatee with another minor, administration *de bonis non* decreed to her, one executor having renounced, and the other, who was abroad, being cited. *Akers* v. *Dupuy*, 1 Hag. Ec. 473.

The executors having died in the deceased's lifetime, a joint limited administration, with the will of a married woman under a power annexed, granted to five residuary legatees, to whom a similar grant had been made at York, the *factum domicilii*, and who were all parties to a suit in Chancery. *In the goods of Sarah Blakelock*, 1 Hag. Ec. 682.

Administration, limited to the receipt of dividends in the English funds, granted to a minor residuary legatee, the wife of a minor, both subjects of, and resident in Portugal, on a certificate being produced, that by the law of Portugal she was entitled. *In the goods of the Countess Da Cunha*, 1 Hag. Ec. 237.

Administration of the goods of an intestate bastard, drowned, together with his wife and only child, will be granted to a creditor; the King's Proctor having been cited, but not the representatives of the wife, on the presumption that the husband survived, and the debt being large, and the property small. *Colvin* v. *H.M. Procurator General*, 1 Hag. Ec. 92.

Administration, as to a creditor, decreed to the mother of an intestate, advanced by her; the father, though alive, having been divorced *à vinculo matrimonii*, and married again. *Aitkin* v. *Ford*, 3 Hag. Ec. 193.

The Court grants administration to a bond-creditor, who has also a mortgage on leasehold property. *Rarburgh* v. *Lambert*, 2 Hag. Ec. 557.

Administration granted to one creditor; a decree with intimation having issued in the name of another. *Talbot* v. *Andrews*, 1 Hag. Ec. 697.

### (C) Limited.

The Court will grant to the agent of a foreign prince an administration limited, to substantiate proceedings in Chancery, but will not extend it to the receipt of a debt, without a power of attorney from proper authorities. *In the goods of the Elector of Hesse*, 1 Hag. Ec. 93.

Administration *de bonis non* limited to a certain legacy, granted to the representative of the substituted legatee, without citing the representative of the residuary legatee, resident abroad, but by practice entitled to the general *de bonis* grant; no claim to this legacy having, since the death (in 1797) of the residuary legatee, (also the executor and legatee for life,) been made by his representative. *In the goods of Martha Steadman*, 2 Hag. Ec. 59.

The Prerogative Court granted an administration, limited to assign a term in the diocese of A, the will of the deceased (who had no goods out of the diocese of B, except this satisfied term,) having been proved in the Court of B, and the chain of executors being subsequently unbroken. *In the goods of Mary Powell*, 3 Hag. Ec. 195.

A will, in existence after the testator's death, being accidentally lost, and the contents unknown, administration, limited till the will be found, granted (on justifying securities) to the widow alone, with a minor daughter entitled in distribution. *In the goods of Benjamin Campbell*, 2 Hag. Ec. 555.

An administrator, *pendente lite*, will be appointed, such appointment being necessary from the nature of the deceased's property, and from the conduct of one of the parties in the suit; and the nominee of the other party, on whose conduct there is no imputation, may be selected, if shewn to be impartial, competent, and responsible. *Young* v. *Brown*, 1 Hag. Ec. 53.

Administration *pendente lite*, and limited to certain property, granted, by consent, to one of the parties. *Schoolmasters of Scotland* v. *Fraser*, 2 Hag. Ec. 613.

The 38 Geo. 3. c. 87. only authorizes the grant of a limited administration *durante absentiâ* of the executor, when there are proceedings depending in Chancery. *In the goods of Thomas Davies*, 2 Hag. Ec. 79.

Administration *durante minoritate* of children in the East Indies, decreed to the uncle, resident in Ireland, he giving full justifying security; the grandfather, to whom, as next-of-kin, the grant would naturally pass, being upwards of eighty, and also resident in Ireland. *In the goods of John Ewing*, 1 Hag. Ec. 381.

### (D) Revocation.

An administration (limited to substantiate proceedings in Chancery,) which was decreed, on the next-of-kin being cited, and after due inquiries for a will, and was called in by the executors of a will,

not produced till long after, directed to be re-delivered out, and the executors, who might have taken a *cæterorum probate*, condemned in costs. *Harris and Wiggins* v. *Milburn*, 2 Hag. Ec. 62.

An administration, with a paper having the character of a *donatio inter vivos* annexed, revoked, since, if treated as testamentary, the deceased's intention would be defeated. *The King's Proctor* v. *Daines*, 3 Hag. Ec. 218.

An administration, with a will annexed, obtained after a caveat entered had expired, but without notice to the adverse party, and while the will was in suit in Ireland; the *forum domicilii* revoked, as surreptitiously obtained, and the party condemned in the costs of a petition in support of it. *Trimlestown* v. *Trimlestown*, 3 Hag. Ec. 243.

An administration *de bonis non* granted in 1827, of an intestate who died in 1790, limited to assign a leasehold property, not severed in the deceased's lifetime, and only mortgaged during an original creditor's administration, (which was granted on the renunciation of the next-of-kin at the time of the death, and which expired in 1806,) revoked; the next-of-kin, for the time being, (in whom all the beneficial interest in the deceased's estate was vested,) not having been cited when the limited grant was made, and there being a suggestion that such grant was surreptitiously obtained, and that there was a surplus belonging to the deceased's estate. *Skeffington* v. *White*, 2 Hag. Ec. 626.

Where administration was granted in 1791, on the renunciation of the next-of-kin, to a creditor who died in 1806, when no *de bonis* grant was taken out till March 1827, and when an administration, limited to certain leasehold property, and granted at that time (without citing the next-of-kin) to a nominee of the persons in possession of such property, was, in February 1828, called in by the representative of the next-of-kin; such representative held barred by time and circumstances, and the administrator, who appeared under protest, dismissed with costs. *Skeffington* v. *White*, 1 Hag. Ec. 699.

A diocesan administration obtained by one next-of-kin, directed to be brought in, and pronounced null and void, on the prayer of another next-of-kin, who had taken out a prerogative administration; the diocesan administrator being personally cited, and shewing no cause to the contrary. *Lotan* v. *Lotan*, 1 Hag. Ec. 683.

When, on the death of a brother administrator, administration had been revoked, because the mother had not formally renounced, that revocation rescinded on the mother's affidavit, that she was aware of her son's application for administration, and had under it received her distributive share. *In the goods of Frederick Stables*, 3 Hag. Ec. 560.

The legatee for life of certain property, having assigned over his interest to the substituted legatee, an administration, with a will annexed, limited to that interest, and granted to the legatee for life, may be revoked, and a new administration limited to that property, decreed to the substituted legatee, then possessed of the sole entire interest therein. *In the goods of Alexander Ferrier*, 1 Hag. Ec. 241.

(E) Bond.

Administration being granted to a person out of his Majesty's dominions, it is required that the sureties to the bond should be resident within the kingdom. *In the goods of John O'Byrne*, 1 Hag. Ec. 316.

In an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the Court will not dispense with such administrators entering into a joint bond. *Stanley* v. *Bernes*, 1 Hag. Ec. 221.

On renunciation of a co-executor, the Court will not grant administration, with the will annexed, without justifying securities to the daughter, the residuary legatee, during the lunacy of the mother, the other executor. *In the goods of James Hardstone*, 1 Hag. Ec. 487.

(F) Practice.

The Court being bound to satisfy itself that the applicant for administration is entitled to the grant, great delay in applying, by raising suspicion, justifies it in calling for explanation. *In the goods of Elizabeth Darling*, 3 Hag. Ec. 561.

Where administration to a person, long dead, was prayed by a creditor, and there had been no personal service on the next-of-kin, (who had no known agent in this country,) the Court required full information as to the debt and the cause of the delay, and that notice should be given to the next-of-kin in the West Indies. *Miller* v. *Washington*, 3 Hag. Ec. 277.

Administration *de bonis non*, with a will annexed, granted to a representative interest, entitled to seven-twelfths of the residuary estate, without citing those having a direct interest, as entitled to distribution. *In the goods of Anne Middleton*, 2 Hag. Ec. 60.

A sentence of the Prerogative Court, pronouncing against a will, and decreeing administration to the daughter, having been affirmed by the Court of Delegates, and the cause remitted, the Court will not allow the execution of the sentence to be delayed, by a prayer, for an answer, to the interest of the widow, who had been cognizant of, though not cited to see proceedings—nor by caveat. *Dew* v. *Clark*, 1 Hag. Ec. 311.

The Court, before granting administration to a creditor, requires an affidavit (*inter alia*) that he has no other security; and if the person, first entitled to the grant, is abroad, and the service of the decree is on the Royal Exchange, that such person has no agent in this country. *Aitkin* v. *Ford*, 3 Hag. Ec. 193.

The Court will grant administration, with papers annexed, to a person, as attorney of an executor, according to the tenor, without requiring a regular power of attorney; such person being clearly authorized to act, by letter, from that executor, the executor of the residuary legatee (who was also executor, but did not take probate,) having consented. *In the goods of Anna Maria Ormond*, 1 Hag. Ec. 145.

Two papers having been propounded by an executor in an allegation, which was rejected, and administration thereupon taken out by the next-of-kin, on a legatee, under one of those papers, calling in the administration, and the administrator appearing under protest, the protest allowed to stand over, in order that the legatee, on shewing he was not cognizant of the former proceedings, &c. &c., might bring in an allegation; the appointment of the executor being in one paper, the interest of the legatee entirely under the other, and the two papers not necessarily connected.

An executor having propounded papers in an allegation, which was rejected, and administration being thereupon decreed to the next-of-kin, a legatee cannot be allowed to call in such administration, in order to repropound the same papers, unless he can bring in an admissible allegation, and shew by affidavit that the facts have come to his knowledge since the rejection of the former allegation; in which case—*semble*, that even the executor might repropound them. *Wood* v. *Medley*, 1 Hag. Ec. 645—61.

The Court will not enforce a monition to transmit the original will, proved in an inferior jurisdiction, where deceased died; but will grant a limited administration, to assign a satisfied term, situate in another diocese. *Crosley* v. *the Archdeacon of Sudbury*, 3 Hag. Ec. 197.

The Court at Madras (the competent jurisdiction) having granted probate to the widow, as universal legatee, and constructive executrix of an informal paper, in which character no security is required; this Court, considering that under the circumstances the widow may be called on to prove the paper *per testes*, or that the grant may be appealed from, will only decree administration, with the paper annexed, to her, as relict and principal legatee, on giving security. *In the goods of Lieut.-Col. Read*, 1 Hag. Ec. 474.

Administration, with paper annexed, wherein were sundry alterations in the body, a blank left for the date, and which appeared, from internal evidence, to have been written more than nine years before death, and was indorsed—"Outline of the will," cannot be granted, in common form, on the exhibition of a proxy of consent from all interested under an intestacy, there being no evidence to rebut the presumption that the paper was deliberative. *In the goods of John Herne*, 1 Hag. Ec. 222.

## ADULTERY.

[See Baron and Feme, Divorce, and Marriage.]

In an action for criminal conversation, the plaintiff will be entitled to a verdict, unless he has been in some degree a party in his own dishonour, either by giving a general licence to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with the defendant, or by having totally and permanently given up all the advantage to be derived from her society. *Winter* v. *Henn*, 4 C. & P. 494. [Alderson]

Held, in an action for criminal conversation, it was not matter of defence, but only in mitigation of damages, that the plaintiff, having married an actress, concealed the marriage from her mother, and very seldom saw his wife, but suffered his wife to remain living with her mother, as if she were a single woman, and allowed her to continue her theatrical performances in her maiden name. *Calcraft* v. *the Earl of Harborough*, 4 C. & P. 499. [Tindal]

## ADVANCEMENT.

Construction of a covenant, that one child should be entitled to a share of the father's property, equal to the fortunes or advancement of the most favoured child.

What shall be deemed an advancement to a child, with reference to the particular language of an instrument. *Baily* v. *Lloyd*, 7 Law J. Chanc. 98.

The assumption by a father, of a debt due from his son to a partnership, in which the father and the son, along with other persons, were partners, was deemed an advancement of a portion to a less amount, to which the son would have been entitled upon the father's death. *Ansley* v. *Bainbridge*, 1 Russ. & M. 657.

## ADVOWSON.

[See Charity.]

## AFFIDAVIT.

(A) How and when entitled.
(B) Before whom to be sworn.
(C) Form and Requisites of.
(D) Defective and Irrelevant.

### (A) How and when entitled.

An affidavit to be used on the Crown side of the King's Bench should not be entitled in a cause, unless the proceedings have originated in that Court, or have been removed by a certiorari.

Accordingly, where a rule had been obtained in a case growing out of an indictment at the Old Bailey Sessions, and the affidavits were entitled, "The King, on the Prosecution of G. W. and W. C. against T. S.," which was the proper title of the cause at the Sessions:—Held, that they were improperly entitled. *The King, on the prosecution of Wagner and Chapman*, v. *Smith and another*, 8 Law J. M.C. 100.

A rule *nisi* for an attachment for non-payment of money under an award, was entitled, "In the matter of ——," but the affidavit of service was entitled "Between A B plaintiff, and C D defendant":—Held irregular, as it should have been entitled the same as the rule. *In the matter of Houghton and Fallows*, 7 Law J. C.P. 71, s. c. 2 M. & P. 452.

In the title of affidavits the christian and surname of the parties should be inserted; but where filed in support of a motion, and incorrect in that respect, and the objection was taken on shewing cause, the Court intimated that they would permit their being altered and resworn to meet the merits of the case. *Lodd* v. *Wilson*, 9 Law J. Exc. 5, s. c. 1 C. & J. 281, s. c. 1 Tyrw. 18.

Affidavit made on behalf of defendants, entitled in the cause as against twenty defendants named in the process:—Held, by Mr. Justice Bayley and Mr. Justice Parke, that it was improperly entitled; and that it should have been entitled in the cause as against the seventeen who had been declared against. —Contrà, Mr. Justice Littledale. *Beeston* v. *Beckett*, 7 Law J. K.B. 193, s. c. 4 M. & R. 100.

### (B) Before whom to be sworn.

An affidavit made by a defendant in a suit in the Court of Exchequer, sworn before a Magistrate in Scotland, permitted to be read. *Ellis* v. *Sinclair*, 3 Y. & J. 273.

An affidavit sworn in Scotland before a commissioner for prize bail, is irregular. *Sylvan*, 2 Hag. 155.

(C) Form and Requisites of.

An affidavit of merits must pursue the usual form —a good defence upon the merits; "a good and meritorious defence to the action," not sufficient. *Bower* v. *Kemp*, 9 Law J. Exc. 80, s. c. 1 C. & J. 287.

The names of all the deponents must be inserted in the jurat. *Houlder* v. *Faison*, 8 Law J. C.P. 18, s. c. 6 Bing. 236, s. c. 3 M. & P. 559.

All affidavits must be signed with the full christian and surname of the deponent, otherwise they cannot be read. *In re Olivia Serres, sei disant Olive, Princess of Cumberland*, 8 Law J. C.P. 109.

(D) Defective and Irrelevant.

Affidavit verifying proceedings at law not evidence; and taken off the file with costs. *Ex parte Barnes & others, in re Daniell*, 1 Mont. & M. 9.

Where affidavits contain irrelevant matter, the Court will not allow them to be read, but what is relevant may be taken as read. *Peddle* v. *Evans*, 1 Hag. Ec. 689.

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## AFFIDAVIT TO HOLD TO BAIL.

[See Bail.]

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## AGENT.

[See Principal and Agent.]

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## AGREEMENT.

[See Contract, and Specific Performance.]

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## ALE AND BEER.

[See Licence.]

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## ALIEN.

Under the 24th section of 37 Geo. 3. c. 97, lands in Great Britain, which on the 28th of October 1795, were held by American subjects, continue capable of being granted, sold, or devised by them, as if they were natives. *Sutton* v. *Sutton*, 8 Law J. Chanc. 161, s. c. 1 Russ. & M. 663.

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## ALIMONY.

An assignment, apparently fraudulent and colourable, by the husband, of all his property, after the commencement of a suit by the wife for divorce, cannot affect her title to alimony *pendente lite*. *Brown* v. *Brown*, 2 Hag. Ec. 5.

In answer to an allegation of facilities, it is proper to state that the wife brought no fortune, but not that her father is possessed of large property. The estimated value of all marketable securities must be included in the calculation of the husband's income, in order to the allotment of alimony *pendente lite*. *Harris* v. *Harris*, 1 Hag. Ec. 351.

Alimony, *pendente lite*, is usually about one-fifth of the annual income; but the proportion may vary according to the circumstances of the parties. *Hawkes* v. *Hawkes*, 1 Hag. Ec. 526.

The Court allotted alimony, *pendente lite*, at the rate of 50*l*. per annum out of an income of 140*l*., and refused to allow the monition not to issue till after fifteen days. *Brown* v. *Brown*, 2 Hag. Ec. 5.

Permanent alimony is always larger than alimony *pendente lite*. Out of an income of 750*l*., the husband having no state nor family to maintain, 250*l*. allotted to the wife—she taking charge of their only child. *Kempe* v. *Kempe*, 1 Hag. Ec. 532.

When alimony, *pendente lite*, is decreed to commence from the return of the citation, all sums paid subsequently to that return, are to be allowed as part-payment. When no sufficient cause is shewn for neglecting to comply with a monition personally served, a party may, at once, be pronounced contumacious; but *aliter*, for a mere informality, if he has virtually obeyed, or is ready to obey, the monition. *Hamerton* v. *Hamerton*, 1 Hag. Ec. 23.

Alimony is allotted for the maintenance of the wife from year to year; the Court, therefore, will not, without sufficient cause shewn for the delay, enforce payment of arrears beyond one year prior to the monition.

Where both parties had long abstained from applying to the Court, the one for a reduction of alimony, the other to enforce the regular payment, it would not enforce arrears, nor inquire as to the sums paid by the husband for his wife's debts, incurred by reason of non-payment of that alimony; nor reduce alimony, on account of an express waiver of a part thereof by the wife, the additional expenses of the husband, occasioned by the mature age of children, the failure, from mismanagement of her trustees, of a portion of the funds set apart for the wife's alimony, or slight additions, *aliunde*, to her means. *De Blaquiere* v. *De Blaquiere*, 3 Hag. Ec. 322—9.

In a suit for a divorce, brought by the wife, repeated and profligate adultery being proved on the part of the husband, (who, however, had to maintain and educate twelve children,) permanent alimony at the rate of 600*l*. per annum, (in addition to 120*l*. per annum separate property,) out of a net income of 4,000*l*., allotted from the date of the sentence, three years before, the cause having in the interval been carried by appeal to the Delegates, but remitted, no steps being there taken by the appellant, and the remaining delay being occasioned by his absence from the kingdom. *Durant* v. *Durant*, 1 Hag. Ec. 528.

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## AMENDMENT.

1. *AT LAW.*

(A) Process.
(B) Declaration.
(C) Records.

## 2. *IN EQUITY.*

(A) Bills.
(B) Pleas.
(C) Time.
(D) Costs.

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## 1. *AT LAW.*

### (A) Process.

The Court will permit a writ to be amended where there are not fifteen days between the teste and the return. *Lowe* v. *Gardner*, 8 Law J. C.P. 146.

The teste of a writ, if irregular in naming a late Chief Baron, instead of the existing Chief Baron, may be amended, even after a rule to set it aside upon that ground; and upon the amendment being made, the rule will be discharged. *Wakeling* v. *Watson*, 1 C. & J. 467, s. c. 1 Tyrw. 377.

The Court refused to allow a writ to be amended, which had been by mistake made returnable on a day certain, instead of on a general return day—on the ground that the amendment would affect the bail. *Houlder* v. *Fusson*, 8 Law J. C.P. 18, s. c. 6 Bing. 236, s. c. 3 M. & P. 559.

The Court refused to allow a *fi. fa.* to be amended, by the insertion of the *testatum* clause, where the defendant had died after the issuing of the writ, but before the time of the application—on the ground that the interests of third parties might be affected by it. *Phillips* v. *Tanner*, 8 Law J. C.P. 41, s. c. 6 Bing. 237, s. c. 3 M. & P. 562.

### (B) Declaration.

The plaintiffs having sued the defendant as administratrixes, they being also the surviving partners of the intestate—the Court allowed the writ and declaration to be amended by describing them as such partners only. *Taylor and another* v. *Lyon*, 7 Law J. C.P. 118, s. c. 5 Bing. 333, s. c. 2 M. & P. 586.

Where a plaintiff sued upon a bill of exchange given to him, and it appeared on the trial that, by agreement between the parties, the bill had been cancelled, and another bill given, which had not been declared upon, and a verdict thereupon passed for the defendant, the Court refused afterwards to allow the plaintiff to amend, upon payment of the costs of the trial, by adding counts upon the new bill. *Sweeting* v. *Halse*, 7 Law J. K.B. 258, s. c. 4 M. & R. 383.

Where a plaintiff obtains leave to amend his declaration in a term subsequent to that in which the declaration was delivered, a new rule to plead is necessary of such subsequent term; but such rule may be given before the amendment is made.

In such a case no demand of plea is necessary of the subsequent term, if there had been one of the previous term. *Beeston* v. *Beckett*, 7 Law J. K.B. 333.

### (C) Record.

*Dyeball* v. *Doe* d. *Lauris*, 2 M. & R. 184, Dig. Law J. 15.

The Judge, at the trial, will not allow an amendment under the statute 9 Geo. 4. c. 14, where there is a variance which would not have occurred if common care had been used in drawing the declaration. *Jelf, knt.*, v. *Oriel and another*, 4 C. & P. 22. [Tenterden]

Where a judgment is stated in the record as of one court, and it appears by the production of an examined copy, to have been obtained in another, the Judge at Nisi Prius may order the record to be amended under the 9 Geo. 4. c. 15. *Briant* v. *Eicke, gent., one &c.*, 1 M. & M. 359. [Tenterden]

In a declaration on a bill of exchange, the date of the bill was stated to be the 26th of March; it really was the 29th. The cause was undefended, and the Judge allowed the variance to be amended, under the statute 9 Geo. 4. c. 14, without the payment of any costs. *Bentsing* v. *Scott*, 4 C. & P. 24. [Parke]

In replevin, the defendant in his avowry stated, that the distress was for rent arrear, and that the plaintiff held the lands on certain terms; however, on the plaintiff's lease being put in, it appeared that he held on other and different terms:—Held, that this variance was not amendable under the statute 9 Geo. 4. c. 15;—Held, also, that that act only applies to cases where some particular written instrument is professed to be set out or recited in the pleading. *Ryder* v. *Malbon*, 3 C. & P. 594. [Park]

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## 2. *IN EQUITY.*

### (A) Bills.

*Hichens* v. *Congreve*, 4 Russ. 562, Dig. Law. J. 15.

The 13th order does not apply to a case, in which the answer was filed before the first day of Easter term, 1828. *Harris* v. *Harrison*, 2 Sim. 431.

The amendment of a bill, under leave, given on allowance of a demurrer, is not reckoned for the purposes of the 13th order. *Pesheller* v. *Hammett*, 3 Sim. 389.

After a first amendment, a motion for leave to amend the bill cannot be made except on notice.

If, however, the amendment is of a trifling nature, as in the description of a party, the Court will allow such an amendment to be made on an *ex parte* application. *Freme* v. *Best*, 8 Law J. Chanc. 7, s. c. 3 Sim. 152, s. c. 1 Russ. & M. 79.

Leave given on an *ex parte* application to amend the bill a second time in material points. *Cottingham* v. *Potts*, 8 Law J. Chanc. 8, s. c. 1 Russ. & M. 81.

After the bill had been previously amended, and the cause had been set down, leave given on an *ex parte* application, to amend the bill by correcting a clerical error. *Cockburn* v. *Raphael*, 8 Law J. Ch. 10.

On the allowance of exceptions to the answer, leave given *ex parte* to the plaintiff to amend his bill, although it had been previously amended. *Mendizabel* v. *Hullett*, 1 Russ. & M. 324.

The thirteenth of the new orders does not apply either to amendments made upon exceptions to the answer being submitted to or allowed, nor to amendments made before answer put in.

In all cases to which that order applies, both notice and affidavit are necessary, unless the Court dispenses with the latter. *Bird* v. *Hustler*, 9 Law J. Chanc. 194, s. c. 1 Russ. & M. 325.

An application to amend, under the 13th order, must be supported by a joint affidavit of the plaintiff and solicitor. *Browne* v. *Dunn*, 3 Sim. 23.

Formal amendments will be permitted to be made, without notice, though the bill has been amended previously. *Smith* v. *Evans*, 1 Russ. & M. 80.

Leave given to amend a bill, without prejudice to an injunction, obtained on the filing of the bill. *Pickering* v. *Hanson*, 2 Sim. 488.

The 8th of the new orders applies only to the case of exceptions, and if the plaintiff afterwards move to amend his bill, the defendant is entitled to an order for time to answer, according to the old practice. *Fosbrooke* v. *Balguy*, 1 Russ. & M. 624, s. c. 1 Tam. 443.

A second order to amend, obtained by petition of course, is irregular, though obtained before answer.

The acceptance of the 20s. costs by the clerk in court of the defendant, is a waiver of the irregularity of a second order to amend, obtained as of course. *Tarleton* v. *Dyer*—*Barnes* v. *Wilson*, 1 Russ. & M. 1.

An order to amend, obtained in violation of the 13th of the new orders, may be treated as a mere nullity; although, therefore, it remains undischarged, it is no answer to a motion to dismiss the bill. *De Geneve* v. *Hannam*, 1 Russ. & M. 494.

(B) Pleas.

Leave will not be given to amend a plea, unless the Court is satisfied that the defect, which the amendment is intended to remedy, arose from an accidental slip; nor will the Court allow the amendment of a plea, unless such amendment will render the plea a good and substantial plea. *Jackson* v. *Rowe*, 9 Law J. Chanc. 32, s. c. 4 Russ. 514.

(C) Time.

It is irregular to obtain an order to amend, when more than six weeks have elapsed from the time when the answer of all the defendants, who are stated to be within the jurisdiction, is to be deemed sufficient, though no answer has been filed by another person, alleged to be out of the jurisdiction, against whom process is prayed, when he shall come within the jurisdiction. *King of Spain* v. *Hullett*, 1 Russ. & M. 7, n.

Affidavit of discovery of material facts, made to support motion to withdraw replication recently filed, and amend, after motion to dismiss, is sufficient without shewing that the matter discovered came to plaintiff's knowledge since replication filed.

But the Court required the plaintiff to undertake to amend within a limited time. *Callanan* v. *Salway*, 13 Price, 799.

On 19th of April 1828 plaintiff obtained an order to withdraw replication and amend, and amended accordingly. In 1829 he obtained, as of course, another order to amend. Motion to discharge the second order refused, the first having been made before the new orders came into operation. *Leith* v. *Wildman*, 3 Sim. 101.

(D) Costs.

Where a defendant puts in a plea to the plaintiff's bill, and the plaintiff sets down the plea for argument, and then moves that the plea may not be in the paper, and on another motion obtains leave to amend his bill—the Court allows the defendant the taxed costs of the plea, and not the 5*l.* costs only. *Jones* v. *Waters*, 9 Law J. Chanc. 58.

Taxed costs allowed, not the sum of 5*l.* on amendment. *Mellish* v. *Richardson*, 12 Price, 530.

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## AMERCIAMENT.

[See Sewers.]

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## ANIMALS.

[See Action.]

In an action against a party, for keeping a dog accustomed to bite mankind, it is not essential that the dog should be his; if he harbours the dog, or allows it to be at, and resort to, his premises, that is sufficient. *M'Kone* v. *Wood*, 5 C. & P. 1. [Tenterden]

A person cannot recover damages for an injury received from the bite of a dog, placed in a yard for the protection of out-houses, unless he had such reasonable and justifiable cause for being in the place where the dog was, as might be pleaded in answer to an action of trespass; and if he had such cause, the circumstance of there being a notice on a board in large letters, warning persons to beware of the dog, will not be an answer to an action by him for the injury, if it appear that he was not able to read. If no suspicion be thrown upon the plaintiff by the defendant, in such a case it may be taken that he had such cause, provided the dog is put in a place forming part of one entrance to the house of the defendant, although there may be other entrances of a more public description, by which the plaintiff might have proceeded. *Sarch* v. *Blackburn*, 4 C. & P. 297, s. c. 1 M. & M. 505. [Tindal]

The owner of sheep in a field, which had been worried by a dog, shot the dog when in another field, at some distance off:—Held, in an action by the owner of the dog, that the defendant was not justified in the act of shooting, as it was not done in protection of his property. *Wells* v. *Head*, 4 C. & P. 568. [Alderson]

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## ANNUITY.

(A) Memorial.
(B) When grant of, void or voidable.
(C) Payments in Liquidation.

[See Bankrupt—Commissioners for the Reduction of the National Debt empowered to grant annuities for stock or money—10 Geo. 4. c. 24, 7 Law J. Abridg. of Statutes, 39.]

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(A) Memorial.

Interest was taken at a specific sum, and the seller engaged to make good that sum, in case the actual interest should fall below it, and a question was raised whether this was not a grant of an annuity, in which case the deed, to be valid by the English law, must be *memorialized*. But no opinion given on that point. *Scott* v. *Allnutt*, 2 D. & C. A.C. 404.

A judgment previously entered up against the grantor of an annuity is not such a charge or security upon his land, within the meaning of the 53 Geo. 3. c. 141. s. 10, as to render it necessary for the grantee, under the circumstances there stated, to inrol his annuity charged upon the grantee's free-

hold property. *Walford* v. *Merchant*, 9 Law J. K.B. 226, s. c. 2 B. & Ad. 315.

It is not necessary, under 17 Geo. 3. c. 26, that the memorial of an annuity should contain the christian names of the attesting witnesses at full length; and the memorial is sufficient, if it states them as they appear signed to the attestation of the deed. *Phillips* v. *Court*, 3 Russ. 267.

It was agreed between the grantor and grantee of an annuity, that the former should pay off a former annuity with a part of the consideration money. Accordingly, the grantee gave to the grantor the whole consideration money, and the latter then, in pursuance of the agreement, paid off the former annuitant, who was present. The deeds took no notice of this former annuity, but treated the money as so much money paid to the grantor, absolutely; and the memorial was the same:—Held, that this was no objection to the annuity.

The deed contained a covenant by the grantor, to pay the grantee the extra sum which would be necessary to insure the life of the grantor, in case he went out of the kingdom. The memorial did not notice this:—Held, to be unnecessary.

The memorial described the nature of the instrument, as "assignment of dividends and annuity deed to secure the same." The deed did contain an assignment of dividends as a security:—Held to be sufficient. *Case* v. *Lowlane*, 9 Law J. K.B. 315, s. c. 2 B. & Ad. 767.

A, by two several deeds, granted to B two annuities, charged on certain estates of which A was tenant for life, and further secured by warrant of attorney, and an insurance on the life of A; and memorials of these annuities were duly inrolled. Afterwards, by deed, A granted another annuity to B, charged upon the same estate, and also upon another estate, to which A was likewise entitled, and by a further insurance on A's life. By this deed A also charged the two former annuities upon the last-mentioned estate. And he conveyed his interest in all the estates to a trustee, in trust, for securing the three annuities. The three annuities were further secured by a covenant in this deed, on the part of the grantor, to authorise and permit his deputy, in an office held by him, to pay a yearly sum to the trustee towards the annuities; and by a covenant for payment of extra premiums of insurance. A memorial of the grant of the last-mentioned annuity was inrolled, but no further or additional memorial was inrolled as to the two first-mentioned annuities, with regard to the charge of them on the additional estate, and the additional securities for them contained in the last-mentioned deed, nor in the memorial inrolled of the third annuity, was any notice taken of the additional securities for the two first annuities:—Held, that it was not necessary, under the Annuity Act, to inrol any memorial of the further or collateral securities for the two first annuities. *Aston* v. *Gwinnell*, 3 Y. & J. 136.

An error in the memorial of an annuity, by stating the annuity to be 257*l.* instead of 237*l.*, renders the annuity void under the statute 53 Geo. 3. c. 141. s. 9. *Nash* v. *Gladstone*, 9 Law J. K.B. 160, s. c. 1 B. & Ad. 1[illegible].

In questions upon the assignment of a term to secure an annuity, a proper memorial of the annuity deed will be presumed, until the contrary be shewn. *Doe d. Broughton* v. *Gully*, 7 Law J. K.B. 201, s. c. 9 B. & C. 344, s. c. 4 M. & R. 249.

(B) When grant of, void or voidable.

Where, on the grant of an annuity, the consideration money was, with the assent of the grantor, paid to a trustee, to be applied by him in payment of the costs of the annuity deeds, afterwards of certain debts due from the grantor to judgment creditors, and the surplus to the grantor:—Held, that this was not a retainer within the meaning of the statute, so as to render the annuity void, notwithstanding the trustee was the partner of the grantee, and both of them were the solicitors employed in the transaction. *Aston* v. *Gwinnell*, 3 Y. & J. 136.

A clergyman granted an annuity, which he covenanted to pay. He demised his rectory as a collateral security; and he gave a warrant of attorney at the same time, which recited the grant and demise; and declared that the warrant of attorney was given to the *end and intent* that the grantee might *immediately* enter up judgment, sue out a sequestration, and *continue* it, during the existence of the annuity:—Held, that; this being the intent of the parties, the warrant of attorney was substantially a charge upon the living against the provisions of the 13 Eliz. c. 20; and the Court therefore set aside the sequestration.

But, where a clergyman granted an annuity, and charged it upon his benefice; covenanted to pay the annuity, and, as a collateral security, gave a warrant of attorney; but the defeasance ran in the usual form, where warrants of attorney are given to lay persons; and it was provided that no execution should issue, unless default should be made in payment of the annuity:—Held, that this was distinguishable from the case above mentioned; and that the warrant of attorney might be considered as referable to the personal covenant to pay the annuity, and as giving a speedy execution in case of the non-performance of that covenant; and as free from the illegal part of the transaction, the charge upon the benefice. *Flight* v. *Salter*, 9 Law J. K.B. 67, s. c. 1 B. & Ad. 693.

An annuity of 120*l.* was granted for four lives in consideration of 1,000*l.*, the grantor covenanting to insure that sum, within thirty days after the falling in of the third life:—Held, not usurious. *In re Naish, executrix of James Stewart*, 9 Law J. C.P. 41, s. c. 7 Bing. 150, s. c. 4 M. & P. 793.

A grantor of an annuity, or his agent, not bound to disclose the circumstances which produced the necessity of granting the annuity, though the agent is the agent for both parties. *Adamson* v. *Evitt*, 9 Law J. Chanc. 1.

The grantee of a void annuity, on account of an informality in the deeds, cannot maintain an action for money had and received, to recover back the money, until he has demanded fresh deeds from the grantor. But it is not necessary for the grantee to tender back the old deeds previous to the commencement of such action. *Widdle* v. *Lynam*, Pen. A.C. 30. [Kenyon]

(C) Payments in Liquidation of.

A married woman being entitled to an annuity, charged on a plantation and residuary estate in Jamaica, devised to A,—her husband, under an authority from A, received the produce of the estate from

1811 to 1816, and never accounted for it: during that period she never applied for any arrears of her annuity:—Held, that the annuity must be presumed to have been satisfied. *Carter* v. *Anderson*, 8 Law J. Chanc. 90, s. c. 3 Sim. 370.

## APOTHECARY.

[See SURGEON AND APOTHECARY.]

## APPEAL.

[See SESSIONS.]

Though the regular appeal from a jurisdiction not peculiar, but subordinate, is to the diocesan, yet if the Judge of the subordinate and diocesan courts be the same person, the appeal may be *per saltum* to the metropolitan; but the reason must appear by the formal instruments in the cause. *Beere and Byles* v. *Jacob*, 2 Hag. Ec. 257.

The appellants (interveners in the Court below) being described in the commission of delegates as "the parochial schoolmasters of Scotland"—*quære*, whether notwithstanding the absolute appearance of the respondents, the inhibition ought not to be relaxed, on the ground that the appellants, not being a body corporate, had no *persona standi* in their collective capacity. *Schoolmasters of Scotland* v. *Fraser*, 2 Hag. Ec. 613.

The Court is not legally obliged to defer to an appeal till an inhibition is served; nor is there any distinction whether all the acts be done on the day the appeal is asserted, or some on a subsequent day: therefore, the Court, having overruled the objections to the admission of an allegation, on the following court-day admitted the allegation, notwithstanding an appeal had, in the interim, been asserted. *Middleton* v. *Middleton*, 2 Hag. Ec. Sup. 139.

The Court will not allow a decree made fifty years ago to be appealed from; nor, where fresh pleadings are so framed as to raise precisely the same question, will the Court put a different construction upon the words of a will than they have received by the previous decree. *Rolph* v. *Thomson*—*Griffin* v. *Richards*, 9 Law J. Chanc. 213.

C, by his will, devised his lands in trust for G his brother, for life, remainder to his sons in strict settlement in tail-male, remainder to S, the testator's sister, for life, remainder in like manner to her sons; remainder to K for life, without impeachment of waste, remainder in strict settlement to his sons in tail male; remainder to S for life, with like remainder to his sons; remainder to the testator's right heirs. The lands were conveyed accordingly by the trustees named in the will to these uses.

G died without issue, leaving S his heir-at-law, and she married P, and with her husband levied a fine of the reversion, which had descended to her on the death of G, to such uses as S should appoint; and she died, having appointed the reversion to P during the joint lives of himself and A, until A should attain twenty-one, or marriage; remainder, as to one moiety, to P for life, and as to the other moiety, to A for life; remainder, as to the whole estate, to the sons, &c. of A in tail, (subject to a term) to P.

K entered upon the death of S and died, devising his real estates, charged with his debts, and bequeathing his personal estate to T K, against whom a bill was filed, charging that K, during his possession of the lands, had committed equitable waste, by cutting trees planted, &c. for ornament, and praying that an account might be taken of the trees cut, and the value, and that T K, as representative of K, might pay the amount out of his assets. A decree was made according to the prayer of the bill. But before the Master had proceeded under the decree, the question of value, and all matters in difference between the parties, were by an order of the Court, by consent, referred to an arbitrator, appointed by the Master under the order, and arbitration bonds were executed by the parties. The arbitrator, by his award, found that a sum of 3,871*l.*, which included the value of the timber cut, was the balance due to the plaintiff, and directed that sum to be paid. An application being made to enforce the payment of the money according to the award, the defendant presented a petition of re-hearing, which suspended the proceedings upon the award, and the case having been re-heard, the bill was dismissed, but no order was made respecting the award.

Upon appeal against this decree, held that the House could not proceed until there should be a judgment upon the whole of the proceedings before the Court below, and a special order was made, by which the appellants had leave to withdraw their appeal, for the purpose of obtaining the judgment of the inferior court upon the question as to the award.

*Semble*—That such a reference as above stated, submits the law as well as the fact to the arbitrator. *Butler* v. *Kynnersley*, 2 Bligh, N.S. 374.

The House of Lords having made an order, containing declarations as to the right of parties, and remitting the case to the court below, with directions; it is not competent to the court below, upon the same state of evidence, to give any judgment inconsistent with the declarations and directions of the House of Lords. *M'Neill* v. *Cahill*, 2 Bligh, N.S. 316.

Where there is a fair and substantial question to be argued on appeal, the decree may be varied as to costs, though affirmed in every other point; but it will not be varied as to costs, where the point, which is presented as the ground of appeal, has no substance. *Attorney General* v. *Butcher*, 4 Russ. 180.

## APPOINTMENT.

[See POWER.]

## APPRENTICE.

[See POOR.]

[Laws relating to apprentices in cotton factories repealed, and others substituted by 1 & 2 Will. 4. c. 39, 9 Law J. Abridg. of Statutes, 77.]

The statute 56 Geo. 3. c. 139. s. 2, which directs that a parish indenture shall be allowed by two Justices of the county into which the apprentice is to be bound, gives those Justices a discretion to determine on the propriety of the binding generally, and not merely with regard to the fitness, respectively,

of the master and apprentice. *Rex* v. *Mills*, 2 B. & Ad. 578.

The statute 8 Ann. c. 8. s. 39, making void indentures of apprenticeship, in which the full sum and sums of money received, given, paid, secured, or contracted for, are not truly inserted, does not apply to cases where the sum actually paid is inserted in the indenture, though it is a less sum than that which was originally agreed for, and the reduction was made to diminish the amount of stamp duty. *King* v. *Low*, 3 C. & P. 620. [Tenterden]

The staying out by an apprentice on a Sunday evening beyond the time allowed him, is not such an unlawful absenting of himself, as will enable his master to maintain an action of covenant against a person who became bound for the due performance of the indenture.

If an apprentice absent himself from his master, and his master take him back, and an action be afterwards brought for such absenting, the taking back, to constitute a defence, must be specially pleaded. *Wright* v. *Gibon*, 3 C. & P. 583. [Best]

Indentured apprentice deserting his service, and entering on board a ship, cannot maintain an action for wages. *Bright* v. *Lucas*, Pea. A.C. 121. [Eyre]

## APPROPRIATION.

[See Debtor and Creditor, and Payment.]

A publican took from a person who boarded and lodged in his house, a bill and a note, both at one time, for his score, part of which consisted of a demand for spirits, but not to the amount of either bill or note; money was also paid on account:—Held, in the action on the securities, that although they were given at the same time, the plaintiff might recover on one of them, and also that he might apply the money paid in reduction of the demand for spirits, although such demand could not be recovered, in consequence of the act of the 24 Geo. 2. c. 40. *Crookshank* v. *Rose*, 5 C. & P. 19, s. c. 2 M. & M. 100. [Tenterden]

Where the consignor of goods appropriates the proceeds thereof in discharge of a particular antecedent debt, he may alter the application of these proceeds at any time before the goods come to the possession of the party, whose debt they were to discharge, unless notice has been given to him of the prior appropriation. *Hankey* v. *Hunter*, Pea. A.C. 107. [Kenyon]

## ARBITRATION.

(A) Effect of Reference.
(B) Revocation.
(C) Arbitrator.
(a) *Authority.*
(b) *Privilege.*
(D) Umpire.
(E) Award.
(a) *Form and Construction.*
(b) *Effect of, and within what time to be made.*
(c) *Setting aside.*
(F) Remedies.
(G) Pleading.
(H) Costs.

### (A) Effect of Reference.

The statute 1 Geo. 4. c. 55. gives no authority to a Judge of Assize to make an order in a cause after the cause has been referred. *Ashworth* v. *Heathcote*, 8 Law J. C.P. 206, s.c. 6 Bing. 596, s. c. 4 M. & P. 396.

### (B) Revocation.

When two parties have submitted to refer to arbitration, and then one of them becomes bankrupt, whether the bankruptcy is of itself a revocation of the submission—*quære.*

Though it be not of itself such a revocation, if the interest in the subject-matter of the party who becomes bankrupt passes to his assignees, the other party is justified in revoking the submission; because, as the assignees would not be bound by the submission, it is no longer mutual. *Marsh and others* v. *Wood*, 7 Law J. K.B. 327, s. c. 9 B. & C. 659, s. c. 4 M. & R. 504.

A submission to arbitration, entered into by order of Nisi Prius, is revocable before award made, as well as a submission entered into by the parties.

In such a case the Court refused to stay the proceedings in the action, leaving the defendant to his remedy by action for damages for breach of the agreement to refer. *Skes* v. *Coron*, 8 Law J. K.B. 224, s. c. 10 B. & C. 403.

Where the plaintiff, after a reference under an order of Nisi Prius, (not made a rule of court,) revoked the authority of the arbitrator before the award was made, and gave the defendant notice of trial:—The Court refused to stay the proceedings. *Green* v. *Pole*, 8 Law J. C.P. 149, s. c. 6 Bing. 443, s. c. 4 M. & P. 198.

The plaintiff and defendant mutually entered into bonds to submit to arbitration a certain claim of the plaintiff on a charter-party, for the hire of a ship. The umpire chosen by the arbitrators evincing partiality towards the defendant, the plaintiff, before the award was made, revoked his authority, and afterwards brought an action on the charter-party, and recovered a verdict for 1,500*l.*, and sued out execution thereon. The umpire, notwithstanding the revocation, made an award in favour of the defendant, who afterwards commenced an action against the plaintiff on the arbitration bond, but, by reason of the plaintiff's being resident in Scotland, was unable to serve him with process.—The Court, on motion, refused to order the execution issued at the suit of the plaintiff in the action upon the charter-party to be stayed. *Stewart* v. *Williamson*, 7 Law J. C.P. 156, s. c. 5 Bing. 415, s. c. 2 M. & P. 765.

### (C) Arbitrator.

#### (a) *Authority.*

No one is compellable to attend before an arbitrator as a witness. *Wansell* v. *Southwood*, 7 Law J. K.B. 227, s. c. 4 M. & R. 357.

#### (b) *Privilege.*

An arbitrator cannot be compelled to give evidence in a cause, as to matters that occurred before him

during the arbitration. *Johnson* v. *Durant*, 4 C. & P. 327. [Tenterden]

(D) UMPIRE.

Where a submission to the award of two persons authorized the appointment of an umpire by them, if they should disagree:—Held, that they might choose an umpire before they entered upon the inquiry. *Bates* v. *Cooke*, 9 B. & C. 407.

Where there is a reference to two persons who have power to nominate a third, their nomination must be the result of their judgment, and not that of chance; and if such nomination be the result of chance, the Court will set aside the award, unless the parties have consented to the arrangement, or afterwards acquiesced in it. *In re Cassell and another*, 7 Law J. K.B. 329, s. c. 9 B. & C. 624, s. c. 4 M. & R. 555.

The award, after reciting that A B and C D had been appointed arbitrators, and that they had appointed E F umpire, proceeded, "We the said arbitrators, do award," &c., and was signed by two arbitrators and the umpire:—Held, that the latter, by signing the award, adopted the language as his. *Bates* v. *Cooke*, 9 B. & C. 407.

(E) AWARD.

(*a*) *Form and Construction.*

If an award direct a party to do that which is impossible, *or* do another act which is possible, the award is good, by reason of the alternative.

Where an award did not, in express terms, put an end to an action, which was one of the subject-matters referred; but directed the parties to execute mutual releases:—Held, that this was a sufficient determination of the action; as the release might be pleaded *puis darrein continuance*. *Wharton* v. *King*, 9 Law J. K.B. 271, s. c. 2 B. & Ad. 528.

An award, made by a barrister, cannot be questioned on the ground of any statement not appearing on the face of the award, or annexed to it. *Williams* v. *Jones*, 5 M. & R. 3.

On a submission of *all matters in difference* to the award of an arbitrator, it is no objection to the award that it does not contain an express adjudication upon every matter contended for: it is sufficient if the award profess to be "of and concerning the matters in difference." *Hayllar* v. *Ellis*, 8 Law J. C.P. 1, s. c. 6 Bing. 225, s. c. 3 M. & P. 553.

An award by the law of Scotland, although it does not decide on the whole matter referred, may be good as far as it goes, provided it be unobjectionable in other respects. *Maclellan* v. *Macleod*, 2 D. & C. A.C. 121.

By an order of Nisi Prius, an action at law, and all matters in difference between the parties at law and in equity, including a Chancery suit, were referred to an arbitrator, who, by his award, ordered that a sum of money should be paid to the plaintiff in the action, and that the bill in Chancery should be dismissed, and that all proceedings therein should utterly cease and determine:—Held, that the suit in equity, and all matters in difference between the parties, were thereby finally determined, although one of the matters in dispute in the Chancery suit was brought before the arbitrator as a matter in difference between the parties, and was not otherwise disposed of than by the ending of the Chancery suit. *Pearse* v. *Pearse*, 9 B. & C. 484.

On a reference of all matters in difference, a demand on one side was laid before the arbitrators, and immediately admitted by the other party, no evidence was therefore given concerning it, nor any adjudication upon it requested. The arbitrators published their award of and concerning the matters referred to them, directing payment of a sum of money (without saying on what account) to the party against whom the above claim had been made, with costs; and it was proved that they left that claim out of consideration in making their award, as a matter not in dispute:—Held, that the award was bad, as the arbitrators ought to have taken notice of the admitted demand. *In re Robson*, 1 B. & Ad. 723.

In a suit instituted to enforce a pecuniary demand against the real and personal estate of a testator, an order was made by consent, referring all matters in difference between the parties in the cause to arbitration; and the arbitrators made an award, ordering the executors to pay a certain sum to the complainants, in full satisfaction of all their demands on him and his testator, but directing that certain other defendants, who, under the testator's will, took interests in his real estate, should be at liberty to prosecute their claims against the testator's estate, in like manner as if no order of reference had been made: the award was held not to be final, and was, therefore, set aside. *Turner* v. *Turner*, 3 Russ. 494.

(*b*) *Effect of, and within what time to be made.*

Where A entered into a recognizance to pay to the King a certain sum, or such sum as B should award; and afterwards, by rule of court, C was, by consent of parties, substituted as arbitrator in lieu of B, and C made his award:—Held, that the recognizance was not forfeited by the non-performance of the award of C. *The King* v. *Bingham*, 3 Y. & J. 101.

A decree having ascertained the right of the plaintiff to relief, accounts were directed to ascertain the amount due to him: afterwards the plaintiff referred all matters in difference to the decision of an arbitrator; and he, without taking into consideration the question of law decided by the decree, made an award, ascertaining the amount due from the defendant to the plaintiff; afterwards, on an appeal against the decree, it was reversed, and the bill was dismissed:—Held, that the award was not binding. *Osmond* v. *Kynnersley*—*Butler* v. *Kynnersley*, 7 Law J. Chanc. 150.

Where all matters in difference in a cause are referred, and the arbitrator awards a sum to the plaintiff in satisfaction of his damages in the cause,—*semble* that the plaintiff cannot maintain another action for a demand not made before the arbitrator, but within the scope of the reference to him.

The proceedings to bar the plaintiff in such a case may be given in evidence under the general issue in the second action. *Dunn* v. *Murray*, 7 Law J. K.B. 390, s. c. 9 B. & C. 780, s. c. 4 M. & R. 571.

If the assignees of a bankrupt attend meetings under a reference, to which the bankrupt was a party, and make no objection to the proceedings, they will be considered as adopting them, and be bound by the award. *Doe* d. *Herring*, *ex parte Herring*, 1 Russ. & M. 153.

By an order of reference a fixed time was given to the arbitrator for making his award. The defendant neglected to appear before him, and no award was executed. The Court refused to grant a rule *nisi*, calling on him to consent to enlarge the time, or otherwise that the plaintiff should be at liberty to enter up judgment for his demand. *Williams* v. *Williams*, 9 Law J. Exc. 2.

Where a Judge's order of reference directs an arbitrator to make his award by such a day, or by such further day as he shall appoint and a Judge of the court shall order:—Held, that, the award not being made within the limited time, and the time being enlarged by the arbitrator, it was necessary to obtain a Judge's order sanctioning the enlargement before any award was made.

Where, under such an order of reference, there were several attendances before the arbitrator after the time originally limited, though within the time of enlargement made by the arbitrator alone; but that the arbitrator had made a further enlargement after the last attendance before him, and there was no Judge's order to sanction any of the enlargements:—Held, that, if the attendance of the defendant cured the previous enlargements without authority, the last enlargement was made without even any implied authority, and that the award was void. *Mason* v. *Wallis*, 8 Law J. K.B. 109, s. c. 10 B. & C. 107, s. c. 5 M. & R. 85.

By an order of reference, the award was to be made by a given day, or such further time as the arbitrator should appoint, by indorsement on the order. The arbitrator accordingly enlarged the time, and, before the expiration of the extended period, the plaintiff, at his request, obtained a Judge's order for a further enlargement; and the arbitrator afterwards, and without any indorsement of the second enlargement on the original order, made his award:—Held, that the consent of parties to the enlargement, was a waiver of the irregularity, and rendered the award valid. *Leggett* v. *Finlay*, 8 Law J. C.P. 52, s. c. 6 Bing. 255, s. c. 3 M. & P. 629.

(c) *Setting aside.*

The Court refused to set aside an award where the plaintiff had allowed a term to elapse before moving the Court, in the expectation that the defendant would make the like motion. *Emmett* v. *Ogden*, 9 Law J. C.P. 83, s. c. 7 Bing. 258.

By a Judge's order, made at chambers, upon hearing the attornies on both sides, and by their consent, the cause was referred to arbitration. It was recited in the award, that the cause was referred by an order of Nisi Prius:—Held, that such award was bad, and that the performence of it could not be enforced by attachment; but the rule *nisi* for setting it aside, not stating it to have been drawn up on reading the order of reference,—held irregular. *Christie* v. *Hamlet*, 7 Law J. C.P. 77, s. c. 5 Bing. 195, s. c. 2 M. & P. 316.

In assumpsit against an attorney for negligence in the conduct of a suit, the declaration contained several special counts, and the usual money counts; the defendants paid money into court sufficient to cover the plaintiff's demand on the latter counts. The cause being referred under an order of Nisi Prius, the arbitrator found that the plaintiff had good cause of action for a certain sum, and directed a verdict to be entered for him for such sum:—Held, that the award was sufficiently certain. Although the objections to an award should be stated in the rule *nisi* to set it aside; yet if it be not done, the Court is not precluded from entering into any valid objection that may be raised to the award. *Dias* v. *Jay*, 7 Law J. C.P. 80, s. c. 5 Bing. 281, s. c. 2 M. & P. 448.

(F) Remedies.

The Court may proceed upon proof of the copy or draft of an award, on being satisfied that the original is lost.

But refused to proceed by attachment upon an award made eight years before. Left the party to proceed by action. *In re Darwin*, 9 Law J. K.B. 183.

If the principal sum due upon an award has been paid, the remedy for interest is by action, and not by attachment. *Churcher* v. *Stringer*, 9 Law J. K.B. 318, s. c. 2 B. & Ad. 777.

Where an action upon the award has been brought, and is depending at the time a demand is made for the purpose of proceeding by attachment, the Court will not interfere by attachment, but will leave the party to the remedy he has sought by action.

But, where a party moved for an attachment, and it appeared that an action had been brought and was discontinued, but it did not appear whether the action was depending when the demand was made, —*Semble*, that this is not sufficient to deprive the party of his remedy by attachment. *In re Higgs and Willis*, 7 Law J. K.B. 90.

To support an attachment for the non-performance of an award on demand, made by a third person who acts under a power of attorney, the execution of the power of attorney must be shewn by the subscribing witness, and a copy of the power of attorney must be left with the party upon whom the demand is made. *Laugher* v. *Laugher*, 1 C. & J. 398, s. c. 1 Tyrw. 352.

An action may be maintained on an award made under a submission by a Judge's order, the parties having attended at the reference. *Wharton* v. *King*, 2 M. & M. 96. [Tenterden]

Jurisdiction of the Court of Chancery in awards under the 9 & 10 Will. 3. c. 15. *In re Joseph and Webster*, 1 Russ. & M. 496.

(G) Pleading.

The declaration on the award made under this submission, after stating the choice of an umpire, alleged that the arbitrators and umpire made the award:—Held, that, taking the whole together, it was substantially an allegation that the umpire made the award. *Bates* v. *Cooke*, 9 B. & C. 407.

(H) Costs.

The Court have no power to give costs on a revocation of a submission by order of Nisi Prius, where the order does not contain the usual provision, empowering the Court to give costs to one party against the other, in case of wilful delay, &c. *Shaw* v. *Cason*, 8 Law J. K.B. 294, s. c. 10 B. & C. 463.

## ARMY.

Regulations with respect to army pensions, 1 Will. 4. c. 41, 8 Law J. Abridg. of Statutes, 96.

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## ARMY ACCOUNTS.

The colonel of a regiment, by power of attorney, authorized his agent to receive the allowances, issued by the Paymaster General of the Forces, for the supply of clothing and accoutrements to the regiment. The agent assigned the certificates, which authorized the issue, to his banker as a security for his account, and the banker received the money. The agent directed the supply, by the tradesmen, of the clothing and accoutrements; and he, from time to time, transmitted accounts to the colonel, representing those supplies as having been paid for; but, in fact, they had not been. The agent became bankrupt; the tradesmen sued the colonel for the amount of the supplies; and the colonel brought an action against the banker to recover the money for those supplies:—Held, that, at all events, the action could not be maintained against the banker until the colonel had paid the tradesmen.—Whether it could be then maintained—*quære*. *The Earl of Dalhousie* v. *Chapman*, 7 Law J. K.B. 233.

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## ARMY AGENT.

If money be impressed by the Crown into the hands of an army agent, for the purpose of being paid to officers, to whom it is due, and it is never demanded by them, and is therefore, not paid by the agent; it remains the money of the Crown in the hands of the agent, for which the agent is accountable to the Crown. *Brummell* v. *Macpherson*, 7 Law J. Chanc. 1.

Information, under 45 Geo. 3. c. 58, at the suit of the Crown, against an army agent, for a discovery and production of documents, with a view to an account. Plea, First—That the accounts had been settled and closed at the War Office, by the issuing of the clearing warrants, and referring to them: Secondly, That the monies impressed in the agent's hands, for the pay, or arrears of pay, of officers, were held by him as the banker or private agent of the officers by whom he was appointed; and that for such monies he was not accountable to the Crown. The plea ordered by the Court below to stand for an answer, with liberty to Attorney General to except:—Held, by the House of Lords, that both parts of the plea were bad, for that the clearing warrants did not purport on the face of them to be a final settlement of accounts; and that an army agent was a public officer, and was accountable to the Crown for monies received by him for the pay and arrears of pay of officers; that the plea might have been overruled, but its being ordered to stand for answer, was only the more favourable to the agent: and orders of the Court below affirmed. *Deare* v. *Attorney General*, 2 D. & C. 377.

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## ARREST.

(A) Where allowed.
(B) Privilege from.
(C) Irregularities.
(D) What constitutes an Arrest.
(E) Re-arrest, where allowed.
(F) In Criminal Cases.

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### (A) Where allowed.

[Arrest for debt, for cause of action, under 20*l.*, prohibited in Ireland; and the practice, as to arrests there, regulated by 10 Geo. 4. c. 35, 7 Law J. Abridg. of Stat. 74.]

A defendant may be arrested in this country upon a debt which arose in a foreign country; although both parties are foreigners; and although, by the law of the foreign country, a person cannot be there arrested for debt. *De la Vega* v. *Vianna*, 8 Law J. K.B. 388, s. c. 1 B. & Ad. 284.

Where a defendant had been arrested on a Sunday under an assault warrant, in order that the plaintiff might cause him to be arrested under a writ on the following day, the Court ordered him to be discharged out of custody. *Wills* v. *Gurney*, 7 Law J. K.B. 99.

### (B) Privilege from.

[See Baron and Feme, Attorney and Solicitor, Parliament, and Peer.]

Where a clergyman is arrested in church, or whilst going to or returning from the performance of divine service, the Court will discharge him. *Goddard* v. *Harris*, 9 Law J. C.P. 109, s. c. 7 Bing. 320, s. c. 5 M. & P. 122.

### (C) Irregularities.

An arrest of a defendant who is described in the writ by the initials only of his christian names, is irregular in the King's Bench.—*Semble*, contrà in Common Pleas. *Bull* v. *Gardner*, 7 Law J. K.B. 166.

By the 32 Geo. 2. c. 28. s. 1, a sheriff's officer, on arresting a party, is required not to take him to prison, unless he shall refuse to name some convenient dwelling-house to which he chooses to be carried, being within the county, &c., and not being his own house:—Held, that the place must be specifically pointed out, so as to enable the officer to ascertain the propriety of taking his prisoner there. *Hamilton* v. *Jones, Pitt, and another*, 9 Law J. C.P. 27.

### (D) What constitutes an Arrest.

An officer employed to arrest a man, goes with his warrant to his house, and tells him that he has a writ against him. He does not actually take him into custody, or touch him, but takes his word that he will attend and give bail in a day or two. He then goes away, receiving a gratuity from the party against whom he had the writ, and goes at his desire to his attorney, and desires him to put in bail, which is accordingly done. This is no arrest. *George* v. *Radford*, 2 M. & M. 244, s. c. 3 C. & P. 464. [Tenterden]

### (E) Re-arrest, where allowed.

Where a plaintiff arrests a defendant a second time for the same cause of action, it is for him to shew that the second arrest is not vexatious.

Whether a plaintiff will be allowed, under any circumstances, to arrest a *third* time for the same cause of action—*quære*. *Wills* v. *Gurney*, 7 Law J. K.B. 99.

Where the defendant has obtained his discharge by reason of a defect in the affidavit of debt, the plaintiff may discontinue the action, pay the defendant's costs, bring a new action, and in that action arrest him. *Visger* v. *Delegal*, 9 Law J. K.B. 284, s. c. 2 B. & Ad. 571.

A arrested B, and died; the executors of A again arrested B for the same cause of action:—Held, that the second proceeding was not vexatious, and that the defendant was not entitled to be discharged out of custody on entering a common appearance. *Mellin* v. *Evans*, 1 C. & J. 82.

The Court discharged out of custody a defendant who had been arrested a second time for a sum included in the amount for which he had been before arrested, although the plaintiff on the former occasion had not been allowed to go into evidence of that part of his demand which formed the ground of the second arrest. *Hamilton* v. *Jones, Pitt, and another*, 9 Law J. C.P. 49, s. c. 7 Bing. 230, s. c. 4 M. & P. 868.

### (F) In Criminal Cases.

A warrant of a Justice of the Peace to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such party, is good. *Rex* v. *Stokes*, 5 C. & P. 148. [Park]

Where a person is brought before the Court in custody, on a criminal charge which warrants that custody, they will not inquire into the circumstances under which the person was apprehended. (Mr. Justice Littledale dubitante.)

There is no distinction in this respect between one class of offences and another. Accordingly, where a person had been arrested in a foreign country, and forcibly brought here in custody to answer to an indictment for perjury, the Court held, that, whether the arrest were legal or not, the offence charged justified a continuance of the custody.

*Semble*—That if the arrest in such a case be illegal, the remedy is to be obtained only by action. *Rex* v. *Scott*, 8 Law J. M.C. 6.

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## ARSON.

[See Hundred.]

An indictment on the statute 7 & 8 Geo. 4. c. 30. s. 2 & 17, for setting fire to a barn and a stack of straw, charged the offences to have been committed "feloniously, voluntarily, and maliciously," instead of "feloniously, unlawfully, and maliciously":—Held, bad.

The prisoners had set fire to a stack of stubble, (which, in Cambridgeshire, is called haulm); they were indicted on the first indictment, for setting fire to a "stack of straw":—Held, that this was not straw. And, on their being again indicted, for setting fire to a stack of "straw called haulm," the Judge intimated, that to convict upon such a count, would not be safe; and the verdict, in consequence, was taken upon other counts, charging the setting fire to a barn and a wheat-stack. *Rex* v. *Reader and Turner*, 4 C. & P. 245. [12 Judges]

An indictment on the statute 7 & 8 Geo. 4. c. 30. s. 17, charged a party with setting fire to a stack of barley, of the value of 100*l.*, of R. P. W.:—Held good, although the words of the statute creating the offence are "any stack of corn or grain":—Held also, that the words "of R. P. W." sufficiently stated the property:—Held also, that if the indictment state that the prisoner, on &c., at &c., feloniously, unlawfully, and maliciously did set fire to a certain stack of barley of the value of 100*l.* of R. P. W. then and there being," this is sufficient, without stating that the prisoner, on &c., at &c., feloniously, unlawfully, and maliciously did *then* and *there* set fire to the stack. *Rex* v. *Swatkins*, 4 C. & P. 548. [Patteson]

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## ASSAULT AND BATTERY.

(A) What constitutes an Assault.
(B) Pleading, Evidence, and Damages.
(C) Jurisdiction in cases of.

### (A) What constitutes an Assault.

A was advancing in a threatening attitude, with an intention to strike B, so that his blow would have almost immediately reached B, if he had not been stopped:—Held, that it was an assault in point of law, though, at the particular moment when A was stopped, he was not near enough for his blow to take effect. *Stephens* v. *Myers*, 4 C. & P. 349. [Tindal]

A captain of a ship is not justified in throwing a stone at a person in a boat, who has fastened it to the ship, and thereby impeded and endangered it, for the purpose of making him let go, unless it was not possible either at the time or before the immediate pinch of the danger, to adopt any other mode for the purpose. *Eyre* v. *Norsworthy*, 4 C. & P. 302. [Tindal]

If parish officers cut off the hair of a pauper in the poor house, by force and against the will of such pauper, this is an assault. *Ford* v. *Skinner*, 4 C. & P. 239. [Bayley]

A medical man is not warranted, merely on statements made by the relations of a person supposed to be insane, in sending men to take him into custody and confine him, unless he is satisfied, from those statements, that such a step is necessary, to prevent some immediate injury from being done by the individual, either to himself or to other persons; and, if access cannot be had for the purpose of examination, application should be made to the Lord Chancellor, that the party may be taken up under his authority. *Anderdon* v. *Burrows*, 4 C. & P. 210. [Tenterden]

### (B) Pleading, Evidence, and Damages.

To an action for assault and false imprisonment, the defendant pleaded *son assault demesne* in the presence of a peace officer, to whose custody defendant gave the plaintiff. The plaintiff replied, that he was employed to serve the defendant with pro-

cess, and, in order to do so, necessarily laid his hands on the defendant. The defendant rejoined, that in this the plaintiff was guilty of more violence than was necessary; and upon this, issue was joined. After verdict for the plaintiff, it was moved in arrest of judgment, that the replication was ill, inasmuch as it could not be necessary, in order to serve process, that the plaintiff should lay his hands upon the defendant. But held, by the Court, that there might possibly be circumstances which would render it necessary; and that the defendant, by rejoining extra violence, had precluded himself from denying that the necessity existed in the particular case. *Harrison* v. *Hodgson*, 8 Law J. K.B. 223, s. c. 10 B. & C. 445.

In an action for an assault, the defendants pleaded by way of justification, that they were *duly assembled as a select vestry* in the parish school-room, and that the plaintiff intruding therein, they turned him out:—Held, that the allegation was not made out without proof that all the members of the select vestry had duly received notice of the meeting. *Dobson* v. *Fussy and others*, 9 Law J. C.P. 72, s. c. 7 Bing. 305, s. c. 5 M. & P. 112.

If parish officers cut off the hair of a pauper as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages. *Forde* v. *Skinner*, 4 C. & P. 239. [Tenterden]

(C) Jurisdiction in cases of.

Where a person is charged before Magistrates with an assault with an intent to commit a felony, and they find, upon examination of the facts, that there was no intention to commit a felony—*Semble*, that they have jurisdiction to deal with the case in a summary manner, as one of assault only, under the 9 Geo. 4. c. 31. ss. 27, 28, 29. *The King* v. *Virgil*, 9 Law J. M.C. 43.

## ASSOCIATIONS.

[See 10 Geo. 4. c. 1, an Act for the suppression of dangerous associations or assemblies in Ireland, 7 Law J. Abridg. of Statutes, 1.]

## ASSIGNMENT.

[See Debtor and Creditor, and Bankrupt.]

A portion of an entailed estate is sold by the heir in possession, for the redemption of the land tax, and the surplus money invested in terms of the statute. The heir of entail next entitled sells for valuable consideration his reversionary and contingent right to the interest of this fund, and assigns it to the purchaser by a deed prepared in the English form, and executed in England, where the parties were domiciled, but without the solemnities required by the law of Scotland.

Held, by the House of Lords, affirming a decision of the Court of Session, that the interest of the money was moveable property, and was well assigned by the English deed, *comitate gentium*. *Scott* v. *Alnutt*, 2 D. & C. 404.

## ASSUMPSIT.

[See Contract.]

(A) When it lies.
(B) Consideration.
(C) Pleading and Evidence.

(A) When it lies.

A plaintiff cannot recover in assumpsit, in respect of a subject-matter which originated in covenant, unless there has been an express promise to pay a specific balance; although the defendant's own wrong prevents the plaintiff having any remedy upon the covenant. The remedy, in such a case, must be sought in equity. *Churchill* v. *Day*, 7 Law J. K.B. 78, s. c. 3 M. & R. 71.

(B) Consideration.

Plaintiff declared that having a judgment for 57*l.* against A B, he was about to levy for 107*l.* on goods of A B, in the defendant's custody; and that, in consideration the plaintiff would forbear executing his writ for seven days, the defendant promised to pay the 107*l.* at the end of that time:—Held, that the forbearance to levy the smaller sum, was a good consideration for the defendant's promise to pay the larger; although the plaintiff shewed by his declaration he had no right to levy more than the smaller.

*Sed quære*, as to amount of damages recoverable. *Smith* v. *Algar*, 9 Law J. K.B. 79, s. c. 1 B. & Ad. 603.

(C) Pleading and Evidence.

In assumpsit, the whole of the consideration for the defendant's promise must be stated. *Fairmanner* v. *Budd*, 9 Law J. C.P. 180, s. c. 7 Bing. 574, s. c. 5 M. & P. 534.

The plaintiff agreed with the defendant to give him a horse and 25*l.* for a mare of the defendant's. The money was paid, and a receipt given by the defendant, stating that "*both* (the horse and mare) were *warranted sound*." The mare proving unsound, the plaintiff sued the defendant on his warranty, and, in the declaration, he omitted to state the warranty on his part:—Held, that the plaintiff could not recover, as the *whole* of the consideration was not set forth. *Cross* v. *Bartlett*, 8 Law J. C.P. 22, s. c. 3 M. & P. 557.

Declaration that, in consideration of plaintiff's appointing P C his agent, defendant undertook that P C would faithfully and honestly discharge any duty assigned to or trust reposed in him. Plea—No undertaking in writing. Replication—An undertaking in writing. Demurrer to the replication, for that this was bringing matter of law to be tried by a jury; but the replication held good, as putting in issue a matter of fact to be tried by a jury. *Lysaght* v. *Walker*, 2 D. & C. A.C. 211.

A having goods at the wharf of B, which C had conveyed there by ship, gave B a paper, by which he authorized him to sell the goods, and out of the proceeds to pay C the balance due to him for freight, mentioning the sum; B sold the goods, and received the proceeds:—Held, in common assumpsit by C against B, for the sum mentioned in the paper, that the paper neither required a stamp, nor ought to

have been declared upon specially. *Humphreys* v. *Briant*, 4 C. & P. 157. [Tindal]

## ATTACHMENT OF PRIVILEGE.

On an attachment of privilege, without an *ac etiam* clause, the defendant may be compelled to give bail in 40*l*. *Collins* v. *Wright*, 10 B. & C. 814.

## ATTACHMENT.

[See ARBITRATION, SHERIFF, and WITNESS.]

The Court will not entertain a motion for the discharge of a defendant from custody under an attachment for contempt, in not producing deeds, papers, &c. before the Master, on an affidavit that the defendant has not, nor ever had, any such in his possession, or within his power. Such an application refused, with costs.

The course is, to leave an affidavit of the fact in the Master's office, when, on obtaining his certificate, the defendant will be discharged as a matter of course.

It was made part of the terms of a subsequent successful application for the defendant's discharge, that he should pay the costs of that application, and of the previous irregular motion. *Hurd* v. *Partington*, 12 Price, 689, Dig. Law J. 425.

An attachment, sealed after an order for time has been obtained, but before it has been served on, or notified to, the plaintiff, is regular. *Hewes* v. *Hewes*, 4 Russ. 508. See *Gardiner* v. *Rowe*, 4 Russ. 578, Dig. Law J. 41.

## ATTAINDER.

[See FORFEITURE.]

## ATTORNEY AND SOLICITOR.

(A) QUALIFICATIONS AND ADMISSION.
(B) CERTIFICATE.
(C) DUTIES AND LIABILITIES.
(D) PRIVILEGES AND DISABILITIES.
(E) CONNEXION BETWEEN ATTORNEY AND CLIENT.
(F) SUMMARY JURISDICTION OF THE COURT OVER.
(G) LIEN.
(H) COSTS.
  (*a*) *Bill.*
  (*b*) *Remedy for.*
(I) STRIKING OFF THE ROLL.

### (A) QUALIFICATIONS AND ADMISSION.

[Attornies of King's Bench and Common Pleas may be admitted and practise in the Exchequer, and allowed to practise as attornies at Westminster, 1 Will. 4. c. 70, 8 Law J. Abridg. of Statutes, 157.]

An articled clerk who had served under the articles two years and a half, when he was prevented by illness from giving regular attention to business during the rest of the term, but attended as his health permitted, was allowed by the Court to be admitted an attorney. *Ex parte Matthews*, 1 B. & Ad. 160.

Where a party had served for two months under articles, and had then left his master, and relinquished the profession, but afterwards, *and after the expiration of the original articles*, caused the same articles to be assigned to another attorney, with whom he served for two years and ten months, (being a Bachelor of Arts):—Held, that, as the articles had expired before the assignment, the service under the assignment was not a service under a contract within the statute. *Ex parte Unthank*, 7 Law J. C.P. 57, s. c. 2 M. & P. 415.

An attorney admitted, but not actually practising in the Court of Great Sessions in Wales, (abolished by the 11 Geo. 4. & 1 Will. 4. c. 70,) not allowed to be admitted an attorney of the Court of King's Bench, under section 16 of that act. *Ex parte Read*, 9 Law J. K.B. 180, s. c. 1 B. & Ad. 957.

Where a notice of application to be admitted an attorney of the Court of Common Pleas, had been left by mistake at the chambers of one of the Judges of the King's Bench, instead of at those of the Lord Chief Justice of that Court—on affidavit of the fact being made, the party was admitted. *Ex parte Lambert*, 7 Law J. C.P. 234, s. c. 3 M. & P. 269.

### (B) CERTIFICATE.

An attorney, who has omitted for one whole year to take out his certificate, and whose admission thereby becomes void, has no claim against a client for business done while he was without a certificate, although he afterwards cause himself to be re-admitted. The re-admission has not, for this purpose, a retrospective effect. *Thompkins* v. *M'Barnie*, 8 Law J. K.B. 332.

But where an attorney omitted for one whole year to take out his certificate, by reason of which his admission became void; and he afterwards obtained a rule of court, ordering him to be readmitted, and his name to be restored to the roll, which was accordingly done:—Held, that he might maintain an action for business done between the date of the rule for his re-admission and his actual re-admission. *Coren* v. *Sharp*, 9 Law J. K.B. 3, s. c. 1 B. & Ad. 386.

### (C) DUTIES AND LIABILITIES.

[See PRINCIPAL AND AGENT.]

Preparatory to commencing an action, it is the duty of an attorney to inform himself correctly of the nature of his client's demand, and of the proof which can be adduced in its support. Thus, in an action brought by an attorney against his client for the costs of a writ and subsequent proceedings (which had apparently been abandoned for want of evidence), and the jury had found a verdict for the amount of the costs; on the argument upon a rule *nisi* obtained for entering a nonsuit on grounds reserved at the trial—(but which grounds failed on such argument)—it appeared, from the Judge's notes at the trial, that the attorney received his instructions through the medium of a third party, a collector of debts, and without any personal interview with the defendant, who had, through such third party, forwarded a written retainer and authority to

the attorney:—It was held by the Court, that, in the exercise of their duty for the protection of suitors, they were called upon to interpose between the attorney and his client, and suggested a *stet processus*, or, at the attorney's option, a reference to the Master to report whether proper inquiries had been made by him before action brought, with a condition annexed for payment of all costs by him, if the report should be in the negative; or, failing the attorney's concurrence in either of those proposals, a new trial to be had between the parties. *Gill* v. *Laugher*, 9 Law J. Exc. 24, s. c. 1 C. & J. 170, s. c. 1 Tyrw. 121.

An attorney who has given notice that he will not go on with a cause in the Court of Chancery without being supplied with money, has a right to desist from it; and may recover for the work done up to that time. *Rowson* v. *Earle*, 2 M. & M. 538. [Tenterden]

*Semble*—If a bill be dismissed at the hearing with costs, and the plaintiff be then out of the jurisdiction, and the plaintiff's suit be so frivolous and vexatious, that the bill could not have been filed *bonâ fide* in expectation of a favourable decree; or if the solicitor of the plaintiff guarantee his client against the costs of the suit, the Court, upon the petition of the defendant, will compel the solicitor of the plaintiff to pay the taxed costs. *Cockle* v. *Whiting*, 1 Russ. & M. 43, s. c. 1 Tam. 55.

A solicitor in a cause, who improperly assumes the character of receiver, is responsible for rents lost by his neglect. *Wood* v. *Wood*, 4 Russ. 558.

In an action against an attorney for negligence in conducting the defence of the plaintiff in a former action, the declaration alleged, "that, by reason and in consequence of the negligence of the attorney, judgment by default had been signed, and such further proceedings had, that final judgment was afterwards signed, and execution issued against the plaintiff." The defendant in the present action, under the advice of counsel, produced at the trial of the last-mentioned cause the Prothonotary's book, for the purpose of proving the above allegation. The proof was held insufficient, and the plaintiff was nonsuited. In an action against the attorney for negligence in not having been prepared with proper evidence of the judgment:—Held, that this was not that degree of negligence that would render him responsible. *Godefroy* v. *Dalton*, 8 Law J. C.P. 79, s. c. 6 Bing. 460, s. c. 4 M. & P. 149.

The plaintiff having sued out a writ of *capias ad satisfaciendum* against the defendant, sent it to the sheriff to be executed. The under-sheriff sent the writ to the defendant's attorney, who neglected to levy or act upon it:—Held, that the attorney could not be called on by a summary application to pay the plaintiff the amount of the debt, as his remedy in the first instance was against the under-sheriff, for having delivered the writ to the defendant's attorney, instead of his own officer. *Harding* v. *Francis*, 5 M. & P. 627.

### (D) Privileges and Disabilities.

Privilege of the solicitor of the Customs to act, though not an attorney of the court. *West* v. *Taunton*, 8 Law J. C.P. 129, s. c. 6 Bing. 404, s. c. 4 M. & P. 79.

An attorney, merely in that character, has no right to insist upon taking part as an advocate upon proceedings before Justices under a penal statute, where it is the practice of the Court in which the proceeding is pending, not to allow persons to practise as attornies or advocates. *Collier* v. *Hicks*, 9 Law J. M.C. 138, s. c. 2 B. & Ad. 663.

To entitle an attorney to privilege from arrest, he must shew that he is actually practising at the time; a solitary instance of employment at an election will not suffice. *Anon.* 4 M. & P. 810.

An attorney, who is in contempt for not obeying an order of the Court of Chancery, cannot be arrested under process for that contempt whilst attending on any of the courts in Westminster Hall.

An order was made for the delivery of papers, after a demand had been made for them by a person duly qualified to give a receipt; delivery of the papers was refused; no other regular demand being made, an order was pronounced, either for the delivery of the papers or commitment; and, on motion, the order for commitment was dismissed, with costs. *In re Dicas*, 9 Law J. Chanc. 183.

Where no money has been advanced by the client, the Court will not allow costs to an individual conducting the cause, who has been struck off the roll of the Courts of King's Bench and Common Pleas, and by omitting to take out his certificate as such, is incapacitated from practising as a solicitor of the Court of Chancery. *Young* v. *Dowlman*, 3 Y. & J. 24.

Under an award in a cause, which award was afterwards made an order of court, the costs of certain parties were directed to be taxed, and paid to them out of the fund; a part of those costs was incurred in proceedings upon a case sent to law; when the bills were carried in for taxation, it was discovered that the person who had acted as their solicitor throughout the suit, and who had already been paid in full, was not a solicitor, but an attorney only; the Master thereupon disallowed all the items in the bill, except disbursements to the clerk in court, and his taxation was confirmed on appeal. *Prebble* v. *Boghurst*, 1 Russ. & M. 744.

### (E) Connexion between Attorney and Client.

[See Evidence, Confidential Communications, and *Pycroft* v. *Gregory*, 4 Russ. 526, Dig. L. J. 45.]

An agreement between an attorney and his client, that the former shall be paid at a rate exceeding the usual allowance, is not in law binding on the client.

But where such an agreement is made, the Master, on taxation, may take it into consideration, and may, if he think proper, allow the sum so specially agreed upon.

And, where a gentleman of fortune agreed to pay his attorney five guineas a day for journies, besides expenses; paid bills sent in to him at that rate; and the Master, upon taxing subsequent bills, allowed at that rate; and the client paid the amount of the Master's allocatur, and several months afterwards applied to the Court for a rule to review the Master's taxation, the Court refused to interfere. *Drax* v. *Scroope and another*, 9 Law J. K.B. 291, s. c. 2 B. & Ad. 581.

As between the client and solicitor, the Court will take care that the client shall not be a sufferer in respect of unnecessary proceedings, instituted by the solicitor. *Wood* v. *Wood*, 4 Russ. 558.

Notice to a solicitor is actual notice to the client. *Tunstall* v. *Trappes—Gosling's case*, 3 Sim. 301, *Lawson's case*, ib. 299.

Communications made to an attorney respecting a matter in dispute and controversy, are privileged, though no cause was then commenced. *Clark* v. *Clark*, 2 M. & M. 3. [Tenterden]

The attorney conducting a cause in court, may be called as a witness by the opposite side, and asked who employs him, in order to shew the real party, and so let in his declarations. *Levy* v. *Pope*, 1 M. & M. 410. [Parke]

The Court will not order a defendant to produce letters, which passed between him and his solicitor, in the relation of solicitor and client, in the progress of the cause, or with reference to it, previously to its being instituted, or which contain legal advice. *Garland* v. *Scott*, 3 Sim. 396.

An attorney who receives a deed from his client, and is compelled to produce it by Commissioners of Bankrupt, and afterwards receives it back from them under an undertaking to produce it again if required, may nevertheless refuse to produce it in an action brought by the assignees of the bankrupt, under whose commission he was compelled to produce it. *Nixon* v. *Mayoh*, 2 M. & M. 76. [Tindal]

A solicitor, who purchases from his client, is bound to prove that he paid that price for the property, which, in the exercise of his professional duty, he would have advised his client to accept from a third person.

After a delay of eighteen years, a bill filed by a client against his solicitor to avoid a purchase, was dismissed. *Champion* v. *Rigby*, 1 Russ. & M. 539, s. c. 1 Tam. 421.

An agreement for a reversionary lease having been obtained by an attorney from the son of his employer, who was remainder-man in a settlement, under which his father, who had granted the existing lease, was tenant for life; on a bill for specific performance, the Court refused, under the circumstances, to enforce the agreement. *Blakeney* v. *Bagot*, 3 Bligh, N.S. 237, s. c. 1 D. & C. A.C. 405.

In taking an account of the pecuniary transactions between a client and his attorney, the latter also filling other confidential situations, the production of a bond, executed by the client to the solicitor, is not alone sufficient evidence of a debt to that amount, but the obligee, or his representatives, are bound to prove the actual payment of the money secured by the bond.

Where, in taking an account of various dealings and transactions between a client and his attorney, extending over a long period of time, and the subject of protracted litigation, prolonged and increased by various appeals to the House of Lords, the Master ultimately made his general report of the balance due on the account; and on the hearing of the cause for further directions, it appeared to the Court that the Master had made the report without reference to an exception to a separate report, which had been allowed by the Court, and confirmed by the House of Lords, and without reference to certain other orders, which it was considered laid down a principle on which the account was to be taken; the Court, of its own accord, referred it back to the Master to review his report, having reference to such exceptions and orders. And the Master having afterwards made his report with reference to the exceptions and orders accordingly, but which was totally different from his former report, the Court confirmed it, overruling exceptions. *Lewes* v. *Morgan*, 3 Y. & J. 230.

By the direction of A, a bill was filed for the administration of a testator's assets, to which A and his infant brother and sister, by A as their next friend, were plaintiffs; D, their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents; after the sister had attained her full age, D died, having appointed her his executrix: A gave notice to the persons who had been the town agents of D, not to take any proceedings in his name, and the sister appointed them to act as solicitors for her:—Held, that A was not entitled to have the papers connected with the cause delivered over to him, though he offered to satisfy any lien which might be claimed against them. *Livesey* v. *Livesey*, 1 Russ. & M. 10.

(F) Summary Jurisdiction of the Court over.

[See *Sutcliffe* v. *Clegg*, 8 Law J. K.B. 280; *post*, Costs, Taxation of.]

Where an attorney, not of this court [Exch.], but who, through the medium of a clerk in court, conducts a defence to an action brought in this court, gives an undertaking for payment of the debt and costs—*Semble*, that he will be liable to the summary jurisdiction of this Court; and that the performance of such undertaking will be enforced against him, though void by the Statute of Frauds, and consequently no action maintainable upon it. *Evans* v. *Duncombe*, 9 Law J. Exc. 82, s. c. 1 C. & J. 372, s. c. 1 Tyrw. 283.

(G) Lien.

Where an attorney, having a lien on papers, delivers them to an arbitrator to examine for the purposes of the arbitration, he may maintain trover, in case the arbitrator refuse to re-deliver them, although, at the time of giving them up, he has not expressly reserved his lien. *Whalley* v. *Halley*, 8 Law J. K.B. 6.

If a solicitor takes a promissory note for his costs payable on demand, he loses his lien. *Roberts* v. *Jefferys*, 8 Law J. Chanc. 136.

A solicitor, who receives rents in a cause, with the authority of the Court, will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff. *Wickes* v. *Townsend*, 1 Russ. & M. 361.

Where a plaintiff and defendant compromised an action, by the latter giving to the former a bill, for a sum amounting to little if any more than the costs, the Court, on the motion of the attorney, ordered that it should be delivered to him, that he might satisfy his costs thereout. *Gould* v. *Davies*, 9 Law J. Exc. 111, s. c. 1 C. & J. 415, s. c. 1 Tyrw. 380.

A rule was obtained by the defendant's attorney to set aside the service of the writ for irregularity, with costs. The defendant afterwards became bankrupt:—Held, that the plaintiff might set off his debt against the costs of that rule; and that the de-

fendant's attorney had no lien upon those costs. *Marshall* v. *Geary*, 9 Law J. K.B. 9.

Held, that the attorney's lien is only on the balance, subject to the equitable rights of the parties inter se. *Lane* v. *Pearce*, 12 Price, 742.

## (H) Costs.

[See Costs, Taxation of.]

### (a) *Bill.*

An attorney cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or interference, and not with the design of imposing on his client. *Hill* v. *Featherstonhaugh*, 7 Bing. 569, s. c. 5 M. & P. 541.

The clause of 3 Jac. 1. c. 7. s. 1, requiring attorneys to deliver a bill to their clients, before charging them with any of the "fees or charges" in the act mentioned, is confined to business done in the king's courts of record at Westminster. *Reynal* v. *Smith*, 1 B. & Ad. 469, s. c. 2 M. & M. 85.

An attorney's bill, for business in a bankruptcy, need not be delivered one month before action brought, pursuant to the statute 2 Geo. 2. c. 23. s. 23. *Crowder* v. *Davies*, 3 Y. & J. 433: s. p. *semble*, *Hamilton* v. *Pitt*, 9 Law J. C.P. 49, s. c. 7 Bing. 232, s. c. 4 M. & P. 869.

*Semble*—That a bill of costs for soliciting a bankrupt's certificate, is such a bill as requires to be signed, under 3 Jac. 1. c. 7, and 2 Geo. 2. c. 23, or at least under the latter act.

The signature of the name of the firm of attornies B and J, without the christian names, to a bill of costs, is sufficient.

And the name of the firm may be so used for recovery of the partnership debts after the dissolution of the partnership. *Smith and Jay* v. *Brown*, 9 Law J. Exc. 151, s. c. 2 C. & J. 542, s. c. 1 Tyrw. 486, s. c. 5 C. & P. 94.

Attending upon, and concerting measures with the attorney of the opposing creditor, to resist the discharge of an insolvent, is not such business as will render it incumbent upon an attorney to deliver his bill one month before the commencement of an action, pursuant to the statute 2 Geo. 2. c. 23. *Crowder* v. *Davies*, 3 Y. & J. 433.

A bill for agency business done by one attorney for another, is not within 3 Jac. 1. c. 7. s. 1. *Sanders* v. *Hornby*, 2 M. & M. 33, s. c. 4 C. & P. 520. [Tenterden]

A, an attorney, did business for B, another attorney, in a cause in which B was a party: Held, that A could not recover the amount of his charges without proof of his having delivered his bill, under the statute 3 Jac. 1. c. 7:—Held, also, that under such circumstances A might recover a sum of money sent on a distinct account, but not for disbursements made in the cause. *Hemming* v. *Wilton*, 4 C. & P. 518, s. c. 1 M. & M. 529. [Tenterden]

An attorney may recover the amount of his bill in an action, although the copy delivered under the statutes 2 Geo. 2. c. 23, and 12 Geo. 2. c. 13, contain such abbreviations as Declon., Instrons., Conce., Afft., Attg., &c. *Frowd* v. *Stillard*, 4 C. & P. 51.

Where any one item in an attorney's bill is taxable, the whole bill must be delivered a month previously to the commencement of an action thereon, pursuant to the statute 2 Geo. 2. c. 23. s. 23; and charges for attending and advising in a suit are taxable. *Smith* v. *Taylor*, 9 Law J. C.P. 83, s. c. 7 Bing. 259, s. c. 5 M. & P. 66.

In a suit instituted by a solicitor for payment of costs due to him from a client, it appeared by the answer, that he had not delivered a signed bill conformably to the act of parliament: a bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill; *semble*, the defect in the title of the plaintiff, as it stood at the institution of the suit, was not cured.

But held, that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions. *Pritchard* v. *Draper*, 1 Russ. & M. 191, s. c. 1 Tam. 532.

If in an action for an attorney's bill it appear that the plaintiff in his bill charged for specific attendances on particular days; and besides that, charges a further sum for several attendances, the Judge at the trial will direct the jury to deduct this latter sum from the amount of the bill. *Rownson* v. *Earle*, 4 C. & P. 44. [Tenterden]

It is not sufficient evidence of delivery of a signed bill at the defendant's abode, that a signed bill is delivered at a particular place not shewn to be his abode, and that he afterwards gives this to his present attorney, who attends the taxation of costs.

The defendant's having signed an admission of the debt to enable the attorney to prove it under a commission of bankrupt then subsisting against him, is no admission of the delivery of a signed bill, and does not dispense with the necessity of such proof in an action subsequently brought against him for the same claim.

An attorney may prove his bill under a commission of bankrupt, without delivering a signed bill. *Eicke* v. *Nokes*, 1 M. & M. 303. [Tenterden]

### (b) *Remedy for.*

To entitle an attorney to proceed with a cause for the purpose of obtaining his costs, after a settlement between the parties, he must shew a clear case of collusion. *Nelson* v. *Wilson*, 8 Law J. C.P. 226, s. c. 6 Bing. 568, s. c. 4 M. & P. 385: s. p. *Anon.* 9 Law J. Exc. 6.

Where an action is brought, not for a debt, but for unliquidated damages, the defendant has a right to compromise with the plaintiff, notwithstanding an express notice from the attorney not to do so; and unless there be fraud or misrepresentation, the Court will not interfere on behalf of the attorney. *Tovery* v. *Payne*, 9 Law J. K.B. 91, s. c. 1 B. & Ad. 660.

Where, in answer to an application for payment of a debt, the debtor applies for and obtains time, he is bound to pay the reasonable costs of the creditor's attorney; and if he refuse to pay them, *semble*, that the attorney may sue out process and proceed, although the debt has been received by the creditor without knowledge of the circumstances.

At all events, where, in such a case, the attorney, in order to secure the payment of those reasonable expenses, but not to charge the defendant, issues a writ before payment, the Court will not interfere to aid the defendant against the expenses incurred afterwards, if he refuse to pay the previous reason-

able expenses. *Morrison and Others* v. *Summers*, 9 Law J. K.B. 13, s. c. 1 B. & Ad. 559.

Where a suit at law is depending for the recovery of a sum of money; and, before judgment, the plaintiff in the action authorizes the defendant in the action to pay over the money to a third person, to whom the plaintiff is indebted, the mere consent of the attorney for the plaintiff to such payment is not a sufficient consideration to support a promise to him to pay his costs.

Whether such consent would be a sufficient consideration, in case the attorney had previously given notice to the defendant in the action not to pay over the money until his costs were paid—*quære*. *Taylor* v. *Watson*, 7 Law J. K.B. 174, s. c. 4 M. & R. 259.

If an attorney waive his privilege and sue as a common person, he is liable to be deprived of his costs under the 39 & 40 Geo. 3. c. 104—(the London Court of Requests Act). *Burn* v. *Pasmore*, 9 Law J. K.B. 51.

(I) Striking off the Roll.

After an attorney has been admitted more than two years, it is too late to make an application to strike him off the rolls on the ground that he has not *bonâ fide* served under articles of clerkship. *Anonymous*, 9 Law J. K.B. 321; s. c. 2 B. & Ad. 766.

## ATTORNEY GENERAL.

The Attorney General cannot, unless he is a Serjeant, be heard in the Court of Common Pleas in term time. *Merchant qui tam* v. *Flight*, 9 Law J. C.P. 226.

## ATTORNMENT.

[See Landlord and Tenant, and *Cornish* v. *Searell*, Dig. Law J. 50, s. c. 1 M. & R. 703.]

## AUCTION AND AUCTIONEER.

(A) Relative to the Sale.
(B) Auction Duty.
(C) Liability of the Auctioneer.

[See Principal and Agent, and Vendor and Purchaser.]

(A) Relative to the Sale.

The employment of a puffer at a sale by auction of property seized under an extent, by an agent of the Crown, to whom a bidding is reserved by the conditions of sale, vitiates the sale.

The misconduct of the purchaser does not preclude him from objecting to the employment of a puffer at a sale by auction. *Rex* v. *Marsh*, 3 Y. & J. 331.

A sale by auction of a policy of assurance on the life of a third person, cannot be invalidated on the ground of fraud, because the particulars of sale did not mention that the vendor had only a redeemable interest in the life of the party insured, although that interest is afterwards redeemed, if the practice of the office is to pay such policies without inquiring into the continuance of the interest, and if there is no misrepresentation or improper concealment of facts by the vendor. Evidence of the course of the office as to payment in such cases is receivable. *Barber* v. *Morris*, 2 M. & M. 62. [Tenterden]

(B) Auction Duty.

A trader seised in fee of real estates first mortgages them, and then conveys them to trustees in trust to pay off incumbrances, and for other purposes. He then becomes bankrupt, and the estates, including all interests, are sold by auction, by order of the assignees, with the concurrence of the trustees, it not appearing whether the mortgagees were at all consulted in the matter: Held, by the House of Lords affirming judgments of the courts of Exchequer and Exchequer Chamber (9 Law J. Exchequ. 92, 2 Y. & J. 124, 3 Y. & J. 126), that the estates so sold were estates of the bankrupt, and, as such, exempt from payment of the auction duty under the acts of 19 Geo. 3. c. 56. s. 19, and 6 Geo. 4. c. 9. s. 16. *Attorney General* v. *Winstanley*, 2 D. & C. A. C. 302.

(C) Liability of the Auctioneer.

In general an auctioneer is not liable for interest on a deposit. Thus, a deposit upon the contract for sale of an estate was paid to the auctioneer. There being difficulties in the title, the sale was not completed until several years had elapsed. The vendor, in the interim, gave notice to the auctioneer to invest the money in government securities, and offered to indemnify him for so doing; but he did not obtain the consent of the purchaser to this arrangement.

The auctioneer was in the habit of keeping a considerable sum at his bankers', to answer the demands which might be made upon him for deposits. Of the remainder of these deposits he made a profit; but it did not appear whether he made a profit of this particular sum, all trace of which was lost in its mixture with the bulk:—Held, in an action by the vendor against the auctioneer, after the sale had been completed, that the latter was not chargeable with interest. *Harington* v. *Hoggart*, 9 Law J. K.B. 14, s. c. 1 B. & Ad. 577.

## AUDITA QUERELA.

Where an execution is levied on the goods of a defendant, who, since the accruing of the cause of action, and before the seizure, has obtained his certificate under a commission of bankrupt, the Court will set aside the execution upon motion; and will not leave the party to his remedy by *audita querelâ*. *Davis* v. *Shapley*, 8 Law J. K.B. 357, s. c. 1 B. & Ad. 54.

## BAIL.

1. *OF THE AFFIDAVIT TO HOLD TO BAIL.*
   (A) Form and Requisites of.
2. *BAIL TO THE SHERIFF.*
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## 1. *OF THE AFFIDAVIT TO HOLD TO BAIL.*

### (A) FORM AND REQUISITES OF.

An affidavit by one of two trustees negativing payment to himself, or, "as he believes," to his co-trustee: Held insufficient, as it should positively negative payment to either trustee. *Ford and another* v. ——, 9 Law J. C.P. 230.

An affidavit, stating that the defendant was indebted to the plaintiffs in a certain sum by virtue of a memorandum, by which he undertook to be answerable to the creditors of W. M. and J. M., *on their* (the creditors) *undertaking* not to issue a commission or sue out process against the said W. M. and J. M. on or before a given day—was held insufficient, it not being averred that the creditors *had undertaken* not to issue a commission or sue out process against W. M. and J. M. within the limited time. *Elworthy* v. *Maunder*, 7 Law J. C.P. 80, s. c. 5 Bing. 295, s. c. 2 M. & P. 482.

Where an affidavit of debt arising upon a contract in a foreign country, is made by a person who sues in a character analogous to that of assignee of a bankrupt in this country, the affidavit must shew, that by the laws of that country such person is allowed to sue in his own name. *Tenon* v. *Mars*, 7 Law J. K.B. 89, s. c. 8 B. & C. 638, s. c. 3 M. & R. 38.

An affidavit of debt that the defendant was indebted on a balance of accounts, held insufficient; although the affidavit went on to shew the different details on the plaintiff's side of the account, which led to the balance. *Visger* v. *Delegal*, 9 Law J. K.B. 284, s. c. 2 B. & Ad. 571.

Affidavit of debt, sworn by a person who did not understand the English language. The *jurat* stated, that the deponent was sworn at the Bill of Middlesex office before Mr. Boddy (the proper officer there), G. D. S. having been first sworn duly to interpret the contents of the affidavit, and the oath, to the deponent; that the affidavit had been read over and explained to the deponent in the French language by G. D. S., and that the deponent was sworn upon his interpretation.—Objection, that the *jurat* did not state that G. D. S. swore he himself understood the French language. Affidavit held sufficient.

Affidavit of debt shewing a cause of action to the plaintiffs as administrators. Bailable process thereon, not describing the plaintiffs as administrators:—Held, sufficient.

Affidavit of debt shewing a cause of action to the plaintiffs as administrators. Affidavit, *contrà*, that search had been made at the Prerogative Office in Doctors' Commons, and no letters of administration appeared: Held, that the affidavit of debt was sufficient; for *non constat* that the right of administration was claimed through the Prerogative Office. *Masuri* v. *Le Comte du Jauffroy*, 9 Law J. K.B. 189.

An affidavit to hold to bail, stating the defendant to be indebted to the plaintiff in a certain sum, "for goods sold and delivered to the defendant, and at his request"—not alleging that they were sold and delivered *by the plaintiff*—is insufficient. *Snell* v. *Anderton*, 7 Law J. C.P. 234, s. c. 3 M. & P. 269.

An affidavit to hold to bail "for money paid, laid out, and expended, and lent and advanced by the plaintiff to the defendant, and at his request," is bad, for not distinctly shewing that the money paid, laid out, and expended, was so paid, &c. to the use of the defendant, and at his request. *Pitt* v. *New*, 7 Law J. K.B. 120: s. P. *Fricke* v. *Poole*, 4 M. & R. 448, s. c. 9 B. & C. 543.

Affidavit that defendant is indebted to the plaintiff in a certain sum "upon the balance of a bill of exchange drawn by the plaintiff upon and accepted by the defendant, on a certain day now past": Held sufficient.

In the affidavit to hold to bail, the defendant was described as "T. Froggatt D." his real name being T. Frognall D. In the declaration he was described as "T. Frognall D., sued as T. Froggatt D.":—Held, that this cured the defect. *Walmesley* v. *Dibdin*, 8 Law J. C.P. 109, s. c. 4 M & P. 10.

In an action by the payee or indorsee against the drawer of a bill of exchange, the affidavit to hold to bail must allege the default of the acceptor. *Buckworth* v. *Levy*, 9 Law J.C.P. 69, s. c. 7 Bing. 251, s. c. 5 M. & P. 23.

Affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in a certain sum on a bill of exchange drawn by M. J. D. upon and accepted by the defendant, and indorsed by M. J. D. to the plaintiff—omitting to state that it was payable to the order of the drawer:—Held sufficient. *Brett* v. *Hughes*, 8 Law J. C.P. 39, s. c. 6 Bing. 239, s. c. 3 M. & P. 566.

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## 2. *BAIL TO THE SHERIFF.*

### (A) OF THE BAIL-BOND.

[See 4. G.]

Where—after the defendant had rendered, and the plaintiff had declared against him whilst in custody, and demanded a plea, the plaintiff took an assignment of the bond, on the ground of an irregularity in the putting in the bail:—The Court set aside the proceedings on the bail-bond. *Wilby* v. *Austin*, 9 Law J. C.P. 44.

A trial is not lost, unless judgment of the term is lost by the defendant's delay to put in and perfect bail in due time. Proceedings on a bail-bond were stayed after bail put in and justified, on the usual terms, without the bail-bond standing as a security, where the writ being returnable the last day of one term, the trial might have been at the first sittings in the next, had bail been put in in due time. *Bevan* v. *Knight*, 1 Tyrw. 420.

[illegible] the bail to [illegible] with [illegible] of [illegible]: [illegible] the debt [illegible] the plaintiff could not [illegible] without giving them [illegible] was [illegible]. Cliff v. [illegible] 422.

[illegible] a [illegible] in [illegible] on a bail-[illegible] [illegible] affidavit of the [illegible] in the original [illegible] [illegible] was [illegible] or [illegible] [illegible] for the [illegible] that these [illegible] and that the [illegible] Shaw v. [illegible], [illegible] Bing. 55, s. c. 2 M. & [illegible]

[illegible] was arrested [illegible] by the [illegible] bail-bond.

[illegible] having returned [illegible] up as a defence [illegible] 3 Law J. K.B. [illegible]

[illegible] in the bail-[illegible] in the [illegible] not ordered [illegible] 3 M. [illegible]

[illegible] with the sheriff [illegible] he was arrested, [illegible] the statute 7 & 8 [illegible] which he had [illegible] up to be can-[illegible] C.P. 71.

[illegible] the debt and [illegible] plaintiff can-[illegible] out of court until the [illegible] expired. *Rowe* v. [illegible] Bing. 634, s. c. [illegible]

[illegible] BAIL.

[illegible] to the statute, cannot be [illegible] the end of the term next [illegible] writ was returnable. *Bud-*[illegible] J. K.B. 182, s. c. 4 M. & R. [illegible]

[illegible] bail bond, in which the plaintiff's name [illegible] instead of Edgington. The [illegible] treated it as a nullity, and signed [illegible] demanding a plea. Judgment [illegible] v. ——, 7 Law J. K.B. [illegible]

A BAIL ABOVE.

PAYMENT OF MONEY INTO COURT, IN LIEU OF.

[illegible] having deposited the amount of [illegible] which he was arrested, with 20*l.* for [illegible] the sheriff, which sums were paid [illegible] under the statute 7 & 8 Geo. 4. c. 71, and the defendant obtained a verdict and judgment:—Held, that he was not entitled to have the sums paid in, repaid, without producing certificates from the Clerk of the Judgments and the Prothonotary, that judgment had been signed, and the money paid into court; and the rule for repayment is only a rule to shew cause. *Symes* v. *Rose*, 7 Law J. C.P. 70, s. c. 5 Bing. 269, s. c. 2 M. & P. 426.

Bail above not perfected—rule *nisi* obtained by the plaintiff to have the money paid over to him; before shewing cause, the defendant renders; on shewing cause, no affidavit of merits: Held, that the plaintiff was entitled to the money. *Newman* v. *Hodgson*, 2 B. & Ad. 422, s. c. 9 Law J. K.B. 237.

(B) WHO MAY NOT BE BAIL.

An Irish freeholder is not competent to justify as bail. *Anon.* 8 Law J. K.B. 187.

A beneficial leaseholder for twenty-one years, rejected as bail, and time not allowed to add and justify another.

In future, no persons but freeholders and housekeepers will be allowed to justify as bail in any of the courts. *Colvin's bail*, 8 Law J. K.B. 9: s. p. *Anon.* 8 Law J. C.P. 2.

If it appear from the affidavit to oppose the justification of bail, that the person offering himself for that purpose, has ceased to be actually a housekeeper, although he occupied a house when he signed the bail-piece, and is about to occupy another, he is not admissible. *Weale* v. *Wild*, 12 Price, 770.

Bail who stated that he had been in the habit of becoming bail at the request of the defendant's attornies, who he felt were bound in honour to make good any loss he might sustain, although they had not actually indemnified him, not allowed to justify. *Acker's bail*, 8 Law J. K.B. 11.

A bail by affidavit rejected, on affidavit that he had dishonoured a note overdue; no reason being stated on his behalf for so doing. *Cross* v. *Williams*, 1 Tyrw. 531.

(C) PUTTING IN.

Where a plaintiff rules the sheriff to bring in the body in this court, as well as in the Court of King's Bench and Common Pleas, the time for the bail to the sheriff to put in and perfect bail above *is now* concurrent and co-extensive with such body rule. *Ladd* v. *Wilson*, 9 Law J. Exc. 5, s. c. 1 C. & J. 281, s. c. 1 Tyrw. 18.

The bail to the sheriff cannot put in bail to the action before the return of the process, without the consent of the defendant. *Birt* v. *Roberts*, 2 M. & M. 177. [Tenterden]

Defendant, arrested by the name of Hatheway, puts in bail by his right name Hathway, without identifying himself as the person sued: Held, that the plaintiff may treat the bail as a nullity, and take an assignment of the bail bond. *Knox* v. *Hatheway*, 9 Law J. C.P. 225.

(D) NOTICE OF.

Requisites of notice of bail, where bail to sheriff justify as bail above. *Anon.* 1 Tyrw. 378.

Where bail had taken a house three months before he came up to justify, into which he had put furniture, but had slept there only two nights, continuing, with his wife and family, to reside at another place:

Held, that it was a misdescription to describe him as residing at the house he had so taken. *Barton's bail by habeas corpus*, 8 Law J. K.B. 9.

Time allowed to serve a fresh notice of justification, and to justify bail, upon an affidavit that the former notice was served at six o'clock in the evening, owing to the inadvertence of the plaintiff's attorney, and his supposition, that the service would be good if made during any part of the day. *Nixon's bail*, 8 Law J. K.B. 187.

(E) Justifying and Opposing.

[Bail may justify before a Judge at chambers, in term or out, 1 Will. 4. c. 70. s. 12, 8 Law J. Abridg. of Statutes, 152.]

By ruling the sheriff to bring in the body before the time for justifying bail has expired, the plaintiff does not enlarge the time for justifying bail until the expiration of the body rule, if at the period when, independently of the body rule, the time for justification expires, he take an assignment of the bail bond, for by so doing he waives the body rule—(Bolland, B., dissentiente.)

If the defendant do not justify his bail in due time, and *comperuit ad diem* is pleaded to a declaration on the bail bond, the Court will order the appearance of the defendant to be recorded as of the day on which the bail justified. *Ladd* v. *Arnaboldi*, 1 C. & J. 97.

Bail who live within ten miles of the city of London or Westminster, must justify in person, and not by affidavit. *Anon.* 1 C. & J. 516.

Where one of the bail has been intimidated by the plaintiff's attorney stating to him, that, if he was not prepared to pay the debt and costs, an execution might be put into his house at a moment's warning, time will be allowed to add and justify another. *Anon.* 8 Law J. K.B. 186.

Upon an affidavit swearing to the fact of intimidation of bail, and a belief that he does not appear on that account, it is not usual to permit affidavits in answer to be filed, and to grant time only on condition that the statements made by the defendant be not satisfactorily answered. *Phillipps's bail*, 8 Law J. K.B. 188.

Further time allowed to the plaintiff to inquire concerning bail, where the bail had told the plaintiff's attorney on the preceding day, that his name had been used without his consent, and that he knew nothing of the matter. *Lloyd's bail*, 8 Law J. K.B. 187.

An affidavit stating as a ground for the non-attendance of bail to justify, that he came to the defendant's attorney's office, and said he could not attend on the day named in the notice of justification, is defective; it ought to state either the actual reason, or that which he alleged, for his inability to attend. *Anon.* 8 Law J. K.B. 187.

An affidavit of merits is not necessary to obtain time to add and justify another bail, where one is rejected in consequence of having taken the benefit of the Insolvent Debtors Act. It is enough that the defendant and his attorney swear that they were not aware of that fact. *Naylor's bail*, 8 Law J. K.B. 188.

The affidavit by bail in the country of competency to justify, should state them to be worth double the sum sworn to, over and above all their debts generally.

If it have the words "just debts," it will be considered sufficient.

But time will be given in such a case to frame another affidavit. *Senior* v. *Speight, in re bail*, 12 Price, 393.

Where persons are bail in several actions, and justify by affidavit, they must swear in each action, that they are worth the sum required after payment of their debts, and beyond what will satisfy their other engagements. *Henshaw* v. *Woolrich*, 9 Law J. Exc. 24, s. c. 1 C. & J. 150.

In a case of bail by affidavits, their sufficiency was denied by counter-affidavits, which the Court gave the defendant a week's time to answer: Held, that the defendant was not at liberty to abandon the original and put in fresh bail. *Cockburn* v. *Ling*, 8 Law J. C.P. 292, s. c. 6 Bing. 732.

After one successful opposition of bail, 5*l.* must be deposited with the Master, to cover the costs, before the bail can justify. *Smith* v. *Cooper's assignees*, 1 C. & J. 460, s. c. 1 Tyrw. 378.

The costs incurred in consequence of statements made in affidavits in opposition to the justification of bail by affidavit, which are positively contradicted, will not be allowed. *Anon.* 8 Law J. K.B. 11.

(F) Liability of.

Bail are liable on their recognizance for the residue left unsatisfied after the plaintiff has proceeded against the goods of the principal by *fieri facias*. *Stevenson* v. *Roche*, 7 Law J. K.B. 304, s. c. 9 B. & C. 707, s. c. 4 M. & R. 561.

Where a defendant who has perfected bail is elected a member of parliament—*Semble*, that, his liability to arrest being only suspended while he is in parliament, his bail would be liable, if he lost his privilege before they were called upon to surrender him.

But if they apply to the Court upon motion while he is privileged, they are entitled to have an *exoneretur* entered on the bail-piece. *Phillips* v. *Wellesley*, 9 Law J. K.B. 6.

(G) Proceedings against.

A *ca. sa.* lodged with the sheriff for a return of *non est inventus* with a view to proceedings against the bail, must remain in the sheriff's office four clear days before the return, exclusive of any *dies non* (such as Ascension Day,) as well as of any intervening Sunday. *Stewart* v. *Beattie*, 7 Law J. K.B. 337.

Holy Thursday intervening is not reckoned as one of the four days for the writ to lie in the office, to charge the bail. *Scott* v. *Larkins*, 9 Law J. C.P. 34, s. c. 7 Bing. 108, s. c 4 M. & P. 748.

Where a cognovit had been given by the principal with the consent of the bail, and, default being made, judgment signed, a *scire facias* issued and returned *non est inventus*, and, without any notice to the bail, two writs of *scire facias* against them returned *nihil*, and judgment signed thereon:—The Court ordered the proceedings to be set aside, holding that the bail should have had notice of their principal's default. *Charleton* v. *Morris*, 8 Law J. C.P. 139, s. c. 6 Bing. 427, s. c. 4 M. & P. 114.

If a plaintiff sue out a joint *scire facias* against bail, upon their joint and several recognizance, he cannot proceed to declare separately against one.

*Sainsbury* v. *Pringle*, 8 Law J. K.B. 317, s. c. 10 B. & C. 751.

### 5. *RENDER AND ENTERING AN EXONERETUR.*

[See 4. (F.), and 1 Will. 4. c. 70. ss. 21, 22, 8 Law J. Abridg. of Statutes, 160.]

Where, after the justification, the allowance of bail is set aside, on the ground of perjury, the original bail are competent to render the principal. *Rex* v. *the Sheriff of Middlesex, in Logan* v. *Louel*, 8 Law J. C.P. 6, s. c. 6 Bing. 257, s. c. 3 M. & P. 594.

The defendant having become bankrupt since the commencement of the action, the Court enlarged the time for his bail to render him, until a fortnight after his final examination. *Stead* v. *Yates*, 7 Law J. C.P. 233, s. c. 3 M. & P. 272.

Where the defendant became bankrupt, and obtained his certificate before judgment, but had neglected to plead *puis darrein continuance*, the Court refused to enter an *exoneretur* on the bail-piece, it appearing that the bail were in a condition to render their principal. *Humphreys* v. *Knight*, 8 Law J. C.P. 220, s. c. 6 Bing. 569, s. c. 4 M. & P. 370.

The defendant's bail having been rejected, and an attachment having gone against the sheriff for not bringing in the body, he put in other bail, and rendered the defendant, the original bail-piece still remaining on the file: Held, regular. *Hamilton* v. *Jones*, 8 Law J. C.P. 275, s. c. 6 Bing. 628, s. c. 4 M. & P. 454.

### 6. *DISCHARGE OF BAIL BY OTHER MEANS THAN RENDER.*

Where the principal has been convicted of felony, his bail in a civil suit are discharged. Therefore, where a principal had been convicted, subject to the opinion of the twelve Judges on a point reserved, the Court allowed the time for the bail to render him to be enlarged until the point was disposed of. *Joyce* v. *Pratt—Forrester* v. *Pratt*, 8 Law J. C.P. 112, s. c. 6 Bing. 377, s. c. 4 M. & P. 55.

After bail-bond given, an arrangement was made between the plaintiff and defendants, without the privity of the bail, for a composition between defendants and their creditors, and for discontinuance or stay of proceedings on payment of costs. The affidavits being contradictory, whether a discontinuance or only a temporary stay of proceedings was meant, but the costs having been demanded and paid;—the Court held it imported a discontinuance, and that the bail were discharged. *Murray* v. *Jackson*, 9 Law J. Exc. 144.

## BAILMENT.

A bailee can claim no higher title to the possession of goods than could his bailor: nor can he claim, as against the right owner of the goods, to hold them until he receives instructions from his bailor, or an indemnity from the right owner. *Wilson* v. *Anderton*, 9 Law J. K.B. 48, s. c. 1 B. & Ad. 450.

## BANKER.

[See PARTNERS, and *Pemberton* v. *Oaks*, 4 Russ. 154, Dig. Law J. 73.]

There is an implied contract between a banker and each of his customers, that the former will pay the cheques of the latter upon presentment, provided the money be paid into his office in such time as that his clerks may reasonably be required to know the fact.

Accordingly, where money was paid in a few minutes before eleven o'clock; and, ten minutes before three, a cheque was presented, and was refused payment for want of sufficient assets, (the clerk who refused not being aware of the payment that morning):—Held, that the customer was entitled to maintain an action against the banker, and to have a verdict for nominal damages; although he did not prove that the refusal had caused him any actual damage. *Marzetti* v. *Williams*, 9 Law J. K.B. 42, s. c. 1 B. & Ad. 415.

Where a mortgage is given to secure the balance due from a customer to his banker, the land is charged with such compound interest, as, according to their course of dealing, enters into the composition of that balance.

In accounts between a customer and a banker, quarterly or half-yearly receipts may be made. *Rufford* v. *Bishop—Bishop* v. *Rufford*, 7 Law J. Chanc. 108, s. c. 5 Russ. 346.

A person who, *bonâ fide*, takes in payment, or otherwise deals with a banker's cheque, after the day on which it is dated, is not thereby bound (by analogy to bills of exchange,) to rest upon the title of the person from whom he took it.

The question in such a case is, whether the person has acted *bonâ fide*, and with due caution, in taking the cheque; and the date is a circumstance for the consideration of the jury upon that question. *Rothschild* v. *Corney*, 7 Law J. K.B. 270, s. c. 9 B. & C. 388.

A bill (with a forged acceptance) was presented in the ordinary course by the *bonâ fide* holders to the bankers of the supposed acceptor. They, under the belief that the acceptance was genuine, paid the bill. The forgery was discovered on the following day, and notice given to the parties who had received the money, and to the other parties. In an action by the bankers to recover back, from the persons who received the money, the amount thus paid: Held, that the discovery and notice being on the following day, were certainly too late. *Semble*, that if the discovery and notice had been on the same day, it would have been in time. *Cocks* v. *Masterman*, 8 Law J. K.B. 77, s. c. 10 B. & C. 902, s. c. 4 M. & R. 676.

A banker in London, corresponding with a banker abroad, has the same right, with respect to English bills of his correspondent becoming due while in his hands, as an English banker has with respect to his customer in England; and, therefore, if such a bill be dishonoured, he may send it, when returned, to his correspondent abroad; but *semble*, that if the foreign correspondent be afterwards in London, in possession of the bill, he ought not to send it again to the London banker, but should himself give notice of dishonour to the party who indorsed it to him. *Daly & anr.* v. *Slatter*, 4 C. & P. 200. [Tenterden.]

C draws a cheque on his banker, payable to A and B, assignees of C, or bearer, and writes the name of their banker across it. B, who has another private account with the banker, pays the cheque in to that account:—Held, that the bankers are justified in applying it to that account; the drawer's writing the name of the bankers of the payee of the cheque across it, not being, according to the custom of trade, information to the bankers that the money is that of the payee. *Semble*, the custom of writing the name of a banker across a cheque, is only for the purpose of securing that the payment shall be made to some banker, not to the banker originally named, for the holder may substitute another for him; and this even when the name of the particular banker is originally written, not by himself, but by the drawer. *Stewart* v. *Lee*, 2 M. & M. 158. [Tenterden]

## BANK NOTE.

A Bank of England note, which had been feloniously stolen in England in February 1826, was remitted, in May 1827, by a foreign merchant to his correspondent in this country, to whom he was indebted in a sum exceeding the amount of the note. The latter demanded payment; the Bank refused to pay, on the ground that the note had been stolen. At the time when the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note:—Held, first, that in trover for the note, the correspondent must be considered the agent of the foreign merchant, and that he could, therefore, recover upon his title only; secondly, that in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to shew that the foreign merchant had given full value for it. *De la Chaumette* v. *the Bank of England*, 7 Law J. K.B. 179, s. c. 9 B. & C. 208.

A Bank of England note is, by the statute 3 & 4 Ann. c. 9. s. 1, transferrable abroad, so as to give the person who receives it abroad *bonâ fide* and for value, a right of action in England. *De la Chaumette* v. *the Bank of England*, 9 Law J. K.B. 239, s. c. 2 B. & Ad. 385.

## BANKRUPT.

[See 1 & 2 Will. 4. c. 56.]

(A) Persons liable to become Bankrupt.
(B) Acts of Bankruptcy.
- (a) *Departure from dwelling-house, and otherwise absenting himself.*
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- (a) *Striking the docket.*
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- (a) *Surrender.*
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- (d) *Allowance.*
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- (f) *Of actions by and against a bankrupt.*

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- (a) *Signature.*
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- (a) *In general.*
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(R) Suits in Equity.
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- (b) *Notice to dispute.*
- (c) *Of the debt, trading, and act of bankruptcy.*
- (d) *Admissibility of proceedings under the commission.*
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(W) Practice of the Court on Petitions in Bankruptcy.
(X) Costs.
(Y) Of the Solicitor.
(Z) Of the Jurisdiction of the Great Seal.

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(A) Persons liable to become Bankrupt.

Shareholders of a steam-packet are not traders. *Ex parte Wiswould and another, in re Wiswould*, 1 Mont. 263.

Buying standing crops of grass, cutting them down, and making them into hay, is a trading within the bankrupt laws. *Bloxham* v. *Graham*, Pea. A.C. 3.

The making of bricks for sale, from clay taken from a man's own land, does not render him liable to the bankrupt laws, as a trader, although he bought the land for the purpose of making bricks.

Nor will it be a trading, if such person buy chalk for the purpose of burning with the clay, to improve the bricks, and afterwards sell a portion of the chalk, when converted into lime. *Heane* v. *Rogers*, 9 B. & C. 577, s. c. 4 M. & P. 486.

Where a party, having manufactured goods for sale, discontinues the sale almost entirely, and uses all his produce himself, but occasionally allows parties applying to have small quantities on payment, it is a question for the jury, whether these sales are with the intention of continuing the trade, or for the accommodation of the applicants; and in the latter case he ceases to be a trader. *Paul* v. *Dowling*, 2 M. & M. 263, s. c. 3 C. & P. 500. [Tenterden]

A scrivener is a person intrusted with the money of his employer, and who finds a borrower. *Ex parte Bath, in re Burman*, 1 Mont. 82.

The second section of the 6 Geo. 4. c. 16. enacts, that "all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, shall be deemed traders liable to become bankrupts": Held, that a ship-broker is a broker within the meaning of the statute, and that the words, "receiving other men's monies or estates into their trust or custody," apply to bankers and brokers as well as to scriveners. *Pott* v. *Turner*, 8 Law J. C.P. 282, s. c. 6 Bing. 702, s. c. 4 M. & P. 551.

A commission of bankrupt under 6 Geo. 4. c. 16, cannot be supported by evidence of a trading, or of an act of bankruptcy, before that act came into operation. *Surtees* v. *Ellison*, 7 Law J. K.B. 335, s. c. 9 B. & C. 750, s. c. 4 M. & R. 586. *Hewson* v. *Heard*, 9 B. & C. 754, s. c. 4 M. & R. 585.

On this ground a commission superseded. *In re Ham*, 1 M. & M'Ar. 287.

(B) Acts of Bankruptcy.

(a) *Departure from dwelling-house, and otherwise absenting himself.*

A departure from the dwelling-house in the ordinary course of business, but with a resolution not to return, unless the trader received a certain favourable communication from a creditor.

The favourable communication arrived: and the trader returned to his house in the ordinary course of his business:—Held, that this was not a departure with intent to delay creditors, so as to constitute an act of bankruptcy. *Fisher* v. *Boucher*, 8 Law J. K.B. 307, s. c. 10 B. & C. 705.

To constitute an act of bankruptcy by the fact of the trader absenting himself with intent generally to delay his creditors, it must be shewn that he absented himself from the place in which his creditors in the ordinary course of business might reasonably expect to find him. *Bernasconi* v. *Farebrother*, 8 Law J. K.B. 303, s. c. 10 B. & C. 559.

(b) *Beginning to keep house.*

Although an actual denial to a creditor is not necessary in order to establish this act of bankruptcy, a mere order to deny, is not sufficient to establish it: there must be an actual denial, *or* some act done, in connexion with the order to deny, which will shew the trader had begun to keep house. Thus—an order to deny to a sheriff's officer who was expected with a warrant to arrest, but nothing whatever done upon that order by any one; held insufficient. *Fisher* v. *Boucher*, 8 Law J. K.B. 307, s. c. 10 B. & C. 705.

If a trader in his own house bears himself denial to a creditor, and does not come forward, this, if done with intent to delay creditors, is an act of bankruptcy, though he has given no directions to be denied. *Smith, assignee of Bullock, a bankrupt*, v. *Moon and others*, 1 M. & M. 458. [Tindal]

The fact of a banker causing the doors and windows of the bank to be closed, is evidence whence the jury may infer a "beginning to keep house" within the 6 Geo. 4. c. 16. s. 3, although that be not his place of residence. *Cumming* v. *Baily*, 8 Law J. C.P. 103, s. c. 6 Bing. 363, s. c. 4 M. & P. 36.

(c) *Fraudulent Conveyance or Transfer.*

A bill of exchange is within the meaning of the 6 Geo. 4. c. 16. s. 3, which makes the fraudulent gift, delivery, or transfer by a trader, of any of his "*goods or chattels*," an act of bankruptcy. *Cumming* v. *Baily*, 8 Law J. C.P. 103, s. c. 6 Bing. 363, s. c. 4 M. & P. 36.

An ante-nuptial settlement may be an act of bankruptcy. *Ex parte Mayer*, 1 Mont. 292.

If a trader buy goods, and sell them on the same day at more than thirty per cent. less than he bought them for, this may be an act of bankruptcy under sec. 3 of the Bankrupt Act; but to make it an act of bankruptcy, the jury must be satisfied that the person to whom the trader sold the goods, must have been led to suppose that the trader was a person going to become bankrupt, who wished to get money into his hands to cheat his creditors. *Cook* v. *Caldecott*, 4 C. & P. 315. [Tenterden]

A fraudulent delivery of goods by an agent of the trader, will not be an act of bankruptcy in the trader, unless it be made by his authority, or receive his subsequent assent.

The delivery of goods to a person for mere safe custody, and to prevent their being seized by a creditor, is not an act of bankruptcy, although the person to whom they are delivered happen to be also a creditor.

"A delivery," to be within the meaning of the 6 Geo. 4. c. 16. s. 3, must be such a delivery as will give some right of property in the goods to the person to whom they are delivered. *Cotton* v. *James*, 7 Law J. K.B. 125.

(d) *Lying in Prison.*

The act of bankruptcy by lying in prison twenty-one days, under the 6 Geo. 4. c. 16. s. 5, has no relation to the first day of the imprisonment. *Moser* v. *Newman*, 8 Law J. C.P. 204, s. c. 6 Bing. 556, s. c. 4 M. & P. 333.

The act of bankruptcy, by lying in prison twenty-one days under the statute 6 Geo. 4. c. 16. s. 5, does not relate to the time of the arrest.

The twenty-one days during which a trader must lie in prison, to constitute an act of bankruptcy under the 6 Geo. 4. c. 16. s. 5, are reckoned inclusively. *Higgins* v. *M'Adam*, 7 Law J. K.B. 97, s. c. 3 Y. & J. 1.

(C) Of the Petitioning Creditor.

(a) *Who may be.*

A creditor who executes a deed of composition, by which, in consideration of an assignment of his property for the benefit of his creditors, the creditors release their debts, is thereby debarred from suing out a commission of bankruptcy, though he could shew a subsequent act of bankruptcy independent of the deed; and although other creditors, who have refused to execute the deed, may sue out a commission, and rely upon the deed as an act of bankruptcy. *Small* v. *Marwood*, 7 Law J. K.B. 197, s. c. 9 B. & C. 300, s. c. 4 M. & R. 81.

Under 6 Geo. 4. c. 16. s. 127, the assignee under a second commission, where the bankrupt has not paid 15*s.* in the pound, takes, from the date of the assignment, a present vested interest, by operation of law, in all future estate acquired by the bankrupt; consequently, a bankrupt, under such circumstances, although he has obtained his certificate under the second commission, cannot, as a petitioning creditor, issue a commission of bankrupt. *Ex parte Robinson*, 7 Law J. Chanc. 75, s. c. 1 M. & M'Ar. B.C. 44.

(b) *Liabilities.*

An attorney brought an action against the petitioning creditor, under a commission of bankrupt, for business done previous to the assignment:—Held, that notwithstanding the 14th section of the Bankrupt Act, (6 Geo. 4. c. 16,) he might maintain the action, without proof that his charges had been allowed by the commissioners, according to the provisions of that section, as the whole was matter of investigation before the taxing officer. *Fisher* v. *Filmer*, 5 C. & P. 92. [Vaughan]

The assignees, after the trial of an action, commenced by them, where it appeared that there was not a sufficient trading to support the commission, and after other acts under the commission, presented a petition to have the commission superseded, and that all costs and expenses incurred might be paid by the petitioning creditor:—Held, that the application came too late, and that the petitioning creditor was not responsible. *Ex parte Paul and another, in re Sir Charles Rich, bart.*, 1 M. & M'Ar. 185.

(c) *Debt.*

Equitable debt not good petitioning creditor's debt. *Ex parte Hawthorne*, 1 Mont. 132.

*Quære*—whether the interest of a dishonoured bill can form part of the petitioning creditor's debt. *Poolly* v. *Millard*, 9 Law J. Exc. 114, s. c. 1 C. & J. 411, s. c. 1 Tyrw. 331.

Taxed costs upon a judgment as in case of a nonsuit, under a rule of court, do not constitute a good petitioning creditor's debt. Such costs are recoverable only by attachment, in the nature of an execution. *Ex parte Stevenson*, 1 M. & M'Ar. 262.

A debt for money lent on mortgage, conditioned for payment after six months notice, such notice not to expire before a certain day, is a good petitioning creditor's debt to support a commission sued out before that day. *Hill and another, assignees of Murdoch*, v. *Harris*, 1 M. & M'Ar. 448.

If a bill of sale of goods be given in satisfaction of a bond debt, and it is afterwards discovered that the obligor had previously committed an act of bankruptcy, the obligee may abandon the bill of sale, and sue out a commission against the obligor, and a co-obligor cannot plead this bill as an accord and satisfaction. *Hull* v. *Smallwood*, Pea. A.C. 13. [Kenyon]

A commission of bankruptcy may be supported on a petitioning creditor's debt, on a balance of accounts which continue running up to the commission and always against the bankrupt to the extent of 100*l.*, though payments have been made sufficient, if applied in the order of time, to discharge the particular balance actually due at the time of the act of bankruptcy. *Shaw* v. *Harvey*, 1 M. & M'Ar. 596.

The 6 Geo. 4. c. 16. s. 18, is applicable to a case, not only of deficiency in the amount, but to any original defect in the nature of the petitioning creditor's debt. *Ex parte Hall*, 1 M. & M'Ar. 39: s. p. *Ex parte Robinson*, 7 Law J. Chanc. 75.

Though, previous to a petition for a substitution, there must be an application to the commissioners to expunge such debt, yet an actual order for such expungement is not absolutely necessary. *Ex parte Robinson*, 7 Law J. Chanc. 75, s. c. 1 M. & M'Ar. 44.

Persons interested in supporting a commission, who sought to obtain the benefit of the 6 Geo. 4. c. 16. s. 186, presented a petition to the Lord Chancellor, in the terms of that section, and obtained, by consent, an order directing the commissioners to make the necessary inquiry as to the debt proposed to be substituted for that of the petitioning creditor; and, in case they found it sufficient, directed the commission to proceed. But it did not appear in terms that the petitioning creditor's debt had been found insufficient to support a commission:—Held, that without such finding the order was inoperative.

Whether such an order, if properly framed in its terms, would be sufficient so as to have a retrospective effect in maintaining an action previously brought by the assignees, *quære*. *Muskett* v. *Drummond*, 8 Law J. K.B. 130, s. c. 10 B. & C. 183.

(D) Of the Commission.

(a) *Striking the docket.*

[Sec. 12 of 1 & 2 Will. 4. c. 56, empowers the Lord Chancellor to issue a fiat in lieu of a commission.]

Docket on an affidavit sworn in Ireland, refused. *Anon.* 1 Mont. 137.

An affidavit not sworn before the solicitor preferred where there are two dockets. *Anon.* 1 Mont. 136.

[illegible]

[illegible]

[illegible]

[illegible] act of bankruptcy committed in the preceding Month, may be sustained, notwithstanding the 5 Geo. 4. c. 98, and 6 Geo. 4. c. 16. *Phillips* v. [illegible], 8 Law J. K.B. 51, s. c. 10 B. & C. 39, s. c. 5 M. & R. 15.

Doctrine of estoppel of the bankrupt himself from impeaching the commission. *Hesse* v. *Rogers*, 7 Law J. K.B. 265, s. c. 9 B. & C. 577, s. c. 4 M. & R. 486.

Where a party had presented a petition in bankruptcy, seeking relief and benefit under a commission, in respect of a particular transaction, he was restrained by an order of the Court from putting in issue the validity of the commission, in an action commenced against him by the assignees in respect of the same transaction. *Ex parte Anderton and others, in re Burrow*, 1 M. & M'Ar. 177.

*(c) Second, third, and renewed commissions.*

A second commission of bankrupt against an uncertificated bankrupt is void, and trespass lies against the assignees and messenger in such second commission for a seizure under it. *Nelson* v. *Cherrill*, 7 Bing. [illegible], s. c. 5 M. & P. 680, s. c. 9 Law J. C.P. 227.

Under a second commission, where the bankrupt has not paid fifteen shillings in the pound, although he obtains his certificate:—Held, that, the assignees take, from the date of the assignment, a present vested interest in all his after-acquired property, and consequently a commission of bankrupt, in vacation, at the petitioning creditor, cannot be supported. *Ex parte Robinson*, 7 Law J. Chanc. 75, s. c. 1 M. & M'Ar. 44.

Where a second commission issued against a person who had previous to the first commission compounded, the Lord Chancellor refused to supersede the second, because 15s. in the pound had not been paid under the first. *Ex parte Welsh*, 1 Mont. 276.

Where a person has been twice a bankrupt, and his estate under the second commission has not paid 15s. in the pound; a third commission taken out against him is absolutely void, and affords no protection, even to his person, for debts contracted AFTER the second commission. *Fowler* v. *Coster*, 8 Law J. K.B. 194, s. c. 5 B. & C. 427.

A third commission against a bankrupt who has not paid 15s. in the pound is void, and may be superseded on the petition of a person summoned to attend the commissioners as a witness. *Ex parte Lane, in re Fowler*, 1 Mont. 12.

A renewed commission may issue for the bankrupt to surrender previous to superseding. *Ex parte Colpoys, in re Coles*, 1 Mont. 207.

If a commission is renewed to a distant place from where the majority of the creditors reside, and the original commission was worked, the Court will, for the convenience of the creditors, renew it back to the original place. *Ex parte Waring, in re Turton*, 1 Mont. 216.

## (E) Of the Provisional Assignee.

[See 1 & 2 Will. 4. c. 56, ss. 22 to 25, and ss. 40 and 55, as to the appointment, duties, &c. of official assignees.]

The provisional assignees under the 6 Geo. 4. c. 16. cannot properly re-assign the bankrupt's estate to the commissioners, in order that they may again assign to the chosen assignees: but the provisional

assignees must assign direct to the chosen assignees. *Mault* v. *Massey*, 9 Law J. K.B. 87, s. c. 1 B. & Ad. 636.

The provisional assignee is entitled to his costs from the mortgagee, in a suit for foreclosure by the mortgagee, who will be allowed to add them to the principal and interest due to him on the mortgage. *Peake* v. *Gibbon*, 1 Tam. 505.

(F) Of the Commissioners.

(*a*) *Authority.*

[1 & 2 Will. 4. c. 56. s. 1. establishes six commissioners in lieu of the seventy before appointed, and their powers and duties, &c. are defined in sections 7, 30, 38, 51.]

The Court will not assume that commissioners of bankrupt are likely to exceed the authority vested in them. Where a mortgagee of the bankrupt's property, who was summoned to attend before the commissioners, petitioned that they might be restrained from requiring the production of the mortgage deed, the petition was dismissed with costs, as being premature. *Ex parte Beeston*, 1 M. & M'Ar. 244.

Under a commission against a bankrupt mortgagor, the commissioners have authority, by the 6 Geo. 4. c. 16. ss. 33 & 34, to enforce from a mortgagee of the bankrupt's property the production of his mortgage deed.

The rule that a purchaser for valuable consideration, without notice, cannot be compelled to discover his title deeds, does not extend to the mortgage or purchase deed itself. *Ex parte Caldecott*, 1 Mont. 55.

A renewed commission transfers all the commissioners' authority to the new commissioners. *Ex parte Hill*, 1 Mont. 5.

(*b*) *Liability.*

Where commissioners of bankrupt exceed the power given to them by act of parliament, they are not protected, as members of a court, from action at the suit of the party grieved.

Where commissioners of bankrupt, in examining a person before them as one capable of giving information concerning the trade, dealings, or estate of the bankrupt, desired him to read to them certain entries in a book which he had produced, and he refused, and they, therefore, committed him—setting out the whole of his examination—treating the desire to read as a question, and the refusal as a refusal to answer a lawful question:—Held, that the warrant was not justified by the facts; and that the commissioners were liable to an action for false imprisonment. *Isaac* v. *Impey*, 8 Law J. K.B. 169, s. c. 10 B. & C. 442. See post (*d*).

Where commissioners take more than the statutable fees, the commission will be renewed to other commissioners. *Ex parte Kirby*, 1 M. & M'Ar. 405.

(*c*) *Examination before.*

A bankrupt, under examination before the commissioners, is not bound to answer questions which would criminate himself.

If a question is put in so general a form, as that an answer to part of it would criminate the bankrupt, while he might answer other parts of it without criminating himself, he may decline to answer any part of it. *Ex parte Kirby*, 7 Law J. Chanc. 148, s. c. 1 M. & M'Ar. 212.

Order made that a witness, who had been twice committed by commissioners of bankrupt, should be again examined by them, on tendering to the solicitor under the commission the costs of the meeting, and of being brought up. *Ex parte Baxter*, 1 M. & M'Ar. 16.

Parties claiming debts and summoned to attend, in the country, for examination under a commission of bankrupt, are not "witnesses" within the meaning of 6 Geo. 4. c. 16. s. 20, so as to entitle them to an auxiliary commission for their examination. *Ex parte Kirby*, 1 M. & M'Ar. 440.

(*d*) *Commitment by.*

If a witness refuse to produce his books, or a copy to refresh his memory, so that he may be enabled to answer such questions as, without reference to his books, he cannot answer, he may be committed for not answering satisfactorily. *In re Dale*, 1 M. & M'Ar. 271, n.

A witness summoned by commissioners under 6 Geo. 4. c. 16. s. 33, being required, and having refused to read certain entries in a ledger, to which he had previously referred during his examination, but which he had not been called upon to produce, was committed by them "for refusing to answer a question:" Held, that the warrant was bad in substance and in form, the request to read not being a question. *Ex parte Isaac*, 1 M. & M'Ar. 23, s. c. 3 Y. & J. 38: s. p. *Isaac* v. *Impey*, 8 Law J. K.B. 169, s. c. 10 B. & C. 442, s. c. 4 C. & P. 113.

A warrant of commitment of a bankrupt, under the 5 Geo. 2. c. 30. s. 16, or 6 Geo. 4. c. 16. s. 36, for refusing to sign his examination, need not set out the examination itself.

The concluding words of such a warrant must be so limited as to have direct reference to the offence imputed in the preceding part; and, therefore, where a commitment, after reciting that the bankrupt had surrendered, and that the commissioners examined him touching his trade, &c., and caused such examination to be reduced into writing, and read over to him, to which examination the bankrupt did refuse to sign his name (not having a reasonable objection to the wording thereof, or otherwise), required the gaoler to detain the bankrupt in custody until such time as he should submit himself and full answer make to the satisfaction of the commissioners to all such questions as should be put to him, and sign and subscribe such examination as aforesaid, was holden to be void. *Ex parte Leake*, 7 Law J. K.B. 128, s. c. 9 B. & C. 234, s. c. 3 Y. & J. 46.

A warrant of commitment, after reciting an examination of the bankrupt, and that he refused to sign or subscribe such examination, proceeded as follows: "These are therefore to require and authorise you, &c., to receive the said, &c., into your custody, &c., until such time as he shall submit himself to us, &c., and shall sign and subscribe the examination aforesaid, according," &c. Held, that the submission was properly confined to the refusal to sign, and that the warrant was not informal. *In re Davidson*, 1 M. & M'Ar. 443.

A solicitor, summoned as a witness by commissioners under 6 Geo. 4. c. 16. ss. 33 & 34, to produce a mortgage deed of the bankrupt's property,

refused to produce such deed, and was committed by them for not answering satisfactorily: Held, that the warrant was defective in form, and that the commitment ought to have been for not producing. All documents required to be produced should be described in the body of the summons, previously to such summons being signed by the commissioners. *Ex parte Frowd*, 1 M. & M'Ar. 269.

If, upon the commitment of a witness by commissioners of bankrupt under the 6 Geo. 4. c. 16. s. 34, it appears by the warrant that the question had reference to one or other of the matters over which the commissioners had jurisdiction, such warrant will be sufficient although it do not state, in the terms of the act, that the witness was examined *with reference to such subject-matter*. *Ex parte Harrison*, 9 Law J. K.B. 53, s. c. 1 B. & Ad. 410.

### (G) Proof of Debts.

#### (a) *In general.*

[Debts may be proved by affidavit, sec. 34, 1 & 2 Will. 4; and issues to try disputed debts may be directed, s. 30, ib.]

Affidavit to prove a foreign debt must be attested by a notary. *Ex parte Moens*, 1 Mont. 15.

A petition by several creditors, to prove, and remove assignees, is not multifarious, if they have a common object. *In re Stoddart*, 1 Mont. 129: s. p. *In re Morgan*, ib. 128.

A, being agent of and also a partner in the Leith Banking Company, opened an office at Carlisle, and circulated there promissory notes drawn by the company's cashier in Scotland, and made payable to the bearer, on demand, at the company's office at Leith:—Held, that this was in violation of the statutes, passed for the protection of the Bank of England, and that a debt founded on notes so issued, cannot be proved under a commission of bankrupt. *Ex parte Randleson*, 1 M. & M'Ar. 86.

An agreement to share the profits of a member of a firm, constitutes a debt proveable against the member for a share. *Ex parte Dodgson*, 1 M. & M'Ar. 445.

Where a person who has contracted to purchase an estate becomes bankrupt before any conveyance has been made, the vendor may, on application by petition to the Great Seal, obtain an order for the sale of the estate, and for permitting him to prove against the bankrupt's estate for any deficiency between the purchase-money agreed upon, and the sum produced by the sale. *Hope* v. *Booth*, 9 Law J. K.B. 21, s. c. 1 B. & Ad. 498.

Where a contract was entered into for the sale of a quantity of goods, to be delivered and paid for at a future day; and, between the time of the contract and the day stipulated for the delivery of the goods, the buyer became a bankrupt, and afterwards obtained his certificate:—Held, that the seller could not prove under the commission; and that the certificate was no bar to an action at the suit of the seller to recover damages for the breach of contract in not accepting and paying for the goods. *Bowman* v. *Nash*, 7 Law J. K.B. 150, s. c. 9 B. & C. 145.

A debt in consideration of marriage, not proveable without a memorandum in writing. *Ex parte Barber*, 1 Mont. 135.

If a creditor, through accident, omits to prove at the final dividend, he may be permitted to prove, without disturbing any payment made by the assignees, and placing the creditors not paid in the same situation as if he had originally proved. *Ex parte Day*, 1 Mont. 212.

#### (b) *Judgments.*

Judgment of nonsuit becomes a debt due from the plaintiff only upon the day when judgment is signed without relating back to the first day of the term; and a commission of bankrupt having been issued against the plaintiff before the day when the judgment was signed:—Held, that he was not entitled to his discharge, upon his obtaining his certificate, from a *ca. sa.* issued by defendant, the debt not being proveable under the commission. *Brough* v. *Adcock*, 9 Law J. C.P. 230, s. c. 7 Bing. 760, s. c. 5 M. & P. 678.

No judgment signed or execution issued on a cognovit signed after declaration filed, shall be deemed within the provision of 6 Geo. 4. c. 16. *Ex parte De Tastet*, 1 Mont. 151.

A plaintiff in execution, upon a judgment by confession, ceases to be a creditor, having security for his debt within the statute 6 Geo. 4. c. 16. s. 108, when the goods seized under that execution are sold, even though an act of bankruptcy be committed before the return of the writ. *Higgins* v. *M'Adam*, 3 Y. & J. 1.

#### (c) *Mortgages.*

A creditor who proves his whole debt, and exhibits a mortgage for a part, and receives a dividend, forfeits the mortgage. *Ex parte Eggington*, 1 Mont. 72.

#### (d) *Contingent demands.*

There must be an actual debt to constitute a contingent debt. *Ex parte the Lancaster Canal Company*, 1 Mont. 44.

Contingent debts, when contingency remote, not proveable. *Ex parte Davis and another*, 1 Mont. 121.

Where the contingency depends upon the separation of husband and wife, and of a widow's not marrying, it is not within section 56. *Ex parte Davis*, 1 Mont. 297.

A sum of 2,000*l.* was lent by A to B, secured to be repaid on a day certain; and was further secured by the bond of a third party, conditioned that, if B did not pay such sum and interest on the appointed day, such third party would pay the same within one week. The third party became bankrupt before the day of payment by B arrived, and B afterwards made default:—Held, that the debt was proveable under the commission against the third party. *Ex parte Lewis*, 8 Law J. Chanc. 56, s. c. 1 M. & M'Ar. 426.

The 56th section of the Bankrupt Act is retrospective as well as prospective.

A debt, which was contingent at the issuing of a commission of bankrupt, is proveable, though the commission issued before the 1st of September 1825, when the 6 Geo. 4. c. 16. came into operation, and though the contingency had happened, and been determined, previously to that time. Accordingly, in February 1772, A covenanted by his marriage settlement for the payment of 2,000*l.*, in case his intended wife, or any issue of the marriage, should survive him. In 1803 a commission of bankrupt

issued against A, under which he obtained his certificate. In February 1825 A died, leaving issue of the marriage. In May 1828, there being funds remaining for distribution amongst the creditors of A, a renewed commission was issued, and a final dividend advertised:—*Held*, that the sum of 2,000*l.* was proveable as a debt under the commission. *Ex parte Grundy*, 8 Law J. Chanc. 54, s. c. 1 M. & M'Ar. 293, s. c. 1 Russ. & M. 293,—overruling 7 Law J. Chanc. 56.

A, by his marriage settlement, dated in 1815, covenanted that his heirs, executors, &c. should, within twelve months after his death, pay 4,000*l.* to trustees, who were to stand possessed thereof in trust for the wife during her life, and afterwards for the children of the marriage; and, if there were no children who became entitled, in trust for the survivor of the husband and wife: there were no children of the marriage: A became bankrupt:—Held, that the contingency was incapable of valuation, and that the trustees could not prove any debt under the covenant as a contingent debt within the meaning of the 56th section of the 6 Geo. 4. c. 16. *Ex parte Eagle*, 8 Law J. Chanc. 96, s. c. 1 M. & M'Ar. 422.

S, by his marriage settlement, covenanted with the petitioners, as trustees, to pay an annual sum of 80*l.* for himself for life, then to his wife for life, and after her death, to any issue of the marriage; and that his heirs, executors, or administrators should, within twelve calendar months after his death, pay to the petitioners the sum of 4,000*l.*, on various trusts: S became bankrupt:—Held, that the petitioners were entitled to prove the value of 4,000*l.*, as a contingent debt against the separate estate of S. *Ex parte Tindall*, 1 M. & M'Ar. 415.

(*e*) *Marriage Settlements.*

[See ante, G, *d.*]

A debt on letters in the nature of a marriage settlement is proveable. *Ex parte Sitger*, 1 Mont. 100.

(*f*) *Annuities.*

An annuity creditor who has a policy of insurance cannot prove without a sale of the policy. *Ex parte Tierney*, 1 Mont. 78.

By a settlement on the marriage of his son, A covenanted to surrender copyhold premises to trustees, upon trust, thereout to pay an annuity of 100*l.* a year to his son for life, or until he should become bankrupt; after the bankruptcy, to the son's wife, if living with her husband, for her life, and after the death of the husband, to her for her life, or widowhood; and upon trust, if there should be one or more child or children of the marriage, (after the death of the husband, and after the death or second marriage of the wife,) by sale or mortgage to raise 2,000*l.* for the benefit of such child or children in such proportions as the husband should appoint—in default, equally; but no part of the estate was to be sold or mortgaged, until some part of the 2,000*l.* should be actually payable, unless by direction of A, in writing. A by deed covenanted to pay the annuities, and also so much of the 2,000*l.* as should not be raised by sale or mortgage. There was one child of the marriage. A, together with his partners, became bankrupt. The annuity to the husband was in arrear. The trustees of the settlement petitioned that a value might be set upon the annuities, and upon the sum of 2,000*l.*, and for a sale of the estate, and if the produce should be inadequate for payment of such values, to be allowed to prove for the deficiency against the separate estate of A: Held, that the petitioners were only entitled to prove for the arrears of the annuity, by virtue of the covenant of A. *Ex parte Davis*, 9 Law J. Chanc. 4, s. c. 1 Mont. 121.

A surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who had obtained his certificate, for the arrears of the annuity subsequent to the commission. *Watkins* v. *Flannagan*, 3 Russ. 421.

(*g*) *Bonds.*

[See *Ex parte Lewis*, ante, G, *d.*]

A creditor who has a bond may apply it to part of the debt, and prove for the residue. *Ex parte Amphlets, in re Brooks*, 1 Mont. 77.

(*h*) *Bills of Exchange.*

If A permits B to draw bills in his name, he is liable as drawer to ignorant indorsees, although he had no interest, and did not know of the particular bills drawn; but he is not liable to the payee having knowledge of the transaction, or his creditors; therefore, money paid by him on those bills is not proveable under a commission against A. *Curtis* v. *Barrs*, Peo. A.C. 119. [Kenyon]

The drawer of a bill of exchange became bankrupt, and absconded before it was due, but his house remained open, in the possession of the messenger, under a commission of bankruptcy issued against him, for some time after the bill became due; and before that time, the holder of the bill had notice that A and B were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonoured. The holder did not give notice of the dishonour to the drawer, or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer: Held, that the bill was not proveable under the commission issued against the drawer. *Ex parte Rohde*, 1 M. & M'Ar. 480.

Two parcels of goods were sold at different times, and paid for by two distinct bills; the vendee afterwards becoming bankrupt, the vendor proved under the commission for the amount of the first parcel, being then the holder of the bill given in payment for the same: the bill for the other parcel was outstanding in the hands of a party to whom it had been negotiated prior to the bankruptcy, but who had given notice of its dishonour: Held, that the vendor was not precluded, under 6 Geo. 4. c. 16. s. 59, from bringing an action against the bankrupt for the amount of the last parcel of goods; and that he would not have been precluded, even if he had been the holder of the second bill at the time of his so proving for the amount of the first parcel of goods. *Ex parte Edwards*, 1 M. & M'Ar. 116.

(*i*) *Costs.*

Where, upon an action on a contract, there was a verdict for the plaintiff at Nisi Prius, subject to a reference before the bankruptcy, (by which it was

directed that the costs of the action should abide the event of the award), and the award was made in favour of the plaintiff after the bankruptcy, the costs were held to be proveable under the commission. *Ex parte Helm and another, in re Fisher*, 1 M. & M'Ar. 70.

(*k*) *Interest.*

The 132nd section of the 6 Geo. 4. c. 16, as to the allowance of interest to simple contract creditors, is not retrospective. *Ex parte Shepard*, 1 M. & M'A. 67.

(*l*) *Servants.*

Construction of the 48th section of the 6 Geo. 4. c. 16.

Who are "servants" within the meaning of that section. *In the matter of M'Neill*, 7 Law J. Chanc. 78.

Weekly labourers, and workmen employed as excavators and bricklayers, are not servants. *Ex parte Crowfoot, in re Streather*, 1 Mont. 270.

A person engaged as a traveller, at an annual salary,—Held, to be a servant or clerk within the meaning of the 6 Geo. 4. c. 16. s. 48. *Ex parte Neal*, 1 M. & M'Ar. 194.

The workmen of a coachmaker, who worked by the piece, and received a specific sum for every job, under separate and distinct contracts, and where there was no hiring for a specific time, are not servants within 6 Geo. 4. c. 16. s. 48. *Ex parte Grellier*, 1 Mont. 264, overruling 1 Mont. & M'Ar. 95.

(H) Of Set-off and Mutual Credit.

A debtor to a bankrupt's estate is entitled to his set-off in respect of a debt due from the bankrupt to him before the commission, provided that the debtor, when he gave credit to the bankrupt, had no notice of a prior act of bankruptcy. The mere knowledge that he was insolvent, or had stopped payment, does not deprive the debtor of his right of set-off. *Hawkins* v. *Whitten*, 8 Law J. K.B. 135, s. c. 10 B. & C. 217.

A debtor to a bankrupt's estate is entitled to set-off in respect of promissory notes of the bankrupt eagerly sought by the debtor for the purpose of set-off, after knowledge of insolvency and stopping of payment by his creditor, provided he had no notice of an act of bankruptcy.

A debtor to a bankrupt's estate, the bankruptcy consisting of several partners, is not entitled to set off any debt which became due to himself after knowledge of an act of bankruptcy committed by any one of the bankrupts. *Dickson* v. *Cass*, 8 Law J. K.B. 396, s. c. 1 B. & Ad. 343.

A trader made an agreement with another person, part of which was, that the trader should give his acceptance, and receive from the other an acceptance of a third person, duly indorsed. The trader gave his acceptance; but it was dishonoured when due. The other person delivered over the bill agreed for; but refused to indorse it. In an action by the assignees of the trader on his becoming bankrupt, for breach of the agreement in not indorsing the bill: Held, that this was not a case of mutual credit within the 6 Geo. 4. c. 16. s. 50, so as to let in a set-off by the defendant.

Held also, that the consideration for the defendant's engagement was the giving of the acceptance by the trader, and not the paying it when due. *Ross* v. *Sims*, 9 Law J. K.B. 85, s. c. 1 B. & Ad. 521.

Assumpsit by the assignees of R, a bankrupt, on a promissory note drawn by defendant, payable to G, or order, and by him indorsed to the bankrupt before the bankruptcy. It appeared that in October 1825, G applied to the bankrupt to discount the note, and took, as part of the proceeds a bill of exchange, accepted by the bankrupt, payable to G's order. G indorsed this bill for value to the defendant, and he got it discounted by H, who was the holder when it became due. A commission of bankrupt issued against R on the 23rd of December, and the bill became due on the 24th, when it was presented and dishonoured. On the 26th H received the amount from the defendant, and returned the bill to him: Held, that he had a right to set off the bill against the demand of the assignees on the promissory note. *Collins* v. *Jones*, 10 B. & C. 777.

In an action by the assignees of a bankrupt, for a debt due to the bankrupt; the defendant may plead a tender as to part, and give evidence of a set-off as to the remainder, without having pleaded the set-off. *Wells* v. *Crofts*, 4 C. & P. 332. [Tenterden]

(I) Of the Assignees.

(*a*) *Choice.*

Adverse interest by an elector is not a reason for rejection of the elected.

Adverse interest in the elected when it amounts to unfitness. *Ex parte Candy*, 1 M. & M'Ar. 198.

The rejection by commissioners of an assignee as unfit, under 6 Geo. 4. c. 16. s. 61, is not final; an appeal lies to the Lord Chancellor. *Ex parte Candy*, 1 M. & M'Ar. 197.

If assignees are elected by the vote of the petitioning creditor before he has proved, the choice may be vacated, although the petition is presented six months after the election. *Ex parte Danby*, 1 Mont. 67.

Where, at the election of assignees, the major part in value of the creditors had been, accidentally, and without default on their parts, excluded from voting, a new choice of assignees was directed to be made. *Ex parte Dechapeaurouge*, 1 M. & M'Ar. 174.

(*b*) *Rights.*

An assignee, under particular circumstances, permitted to bid at the sale of the bankrupt's estate, his solicitor not having the management of the sale. *Ex parte Morland, in re Pyne*, 1 M. & M'Ar. 76.

The assignee of a bankrupt may be justified in declining to continue works in a mine, which do not appear likely to prove immediately beneficial to the estate; and even in relinquishing the bankrupt's interest therein as a *damnosa hæreditas*; but, however pure their motives, neither assignees nor commissioners can be permitted to possess themselves, by purchase or otherwise, of any of the bankrupt's interest in such property.

Against all transfers of the bankrupt's estate, either to the assignees or commissioners, the rule of the Court is uniform and inflexible. An assignee ought not to act as solicitor under the commission. *Ex parte Badcock*, 1 M. & M'Ar. 231.

Where a warrant of attorney is given to a person who afterwards becomes bankrupt, his assignees may enter up judgment in the name of the bankrupt, and in general cannot do so in their own names. *Guiness* v. *Carroll*, 9 Law J. K.B. 11, s. c. 1 B. & Ad. 459.

Assignees are not entitled to travelling expenses. *Ex parte Elsee*, 1 Mont. 1.

Assignees cannot delegate their general authority; the House of Lords will rectify an erroneous opinion of the Scotch courts, with respect to English law, founded upon the opinion of counsel. *Douglas* v. *Browne*, 1 Mont. 93.

(*e*) *Liabilities.*

Assignees of a bankrupt not responsible for a loss sustained in the disposal of the bankrupt's effects, where, under the circumstances, it could be inferred that there had been no blameable negligence in their conduct. *Ex parte Turner*, 1 M. & M'Ar. 52.

In an action brought against J T by the defendants, a verdict was taken against him for 10,000*l.*, subject to an award; J T then became bankrupt, and afterwards the award was made, by which the amount of the damages was reduced; it did not appear that the assignees went in before the arbitrator: Held, that they were not bound by the award. *Dod* v. *Herring*, 3 Sim. 143.

After assignees have acted for some time under a commission, which ultimately proves to be invalid, the assignees are liable for the costs which have been incurred, and not the petitioning creditor. *Ex parte Paul*, 7 Law J. Chanc. 139.

An application to the Court for an order to enrol the proceedings under 6 Geo. 4. c. 16. s. 96, must be on petition. Assignees who refuse, at the request of parties interested, to enrol proceedings, which before the 6 Geo. 4. c. 16. they were bound to produce on a *subpœna duces tecum*, refuse at the peril of costs. *Ex parte Johnstone*, 1 M. & M'Ar. 82.

If the creditors of a bankrupt meet for the purpose of considering whether unfinished work of the bankrupt shall be finished and sold, and they refuse to finish it, until one assignee agrees to find funds, on which they all agree, the other assignee is not liable for materials provided to finish the work. *Bothomley* v. *Usborne*, Pea. A.C. 99. [Kenyon]

If four persons are chosen assignees, and at the choice it is verbally agreed that one shall act, and notice is given to the banker to pay the drafts of the one, and a dividend is declared, and notice is given to the creditors, "that they may receive the dividend upon application to the assignees," and the acting assignee pay the dividends by cheques which are dishonoured, he having overdrawn the account, and absconded: the other three assignees are liable. *Ex parte Booth*, 1 Mont. 248.

The 44th section of the statute 6 Geo. 4. c. 16, by which, every action brought against any person, for anything done in pursuance of the act, must be commenced within three calendar months next after the fact committed, does not apply to the case of an assignee. *Carruthers* v. *Payne*, 7 Law J. C.P. 84, s. c. 5 Bing. 270, s. c. 2 M. & P. 429.

The 44th section of the 6 Geo. 4. c. 16. does not protect assignees in the seizure of goods supposed to be those of the bankrupt, and consequently an action against them, in respect of such seizure, is well brought, though it be commenced after the expiration of three months from the fact committed. *Edge* v. *Parker*, 7 Law J. K.B. 101, s. c. 8 B. & C. 697.

(*d*) *Removal of.*

[See Section 36, 1 & 2 Will. 4. c. 56.]

A purchase by an assignee of a small portion of the bankrupt's estate, although it may render an inquiry necessary, does not justify the removal of assignees. *Ex parte Thomson*, 9 Law J. Chanc. 17.

(K) Of the Assignment.

(*a*) *Of the Conveyance.*

It is not necessary to enrol a provisional assignment, when the title appears in the general assignment. *Ex parte John Martin*, 1 Mont. 84.

(*b*) *Of the Bankrupt's property, real and personal.*

Under 6 Geo. 4. c. 16. s. 65, the equitable mortgagee of a bankrupt tenant in tail is entitled to have his lien made good as against the fee simple of premises, of which the bankrupt was seised as tenant in tail. *Ex parte Wise*, 1 M. & M'Ar. 65.

The Registry Act, 7 Ann. c. 20, does not apply to a mere equitable mortgage, created by the deposit of the title deeds.

Such an equitable mortgage will prevail against a subsequent assignment, duly registered to the assignees of the bankrupt mortgagor.

An equitable mortgagee is entitled to receive the rents, and hold them against the mortgagor or his assignees, after he becomes bankrupt. *Sumpter* v. *Cooper*, 9 Law J. K.B. 226, s. c. 2 B. & Ad. 223.

Where a bankrupt had merely an equitable interest in certain shares of the stock of a public company:—Held, that the assignees could not maintain trover for the certificates of the shares; which certificates described the person who was legally entitled, and not the bankrupt, as the shareholder. *Dawson* v. *Rishworth*, 9 Law J. K.B. 96, s. c. 1 B. & Ad. 574.

Payments agreed to be made by an occupier of the soil, under a parol licence to dig earth and make bricks, are in the nature of rent, and as such, a mortgagee of the premises is entitled, after notice in the usual manner, to all sums in arrear from such occupier at the time of the notice, or which may become due afterwards. *Ex parte Hankey*, 1 M. & M'Ar. 247.

If the servant of A embezzle his property, and therewith purchase a lease, &c., and afterwards commit an act of bankruptcy, and then assign the lease to A; A has not such an equitable lien as to be an answer to an action of trover by the assignees. *Bloxam* v. *Graham*, Pea. A.C. 3. [Kenyon]

Son carrying on business at E, ostensibly for himself, but really for his father, orders goods in his own name, meets them when arrived at E, and, before delivery, gives them a further destination to his uncle's house, situate in W, where he occasionally did business:—Held, that as the son appeared to do so in the ordinary course of business and according to an original intention, and not adversely, (his father being in prison for debt,) to protect himself in respect of a lien on them for the price, for which he was liable, the goods were the property of the father in the hands of the uncle. *Hawkes* v. *Dunn*, 9 Law J. Exc. 184, s. c. 1 C. & J. 528, s. c. 1 Tyrw. 413.

A customer is not entitled to recover short bills in the hands of his bankers, at the time of their bankruptcy, where the habit of dealing between the parties was such as to warrant an inference, that they mutually considered and treated such bills as cash. *Ex parte Thompson*, 1 M. & M'Ar. 192.

By the terms of agreement between F & Co. and their bankers S & Co., the permission to discount indorsed bills of exchange was limited to the amount necessary to meet such acceptances of F & Co., as were in the course of immediate payment at the house of S & Co. To cover certain acceptances becoming due, F & Co. remitted to S & Co. an indorsed bill of exchange; the acceptances were, however, dishonoured by S & Co., who soon afterwards stopped payment. S & Co. then procured the bill to be accepted, and made an entry in their books of their having discounted it. A commission of bankrupt having issued against S & Co.:—Held, that S & Co. had no right to discount the bill without executing the trust reposed in them, and that their assignees were bound to deliver up the bill to F & Co. *Ex parte Frere*, 1 M. & M'Ar. 263.

Bills of exchange were deposited with bankers before their bankruptcy, and handed over by them on the day of their bankruptcy to A B, who received the proceeds of some of them, and handed over those monies and the remaining bills to the assignees as soon as they were appointed:—Held, that the assignees were not liable in trover for the bills of which A B received the proceeds. Demand of the bills having been made on A B, but the assignees having received the proceeds of some of them before any demand was made on themselves:—Held, that they were nevertheless liable in trover for those so received. *Tennant* v. *Strachan*, 2 M. & M. 377, s. c. 4 C. & P. 31. [Tenterden]

Agreement by a trader for the purchase of two pipes of wine. They were lying in a bonded warehouse, in the names of two persons, who had given bond for the duties. It was a part of the agreement that the buyer should pay the duties. The seller gave to the buyer an order on the warehousemen to deliver the wine. There never was any actual delivery or transfer of the wine. The warehousemen, on the duties becoming payable, paid the duties, and were repaid by the seller, who thereupon wrote to the buyer, informing him that they had discharged the duties, and added the amount to the account, and requiring payment. The wines had now been removed to the warehouse of the warehousemen, who had thus given bond, and paid the duties. The buyer sold one of the pipes of wine; and it was delivered to his order by the warehousemen, who charged him rent from the time of the purchase.

The buyer afterwards became bankrupt; and, in an action of trover by his assignees against the warehousemen to recover the other pipe,—it was held, that they were not entitled to recover without payment of the debt, for which the seller, through the warehousemen, had a lien. *Winks* v. *Hassall*, 7 Law J. K.B. 265, s. c. 9 B. & C. 372.

The right of action for damages, in respect of a breach of contract *touching property*, passes to the assignees of the bankrupt person having such a right, although, at the time of the bankruptcy, the amount of the damages is unliquidated. *Wright* v. *Fairfield*, 9 Law J. K.B. 309, s. c. 2 B. & Ad. 727.

(*c*) *Property of the Bankrupt's Wife.*

The wife of a bankrupt was entitled, under the will of her grandmother, to a moiety of certain public funds on the death of her mother. Her husband became bankrupt; then the wife died; then the mother died. On a bill filed by the assignees of the bankrupt against the executrix of the grandmother and the administrator of the wife of the bankrupt:—Held, that the bankrupt, having survived his wife, the assignees became beneficially entitled. *Harper* v. *Ravenhill*, 6 Taunt. 144.

A right by husband and wife, in right of the wife, to bring a writ of entry *sur abatement*, passes by the assignment to the assignees of the husband, on his bankruptcy. *Mitchell* v. *Hughes*, 8 Law J. C.P. 248, s. c. 6 Bing. 689, s. c. 4 M. & P. 577.

(*d*) *Trust Property.*

In a lease, the name of A is inserted as the lessee upon a trust for B, but there is no declaration of trust in writing: A commits an act of bankruptcy, and then executes a declaration of trust; afterwards, a commission of bankruptcy issues against A:—Held, that this declaration of trust, though executed after the bankruptcy, will prevail in favour of B, against the assignees. *Gardner* v. *Rose*, 7 Law J. Chanc. 2.

Under the 6 Geo. 4. c. 16, estates, of which a bankrupt is seised as a bare trustee, do not pass to his assignees. The assignees of a bankrupt are not necessary parties to the conveyance of an estate of which the bankrupt was seised as trustee. *Ex parte Gennys*, 1 M. & M'Ar. 258.

Husband and wife make a post-nuptial settlement in 1821, of monies due to the wife. The monies were received by the trustees, and invested in their names. The husband was a trader, and had committed acts of bankruptcy prior to the settlement. In 1823 he was declared bankrupt:—Held, that his assignees were entitled to the funds. The 6 Geo. 4. c. 16. s. 73, has no retrospective operation. *Wombwell* v. *Lever*, 2 Sim. 360.

The interest of a sum of stock was given to A for life, remainder to his children, with proviso that it should not be subject to alienation or disposition by mortgage or otherwise, or by anticipation of the receipt; and in case he should charge or attempt to incumber the same, such charge, mortgage, sale, or disposition, or incumbrance, was to operate as a forfeiture of his life-interest, and the fund was to go to the persons next in remainder, as if he were actually dead: A became bankrupt:—Held, that his life-interest did not cease, but passed to his assignees. *Lear* v. *Leggett*, 7 Law J. Chanc. 127, s. c. 2 Sim. 479, s. c. 1 Russ. & M. 690.

Where, upon the bankruptcy of a trustee, one person is solely entitled to all the trust estate, the Court will, upon petition in bankruptcy under 6 Geo. 4. c. 16. s. 79, order the bankrupt to transfer and deliver it to such person without a new trustee. *Ex parte Hancox*, 1 Mont. 247.

(*e*) *Reputed ownership.*

The owner of certain iron-works mortgages them, and continues in possession till he becomes bankrupt:—Held, that nearly the whole of the machinery belonged to the mortgagee, and not to the assignees

of the bankrupt, and was not to be considered as within the order and disposition of the bankrupt. *Rufford* v. *Bishop*, 7 Law J. Chanc. 108.

Parties mortgaged cotton-mills, "with steam-engine, engine-house, boiler, and boiler-houses, warehouses, and counting-houses," and became bankrupt: Held, that the steam-engine and boilers were not in the order and disposition of the bankrupts, at the time of their bankruptcy. *Hubbard* v. *Bagshaw*, 9 Law J. Chanc. 190.

Shares in a canal company, which, by the act incorporating the company, are declared to be personal estate and transmissible as such, are within the 73d section of the Bankrupt Act.

Therefore, if they are assigned by A to B as purchaser for valuable consideration, by deed, but the transfer is not completed in the books of the company, and the shares continue standing in the name of A, and he becomes bankrupt, they pass to his assignees. *Brockbank* v. *Dilworth*, 8 Law J. Chanc. 1, s. c. 1 Mont. 116.

If a person buying wine of a merchant, permit it to remain in his cellar, though for the purpose of ripening, and the merchant becomes a bankrupt, the assignees may take the wine as being in the possession of the bankrupt, under 7 Jac. 1. *Tunner* v. *Barnett*, Pea. A.C. 98. [Kenyon]

The plaintiff ordered a chariot of a coach-builder, and paid him for it, and when completed in other respects, he ordered a front seat to be added, and afterwards sent for it repeatedly, and the builder promised to deliver it.—The plaintiff being afterwards dissatisfied with it, directed it to be sold, and it remained on the builder's premises for that purpose, who afterwards became bankrupt, the front seat not having been added; and the chariot was seized by the assignee, and sold under the commission:—Held, that the plaintiff was entitled to recover in an action of trover brought against the assignee, as the chariot did not pass to him as being in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of the 72nd section of the statute 6 Geo. 4. *Carruthers* v. *Payne*, 7 Law J. C.P. 84, s. c. 5 Bing. 270, s. c. 2 M. & P. 429.

A assigned a leasehold messuage and household furniture to B upon trust for the use of A for life, and after his decease, for the use of C his wife, for life, and after the decease of the survivor, for the use of their daughter D. A occupied the messuage, with the furniture, until October 1816, when he died. In October 1817, C, the widow, married E, who immediately took possession of the messuage and furniture, and continued in possession until October 1828, when a commission of bankrupt issued against him.

In October 1818, E had procured B to assign the messuage and furniture to him by a deed, which contained false recitals, and was in breach of the trust:—Held, under these circumstances, on the petition of C and D, that the furniture was not in the order and disposition of the bankrupt E, and that his assignees should be restrained from selling the same. *Ex parte Hortwood*, 1 M. & M'Ar. 169; confirmed *Ex parte Henecliffe*, 1 Mont. 24.

Where a party effects a policy of assurance on his life, and assigns the same, by way of mortgage, as a security for a debt, and afterwards becomes bankrupt—and the person to whom the assignment is made, (though for valuable consideration,) does not give notice of his claim to the persons liable to pay the money assured:

Held, that the policy is within the order and disposition of the bankrupt, at the time of his bankruptcy; and the produce arising from the sale of it is to be applied by the assignees for the benefit of the creditors generally; and the specific assignee must go in, and prove his debt under the bankruptcy. *Ex parte Colville*, 9 Law J. Chanc. 56, s. c. 1 Mont. 110: s. p. *Williams* v. *Thorp*, 2 Sim. 257.

If property is assignable by transfer tickets, the reputed owner is the possessor of the tickets. *Ridout* v. *Lloyd*, 1 Mont. 103.

### (L) Of Relation.

#### (a) *Payments made by, to, and on account of the bankrupt.*

[*Gardener* v. *Rowe*, Dig. Law J. 91, s. c. 4 Russ. 578.]

The 82nd section of the statute 6 Geo. 4. c. 16, applies as well to payments made before, as to payments made since, the passing of that act. *Terrington* v. *Hargreaves*, 7 Law J. C.P. 207, s. c. 5 Bing. 489, s. c. 3 M. & P. 137.

*Semble*, that payments made to a banker under an agreement, by which agreement the customer was allowed to overdraw his account, are not voluntary payments so as to make them fraudulent under 6 Geo. 4. c. 16. *Vacher* v. *Cocks*, 8 Law J. K.B. 341, s. c. 1 B. & Ad. 148.

Where a trader borrows money for the purpose of executing a particular order, under a verbal stipulation that it shall be repaid out of the proceeds of the order, and accordingly, on receiving those proceeds, makes such repayment,—this will not constitute a fraudulent preference, although, at the time when he makes such repayment, he is known by the lender to be in a state of insolvency, and shortly afterwards becomes a bankrupt.

Thus, where the defendants, in July 1827, lent certain traders a sum of money to enable them to execute orders given by the East India Company, under the express agreement that the loan was to be returned on the East India Company paying for the goods supplied, and in the November following, on such payment being made, the amount of the sum lent was immediately handed over to the defendants, they having been cognizant of the fact, that from July up to that time the traders had been in an insolvent state, and an act of bankruptcy was committed on the following day; it was held, that this payment was not a fraudulent preference, and, therefore, that the assignee could not recover back the amount thereof. *Hunt* v. *Mortimer*, 8 Law J. K.B. 62, s. c. 10 B. & C. 44, s. c. 5 M. & R. 12.

A trader in prison under arrest for debt, eight days before the suing out of the commission under which he was declared a bankrupt, obtained a day-rule and went to an insurance-office to receive a sum of money that was due to him. The defendant, a creditor, knowing that his debtor was to receive the money, met him at the office, and there demanded and received payment of his debt. In an action by the assignees to recover the sum so paid to the defendant, as money had and received to their use, the jury having found that the payment was not

made with a view to a fraudulent preference, and that the creditor was not at the time aware of an act of bankruptcy by the debtor,—The Court held the payment to be protected by sect. 82 of the 6 Geo. 4. c. 16. *Churchill* v. *Crease*, 7 Law J. C.P. 63, s. c. 5 Bing. 177, s. c. 2 M. & P. 415.

A being a bankrupt continues in possession of his estate, and grants an annuity out of certain premises to B. The tenant in possession pays the rent to B in order to prevent a distress. The assignees cannot maintain an action for money had and received against B. *Darnton* v. *Pigman*, Pea. A.C. 111. [Kenyon]

A bankrupt assigned all his property to two trustees, one of whom was the petitioning creditor, who was present at the execution of it by the bankrupt, and executed it himself, but not in the presence of any attorney or solicitor:—Held, that this was not such an assignment, as, being communicated to a creditor of the bankrupt, before the receipt by him of money from the bankrupt, would enable the assignees to recover such money as money received after and with notice of an act of bankruptcy. *Burbidge* v. *Watson*, 4 C. & P. 170. [Tindal]

Where a sale of goods takes place after an act of bankruptcy committed by the seller, but not known to the buyer, and the buyer *bonâ fide* pays the amount to the seller, against whom a commission of bankrupt issues within two months afterwards, the payment made by the buyer is protected by the 6 Geo. 4. c. 16. s. 82.

But, whether the assignees are in such a case entitled to repudiate the contract, and, upon tendering to the buyer the amount of such payment, to have the goods back—*quære*. *Hill* v. *Farnell*, 7 Law J. K.B. 139, s. c. 9 B. & C. 45.

The defendant accepted a bill of exchange for 98*l*. for the accommodation of one P, after a secret act of bankruptcy by P, and on the same day it was agreed between them that P should sell to the defendant four horses for 70*l*. in part of the bill. The defendant paid the bill when at maturity, and the horses were delivered to him:—Held, that this transaction was not within the protection of the 6 Geo. 4. c. 16. s. 82. *Carter* v. *Breton*, 8 Law J. C.P. 224, s. c. 6 Bing. 617, s. c. 4 M. & P. 424.

If A have a lien on goods of a bankrupt in his hands, and B, without knowledge of any act of bankruptcy, pay A the sum for which he has a lien, and advance a further sum to the bankrupt upon those goods, which are delivered to him, trover will not lie by assignees. He has the same lien as A; but if the value of the goods be more than the whole sum advanced, the assignees may maintain an action for money had and received for the residue. *Dixon* v. *Purse*, Pea. A.C. 187. [Kenyon]

The state of mind and motives of action of a trader, in making a payment to an importunate creditor, on the eve of bankruptcy, are proper to be taken into consideration by a jury, to assist them in determining whether the payment was voluntary or compulsory. The jury having affirmed the former by their verdict, where the debt was a bill, having ten days to run, and the creditor threatened to arrest the trader and his father (the acceptor for his son's accommodation,) if not paid when due, and the son swore that his motive was to save his father and benefit the creditor; the Court refused to grant a new trial. *Cook* v. *Rogers*, 9 Law J. C.P. 155, s. c. 7 Bing. 438, s. c. 5 M. & P. 353.

Where a bankrupt is in the habit of supplying his son with money to pay his bills, gave 200*l*. for that purpose just before he stopped payment, being at the time insolvent, but not expecting to become bankrupt:—Held, that the question for the jury in an action by his assignees against the son to recover that money was, whether it was given in the ordinary course of maintaining the son, or as a fraudulent preference of the son over the creditors, made in contemplation of insolvency. Such gift of money is not within the 6 Geo. 4. c. 16. s. 73. *Abel* v. *Daniell*, 1 M. & M. 370. [Tenterden]

(*b*) *Other dispositions of the bankrupt's property.*

A transfer made on the eve of bankruptcy, from the fear of criminal process, is valid. *Ex parte De Tastet*, 1 Mont. 138.

Under the 21 Jac. 1. c. 19, a deed, which is overreached by an act of bankruptcy, is void, though the commission of bankrupt does not issue till more than five years afterwards, if the party, who claims the benefit of the deed, had, at the time, notice of the act of bankruptcy. *Mountford* v. *Ponton*, 7 Law J. Chanc. 156, s. c. 1 Mont. 79.

A transfer of goods in warehouse by a bankrupt to A & Co., by mistake for A & Son, more than two months before the issuing of a commission, but corrected within two months, vests the property in the goods in A & Son from the time of the first transfer, under the 81st section of 6 Geo. 4. c. 16. A commission issued and not acted on nor gazetted, is sufficient to defeat a transaction within two months of it, under the provision of the 81st section. *Pattison* v. *Lashmoor*, 2 M. & M. 251. [Tenterden]

Assignees of a bankrupt cannot recover in trover goods delivered upon a transaction which the bankrupt himself could not impeach, unless the delivery is subsequent to an act of bankruptcy taking place after the petitioning creditor's debt has accrued.

Where the bankrupt, after a secret act of bankruptcy, bought on credit, and sold for ready money at unduly low prices, the purchasers were held not protected by 6 Geo. 4. c. 16. s. 82, unless the purchase was in the usual course of business.

And if the purchaser knew the price to be greatly under the value of the commodity, it is not within the protection of the statute. *Ward* v. *Clarke*, 1 M. & M. 497. [Tenterden]

A sale of goods at such a price and under such circumstances that the buyer ought to know the trader is selling to raise money in fraud of his creditors, is an act of bankruptcy, and the buyer is liable to the assignees in trover for the value of the goods. *Cook* v. *Culdecott*, 1 M. & M. 522. [Tenterden]

(*c*) *Judgments and executions.*

On a supplemental order directing payment of money into court; not a judgment within the bankrupt law, but a specific equity upon the fund, protecting it for the parties ultimately entitled, against the assignees under a bankruptcy taking place between the order and the decree. *Hitchens* v. *Congreve*, 1 Mont. 225.

Judgment is entered up on a warrant of attorney against grantor of an annuity and his surety before 1st April 1825, after which day the former becomes

bankrupt. By 6 Geo. 4. c. 16. s. 55, no execution can issue against the surety, until the value has been ascertained by the commissioners under section 54. *Home* v. *Morgan*, 4 M. & R. 559.

*Semble*, that on the sale of the goods under an execution, the property is divested out of the debtor; and the creditor is no longer a creditor having security for his debt under the 6th Geo. 4. c. 16. s. 108.

But, at all events, he is not such a creditor after the money (the produce of the sale) has been paid over to the sheriff; and, consequently, an act of bankruptcy committed afterwards will not affect the rights of the judgment creditor.

Nor will the rights of the judgment creditor be affected by the circumstance of the act of bankruptcy being committed before the writ is returnable. *Higgins* v. *M'Adam*, 7 Law J. K.B. 97, s. c. 3 Y. & J. 1.

The defendant obtained a judgment by *nil dicit* (in an action for goods sold) against a bankrupt, and afterwards executed a writ of inquiry, and signed final judgment, which was affirmed on a writ of error, and issued execution against his effects, before any act of bankruptcy committed; but an act of bankruptcy was committed before the sale. The final judgment was obtained *before*, but the execution issued *after* the 6 Geo. 4. c. 16. came into operation: —Held, that this was a judgment within the proviso in the 108th section of that statute; and, therefore, that the assignees were entitled to recover from the execution creditor the money levied. *Cumming* v. *Walsford*, 8 Law J. C.P. 168, s. c. 6 Bing. 502, s. c. 4 M. & P. 238.

Where money had been raised by the sheriff under a *fieri facias* before the return of the writ; and the debtors became bankrupt after the return of the writ, —it was held, that the judgment creditor was not, at the time of the bankruptcy, a creditor having security according to the 6th Geo. 4. c. 16. s. 108; and consequently, that he was not liable to refund the money to the assignees, although it had not been paid to him by the sheriff until after the bankruptcy. *Morgan* v. *Pellatt*, 7 Law J. K.B. 54, s. c. 8 B. & C. 722.

Where the goods of a bankrupt taken in execution, are discharged by payment of the sum to be levied by a creditor after a docket struck, the assignees subsequently chosen cannot, by repaying that sum, maintain an action for money had and received against the sheriff. *Bucker* v. *Booth*, 1 M. & M. 518. [Parke]

### (M) Of Partners.

The statute 6 Geo. 4. c. 18. s. 12. did not extend to prevent partners from lending money on *respondentia*. *Gore* v. *Wynne*, 1 M. & M. 393. [Tindal]

If a commission issue against three, and the joint estate is insufficient, and one partner pay the deficiency from his private estate, and there is a surplus on the separate estates of each of the others, the partner who paid the deficiency is entitled to such surplus before interest is paid to the separate creditors. *Ex parte Rix*, 1 Mont. 237.

Assignees appointed of a bankrupt's estate—money not paid into a banker's, but to a merchant's house; one of the assignees was one of the merchants; he became bankrupt, and his partner held liable for the money in their hands belonging to the assignees of the original bankrupts, but not for any interest. *Tobin* v. *Cass*, 9 Law J. Chanc. 242.

A trust deed, for the benefit of Scotch creditors, made by one of three partners in two Scotch firms, all of whom are also partners in English firms, is not such an act, in the ordinary course of the partnership business, as to be valid against the other two partners or their representatives, and the assignees under a general commission against all cannot homologate it. *Douglas* v. *Brown*, 2 Dow. & C. 171.

Where one member of a firm, who carries on business on his separate account, supplies goods to the firm, and a commission issues against the firm, the debt is proveable; but not so for money advanced. *Ex parte Cook*, 1 Mont. 228.

In December 1818, A, B, C, and D, dissolved partnership as bankers by deed, by which it was agreed, that A and B should retire, and the business be carried on in future by C and D. C and D covenanted to indemnify A and B against all outstanding demands. In October 1825, C died, and a commission issued against D; A having been obliged to pay certain partnership debts which C and D had undertaken to indemnify him against: Held, that he might prove under the commission for the amount so paid, although he knew the firm to have been insolvent at the time of the dissolution in 1818. *Ex parte Carpenter*, 1 M. & M'Ar. 1.

A, being in partnership with B and C, and holding stock, as a trustee, along with two other trustees, forges the signature of his co-trustees to a power of attorney, authorizing B and C to sell the stock: they sell the stock, and transfer it to the purchaser, and the proceeds are paid in to the bankers of the partnership; commissions of bankrupt issue against B and C, and against A; prosecutions are instituted against A for other forgeries of a similar kind, and he is convicted, and executed, but no prosecution is instituted by his co-trustees: Held, that the co-trustees are entitled to prove the value of the stock against the partnership estate. *Ex parte Stone*, and *Ex parte Bolland*, 7 Law J. Chanc. 10, s. c. 1 M. & M'Ar. 315.

A partnership acceptance, given in discharge of the several debt of one of two partners, cannot be proved against the joint estate, by a person who took it in discharge of such several debt, though it was left for acceptance at the house of business of the partnership, and thence returned accepted, unless the holder makes out that it was accepted in the partnership name, with the knowledge and assent of the other partner. *Ex parte Goulding*, 8 Law J. Chanc. 19.

Where parties are interested jointly, and enter into a covenant, by which they promise on demand, jointly and severally to pay, no demand is necessary in order to entitle the creditor to proceed severally against the parties; but where it was expressly stipulated by three partners that, until a demand was made, an existing debt should remain a joint debt, and no demand was made previously to the bankruptcy: Held, that the debt was proveable against the joint estate, but not against the separate estates of the three. *Ex parte Fairlie*, 1 Mont. 17.

An insolvent who has applied to take the benefit of the act, is not insolvent within the rule that a proof cannot be made against the separate estate, if there is a solvent partner.

Section 62 applies only to partnerships subsisting at the time of the bankruptcy. *Ex parte Morris*, 1 Mont. 218.

Under a joint commission, proof ordered by the joint against the separate estate of one partner, who had appropriated partnership stock without the privity or sanction of the other partners, and afterwards retained it, with their knowledge, but under circumstances from which their subsequent approbation could not be inferred. *Ex parte Watkins*, 1 M. & M'Ar. 57.

A, B, and C, being bankers in copartnership, were appointed treasurers of a corporate body, and executed a joint and several bond, in a penalty of 20,000*l.*, conditioned for the performance by them of various duties as treasurers, and especially, that they would, "when thereunto required by the said company," &c., pay all balances in their hands, &c. A commission of bankruptcy issued against A, B, and C, who had, at the time, a large balance in their hands as treasurers; but, no demand under the bond having been made by the company before the bankruptcy: Held, that there was not a sufficient breach of the condition to constitute a debt proveable against the separate estates of the bankrupts. *Ex parte the Lancaster Canal Company*, 1 Mont. 27.

A employed B and C as his stockbrokers; and, for the purpose of more convenient transfer, allowed certain stock, belonging to him, to stand in the name of B alone; B, without the consent or knowledge of A, sold this stock, and paid the produce into the partnership funds of B and C. B and C having afterwards become bankrupt: Held, that A was entitled to prove against the separate estate of B, or against the joint estate, as he should think fit. *Ex parte Turner*, 1 Mont. 255.

A payment by the bankrupt partner, of a partnership debt, is not protected by the 82nd section of the 6 Geo. 4. c. 16. *Craven* v. *Edmondson*, 8 Law J. C.P. 298, s.c. 6 Bing. 734, s.c. 4 M. & P. 622.

Assignees of a bankrupt firm cannot recover back money by reason of the mere misappropriation of one of the partners before bankruptcy. *Jones* v. *Yates*, 7 Law J. K.B. 217, s.c. 9 B. & C. 532, s.c. 4 M. & R. 613.

J C S and W S, carrying on business as brewers, in co-partnership, admitted W W as a dormant partner. It was stipulated by deed that the stock and effects of the old firm, including the plant, &c., and book debts, should form part of the capital stock of the new co-partnership; that W W should be paid 10 per cent. on the capital advanced by him, and should not otherwise interfere. The business was carried on as before, in the names of J C S and W S only, until the new firm became bankrupt. Upon petition of several creditors of the old firm, some of whom had notice of the dormant partner, it was held, that all the personal chattels of the new firm were within the order and disposition of J C S and W S, and ought to be administered in the bankruptcy as the separate estate of the two. *Ex parte Jennings*, 1 Mont. 45.

If one of four partners die, and the surviving partners compromise, and obtain securities for, a debt due to the original firm, and become bankrupts, the securities are, by reputed ownership, distributable amongst the creditors of the three.

If goods are purchased and paid for by a firm of four, on joint account of themselves and two other firms, and one member of the firm of four die, and the goods are in the possession of one of the two firms, upon the bankruptcy of the survivors the goods do not pass by reputed ownership to the assignees of the survivors. If a firm consign goods to Hayti, which after the death of one member, are returned, and a bill of lading from Hayti is sent to the holder of a bill of exchange dishonoured by the partnership, and the goods remain in the West India Docks; they, upon the bankruptcy of the survivors, are not in their reputed ownership. Goods in the hands of an agent are not in the reputed ownership of his principal. If a firm is possessed, as mortgagees, of real estate, which, after the death of one member, remains in the possession of the survivors, it is not in their reputed ownership. *Ex parte Taylor*, 1 Mont. 240.

Where several persons engaged in a joint adventure which produced certain property, and one of them became bankrupt after the completion of the adventure, before the delivery of his share:—Held, that his assignees were not entitled to recover the share of the property without paying the bankrupt's share of the expenses.

Where, in such a case, the course of business was, to put into a warehouse all the shares apart, marked with the initials of each adventurer, and to deliver it out, if his share of the expenses had been paid; and in the particular case there had been a partial delivery:—Held, that this did not amount to a virtual delivery of the whole, although a charge for warehouse-room formed a part of the expenses. *Holderness* v. *Shackels*, 7 Law J. K.B. 80, s.c. 8 B.&C. 612, s.c. 3 M. & R. 25.

A surplus of separate estate must be carried to a deficient joint estate, before payment is made on a voluntary bond. *Ex parte Spurrier*, 1 Mont. 246.

A commission having issued against A, B, and C, and it being subsequently discovered that B was an uncertificated bankrupt, the commission was ordered to be wholly superseded. *Quere*—whether a joint commission, invalid in its connexion as to one partner, can, after a supersedeas as to that one partner, be rendered valid against the remaining partners? *Ex parte Wray*, 1 M. & M'Ar. 195.

### (N) Of the Dividend.

Where a creditor cannot by accident produce his security at the time of a dividend, and his proof is in consequence rejected, the dividend may be opened on giving instant notice to the assignees. *Ex parte Barclay*, 9 Law J. Chanc. 168, s. c. 1 Mont. 126.

If three commissioners are not present when an order of dividend is made, it is invalid. *Ex parte Day*, 1 Mont. 213.

Money remaining in the hands of the assignee to answer the dividend on a claim, which had not been matured into a proof, being lost by the bankruptcy of the assignee, and the proof being afterwards perfected:—Held, that the creditor must bear the loss, and that he cannot claim the amount of the dividend out of the assets of the bankrupt realised subsequently. *In re Grant*, 7 Law J. Chanc. 76, s.c. 1 M. & M'Ar. 77.

Under a commission against A, a dividend was declared, and repeatedly advertized to be paid to the creditors who had proved. Subsequently to the appointed days for payment, B and C, the bankers to the commission, in whose hands a sum, more than sufficient for the payment of such dividend, had been left by the assignees, stopped payment, and afterwards became bankrupt:—Held, that an order of dividend is to be considered as a separation, from the bulk of the estate, of the sum to be divided, and that the unpaid dividends were lying in the hands of the bankers, at the risk of the creditors who had neglected to apply for payment. *Ex parte Powell*, 1 M. & M'Ar. 283.

On petition for payment of dividends, which is unsuccessfully opposed by the assignees, interest at five per cent., and costs, are of course against the assignees, who, if they acted *bonâ fide*, may reimburse themselves out of the estate. *Ex parte Harrison*, 1 Mont. 250.

### (O) Of the Bankrupt.

#### (*a*) *Surrender.*

[See Section 20, 1 & 2 Will. 4. c. 56.]

The commissioners cannot apply for an enlargement of time to surrender. *Ex parte Hall*, 1 Mont. 3.

A bankrupt, who was in prison for debt, did not surrender to his commission; neither did he apply to have the time for his surrender enlarged, nor to be brought up to surrender under section 119 of the Bankrupt Act, 6 Geo. 4. c. 16; nor did he give notice to the commissioners that he was in prison:—Held, that under these circumstances he was not indictable under section 112 of the statute 6 Geo. 4. c. 16, for not surrendering to his commission, even though the imprisonment could be shewn to have been collusive. *Rex* v. *Mitchell*, 4 C. & P. 251. [Littledale]

#### (*b*) *Other duties.*

A bankrupt is not indictable on the statute 6 Geo. 4. c. 16. s. 112, for concealing his books, till after he has concluded his last examination. *Rex* v. *Walters*, 5 C. & P. 138. [Park]

The lease of a house belonging to the bankrupt having been sold by auction under the usual order, the Court directed the assignees to execute an assignment, and the bankrupt to deliver up possession to the purchaser:—upon refusing to comply, the bankrupt was ordered to be committed. *Ex parte Hawkins*, 1 M. & M'Ar. 115.

#### (*c*) *Rights and privileges.*

Petition, that a bankrupt be compelled to convey under 6 Geo. 4. c. 16. s. 78, refused, until he could have an opportunity of trying the validity of the commission. *Ex parte Thomas*, 1 M. & M'Ar. 64.

A proved a debt of 424*l.* against the separate estate of B, and died before B had obtained his certificate, having bequeathed to B a legacy of 200*l.*:—Ordered, on the petition of the assignee, that the sum of 200*l.* should be deducted from the proof of 424*l.* made by A. *Ex parte Man*, 1 M. & M'Ar. 210.

#### (*d*) *Allowance.*

The right to allowance does not apply to dividends declared before the present statute came into operation. *Anon.* 1 Mont. 10.

Where the bankrupt's right to an allowance vested before the 1st of September 1825:—Held, that he was only entitled to the amount directed to be paid by the 5 Geo. 2. c. 30. s. 7. *Ex parte Buck*, 1 M. & M'Ar. 297, n.

A full allowance payable to each bankrupt.

Quære—whether allowance before final dividend? *Ex parte Gibbs*, 1 Mont. 105.

The bankrupt is not entitled to claim his allowance until after a final dividend has been made. *Ex parte Surridge, in re Joyner*, 1 M. & M'Ar. 287: s. p. *Ex parte Minchin*, post.

Where a commission had issued in 1815, and it was stated in the petition that a final dividend had been advertized in June 1827, the bankrupt's allowance was ordered to be paid, although it was submitted at the bar that there was still some reversionary property, but of small amount, to be realized. *Ex parte Davis*, 1 M. & M'Ar. 36.

Where A, being one of three partners, had paid 20*s.* in the pound on his separate estate, and 12*s.* 6*d.* in the pound had been paid on the joint estate, but on the separate estates of the two other partners a sufficient dividend had not been paid:—Held, that under the 6 Geo. 4. c. 16, A was entitled, for his sole use, to an allowance of five per cent., not exceeding 400*l.* *Ex parte Minchin*, 1 M. & M'Ar. 135.

#### (*e*) *Of the surplus.*

Construction of the 132nd section of the 6 Geo. 4. c. 16. The 132nd section of the 6 Geo. 4. c. 16. is not retrospective. *In re Sheppard*, 1 M. & M'Ar. 67.

Section 132 of 6 Geo. 4. c. 16, as to payment of interest, is not retrospective. *Ex parte Sammon*, 1 Mont. 253.

#### (*f*) *Of actions by and against a bankrupt.*

A was entitled to commission for introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bargain. After he had introduced the purchaser, but before the matter was settled, he became bankrupt, and his assignees brought an action for the commission, which they afterwards discontinued, and wrote to him, saying that they disclaimed all right to the money. A, upon this, brought an action in his own name:—Held, that he was not entitled to recover. *Hillary* v. *Morris*, 5 C. & P. 6. [Tenterden]

New trial of an action, brought by the bankrupt for impeaching the validity of a commission, directed, notwithstanding the costs of a former action were unpaid, and assignee restrained from setting up such non-payment in bar of the new action. It is not necessary that the action should be brought within three months, the act of the assignees in taking possession of the bankrupt's property not being done "in pursuance of the statute," within the meaning of 6 Geo. 4. c. 16. s. 44. *Ex parte Eagar*, 9 Law J. Chanc. 51.

The plaintiff, an uncertificated bankrupt, with a view to trying the validity of the commission, sued his assignees in assumpsit for money had and received, and held them to bail in a large sum. The Lord Chief Justice made an order at chambers for cancelling the bail-bond, on the defendant's entering a common appearance. The Court confirmed the order. *Chambers* v. *Bernasconi*, 8 Law J. C.P. 159, s.c. 6 Bing. 498, s.c. 4 M. & P. 218.

A purchases from B a parcel of goods, and accepts a bill of exchange for the amount; A purchases another parcel of goods from B, and accepts another bill of exchange for the amount; both bills are dishonoured: A is declared a bankrupt; and B proves the amount of the first bill under the commission:—Held, that, notwithstanding his proof, he may proceed at law against the bankrupt for the amount of the other bill. *Ex parte Schlesinger*, 7 Law J. Chanc. 26.

Under 6 Geo. 4. c. 16. s. 120, which authorizes the discharge of a certificated bankrupt taken in execution for a debt proveable under his commission, the Court has incidentally the power of staying, before judgment, proceedings against such a bankrupt for such a debt. *Sadler* v. *Cleaver*, 7 Bing. 769, s. c. 5 M. & P. 706.

Where A, having proved a debt under a commission against B, brought an action and obtained judgment against B for the amount so proved, a sum attempted to be proved, and other sums advanced after the bankruptcy, and upon this judgment sued out execution, and caused property of B, in the possession of his assignees, to be taken in execution, the Court ordered the execution to be withdrawn altogether.—*Quære*, whether the Court would have so interfered if the judgment and writ of execution had not included the sum proved under the commission? *Ex parte Chambers*, 1 M. & M'Ar. 130.

### (P) Of the Certificate.

#### (a) *Signature.*

A creditor may sign a bankrupt's certificate, though he has notice by the surety (who has not paid the debt) requiring him not to do so. *Brown* v. *Carr*, 9 Law J. C.P. 144, s. c. 7 Bing. 508, s. c. 5 M. & P. 497.

#### (b) *Staying.*

A petition to stay a certificate because the commission is concerted, does not lie. *Ex parte Smith*, 1 Mont. 11.

#### (c) *Recalling.*

A person is not allowed to purchase a debt under a commission of bankrupt, with a view thereby to qualify himself to impeach the proceedings. *Ex parte Keys*, 9 Law J. Chanc. 11.

#### (d) *Effect of.*

The certificate of a bankrupt purchaser will discharge him from all liability under the contract of purchase. *Hope* v. *Booth*, 9 Law J. K.B. 21, s. c. 1 B. & Ad. 498.

An attorney in custody for contempt for nonpayment of money is discharged by bankruptcy and certificate, if the money be proveable as a debt under the commission. *Rex* v. *Edwards*, 7 Law J. K.B. 341, s. c. 9 B. & C. 652.

The Court will set aside an execution (issued by a creditor whose debt was proveable under the commission) under which goods acquired by the defendant since his certificate have been seized; although so much doubt appears as to the validity of the commission, that the assignees have been defeated in an action brought by them for want of sufficient proof as to the trading. It is sufficient in such a case for the defendant bankrupt to shew that he has properly obtained his certificate. *Barrow* v. *Polk*, 9 Law J. K.B. 95, s. c. 1 B. & Ad. 629.

Under the 6 Geo. 4. c. 16. s. 127, no action can be maintained against a certificated bankrupt for a debt due before his commission, although he has compounded with his creditors before his commission, and his effects have not produced 15*s.* in the pound under it. *Eicke* v. *Nokes*, 1 M. & M. 303. [Tenterden]

Where a bankrupt, prior to his bankruptcy, had contracted to take up A's acceptance, or indemnify him against it, but did neither; and A, after the bankrupt had obtained his certificate, paid it himself:—Held, that bankruptcy was no defence to an action brought by A for a breach of promise, inasmuch as, at the time of the commission, no debt was in existence between the parties; neither had the defendant "contracted any debt payable upon a contingency," within the meaning of the 56th section; nor was the relationship between them, at the time of the bankruptcy, that of a "surety," according to the 52nd section. *Yallop* v. *Ebers*, 9 Law J. K.B. 105, s. c. 1 B. & Ad. 698.

Action for libel. Cause at issue. The parties then compromised by defendant making an apology and agreeing to pay costs as between attorney and client. That arrangement was turned into a rule of court, and the costs taxed. Afterwards, the defendant became a bankrupt, and obtained his certificate:—Held, that he was discharged by his bankruptcy, and that the plaintiff should prove under the commission. *Riley* v. *Byrne*, 9 Law J. K.B. 305, s. c. 2 B. & Ad. 779.

A bankrupt rendered in discharge of his bail, where judgment has been had against him after certificate, in an action commenced before, is entitled to his discharge, notwithstanding he has neglected to plead his bankruptcy and certificate *puis darrein continuance*. *Humphreys* v. *Knight*, 8 Law J. C.P. 221, s. c. 6 Bing. 572, s. c. 4 M. & P. 375.

### (Q) Of a Supersedeas.

#### (a) *In general.*

A petition lies to restrain a bankrupt from proceeding at law to supersede the commission.

What amounts to an acquiescence? *Ex parte Hill*, 1 Mont. 9.

The Court may supersede, notwithstanding a verdict in favour of the commission, and, if a new trial is directed, may restrain proceeding for double costs. *Ex parte Eager*, 1 Mont. 85.

On supersedeas on consent, a creditor cannot privately stipulate for better terms than the other creditors. *Ex parte Ridley*, 1 Mont. 131.

When the petitioning creditor petitions to supersede, a petition by the bankrupt, except for the assignment of the bond, does not lie. *Ex parte Sylvester*, 1 Mont. 125.

#### (b) *Causes for.*

A commission issued at the request of the bankrupt is supersedeable. *Ex parte Gane*, 1 M. & M'Ar. 399.

A commission against T C and three others, superseded as to T C, on the petition of the assignees, under a commission previously issued against T C and another. *In re Coleman*, 1 M. & M'Ar. 15.

A commission having issued on the petition of four partners, one of whom died before the date of the fiat and of the commission, it was ordered to be superseded forthwith, with liberty to the surviving partners to lodge new docket papers and issue another commission. *Ex parte Wakefield*, 1 M. & M'Ar. 291.

*Semble*, that a composition agreed to under the 133rd section of the 6 Geo. 4. c. 16. will not bind any creditor, unless, as to him, three facts combine—1st. That he had proved under the commission. 2nd. That he was present at the meeting at which the composition was agreed upon. 3rd. That he concurred in the agreement for the composition.

*Note.*—The margin to the 133rd section in the printed copy of the above act, appears not to give the substance of that section correctly, by using the words "which shall bind the rest."

Where creditors agree to a composition and release, and subsequently the debtor gives to one of the creditors a security for the balance of his debt, those two facts are not of themselves sufficient to render the security void on the ground of its being a fraud upon the other creditors.—A third fact must be shewn, namely, that the security was given in pursuance of an agreement made at the same time with the agreement for the composition.

Accordingly, where, in an action upon such a security, the defendant pleaded the two facts above mentioned, but not the third, as proving that the security was obtained by fraud; and the plea was affirmed by the verdict of the jury:—Held, [by reason that the third fact was not shewn] that the plea was insufficient; and that the plaintiff was entitled to judgment *non obstante veredicto*.

The Stirling Banking Company in 1825 stopped payment, and a sequestration soon after followed. Two or three years afterwards, before their funds had been realized and their affairs wound up, they made an offer to the creditors of a composition of 20s. in the pound, with interest up to the period of the sequestration, with security for payment on approval of the composition by the Court. This was accepted by more than the statutory portion of the creditors. Petitions for approval were presented, but were objected to by three creditors to a very comparatively small amount, on the ground that, since the acceptance of the composition, it had been ascertained that the company had realized, or would speedily realize, ample funds to pay their debts in full, with interest to the time of payment. The Court, however, considered the composition reasonable at the time it was accepted, and approved of it, and that judgment affirmed by the House of Lords. *Robertson* v. *Alexander*, 2 Dow. & Cl. 312.

(*c*) *Practice upon petitions to supersede.*

A commission may be superseded by consent before surrender. *Ex parte Glynn*, 9 Law J. Chanc. 167, s. c. 1 Mont. 124.

If a bankrupt is unable, in consequence of illness, to attend an adjourned third meeting, and the commissioners therefore adjourn the meeting, the Court will, upon consent of all the creditors, supersede without another surrender. *Ex parte Norcott*, 1 Mont. 281.

Commission superseded, upon a petition presented on the thirteenth day from the date of the commission, on the ground of fraudulent collusion between the bankrupt and petitioning creditor. *In re Levy*, 1 M. & M'Ar. 11.

Commission sealed, but not opened, ordered to be superseded, at the instance of the petitioning creditor, reserving to the bankrupt, in the order, all his rights, whether by action or petition. *Ex parte Palmer*, 1 M. & M'Ar. 211.

Commission sealed, but not opened, cannot be superseded, at the instance of the petitioning creditor, without serving the bankrupt or shewing that he cannot be found. *Ex parte Forth*, 1 M. & M'Ar. 10.

Petition to supersede, presented in the lifetime of the bankrupt, ordered to stand over, on his death, until his personal representatives, or those entitled to take out administration, were served. *Ex parte Leworthy*, 1 Mont. 54.

The pendency of an indictment is not a ground for deferring the hearing of a petition to supersede a commission of bankrupt, if the parties indicted do not object to proceed. *Ex parte Bromley*, 1 M. & M'Ar. 92.

(*d*) *Effect of.*

Sales made by the assignees under a commission which has been superseded, are void as against the assignees chosen under a subsequent commission, not being within the protection of the 87th section of the 6 Geo. 4. c. 16. *Gould* v. *Shoyer*, 8 Law J. C.P. 267, s. c. 6 Bing. 738, s. c. 4 M. & P. 635.

A commission of bankrupt is issued against A and B; afterwards a commission is issued against A, C, D, and E; the second commission is then superseded as to A:—Held, that it is a valid, legal commission against C, D, and E. *Burlton* v. *Wall*, 7 Law J. Chanc. 183, s. c. 1 Tam. 113.

(R) Suits in Equity.

Demurrer to a bill by assignees of a bankrupt, on the ground that it did not state the suit to be instituted with such consent of the creditors or of the commissioners as required by the statute 6 Geo. 4. c. 16, overruled. *Jones* v. *Yates*, 3 Y. & J. 373.

The consent of the creditors of a bankrupt, or of the commissioners, to the prosecution of a suit, in which the bankrupt's estate is interested, and which was commenced by the assignees without such consent, will not enable the assignees to sustain such suit.

Demurrer allowed to a supplemental bill by assignees, stating that the commissioners, after the institution of the suit, had given their consent to its prosecution. *King* v. *Tullock*, 7 Law J. Chanc. 122, s. c. 2 Sim. 469.

Bill to have acceptances fraudulently obtained from the plaintiff, by one of the defendants, and which were in possession of the other defendant, but who claimed no interest in them, delivered up to be cancelled. The former defendant pleaded his bankruptcy under a commission issued after the filing of the bill. Plea overruled. *Muckworth* v. *Marshall*, 3 Sim. 368.

(S) Actions at Law.

[See ante, L, M.]

If the assignees of a bankrupt lessee decline accepting the lease, and the bankrupt also decline it,

and give it up under the act 6 Geo. 4. c. 16. s. 75, the assignees cannot afterwards sue the lessor in respect of any subsequent breach of covenant in the lease. *Kearsey* v. *Carstairs*, 9 Law J. K.B. 323, s. c. 2 B. & Ad. 716.

A having become bankrupt, his goods were sold by order of his assignees. Some goods of his in B's hands at the time of the bankruptcy, and on which B claimed a lien, were also included in the sale: but this was done by B's order, and the assignees refused to authorize it. The assignees afterwards signed a memorandum that all the goods included in the sale were the property of A, the bankrupt, to exempt them from auction duty under 6 Geo. 4. c. 16. s. 98:—Held, that this was no adoption of the sale, so as to prevent the assignees from maintaining trover against B for the goods. *Bleaden* v. *Hancock*, 2 M. & M. 465, s. c. 4 C. & P. 152. [Tindal]

It is sufficient answer to an action by assignees of a bankrupt, to prove that the party is an uncertificated bankrupt under a former commission still in force, and that on that occasion his effects were duly assigned; and this evidence may be given to invalidate the subsequent commission, without the notice required by 6 Geo. 4. c. 16. s. 90.

An award, stating such former bankruptcy as the answer to an action by subsequent assignees, must expressly shew that the effects were assigned under the first commission. *Phillips* v. *Hopwood*, 1 B. & Ad. 619.

If bills be paid in at a bankers' as short bills, (i. e. bills which the bankers are to present when due, and carry the proceeds to account,) and after a commission of bankrupt has issued against the bankers, but before the choice of assignees, a person, on behalf of the customer by whom they were paid in, calls at the banking-house to demand a return of these bills, the answer he receives is evidence in an action of trover, brought against the assignees for the recovery of such bills: but if, before the choice of assignees, some of the bills were paid, the customer cannot recover the value of such bills as were so paid, in an action of trover against the assignees. If the assignees, when called on to return the bills, claim a right to retain such as have not been paid, alleging that the bankrupts had discounted them for the customer before the bankruptcy, this is presumptive evidence that these bills were the bills paid in by such customer.

If a customer pay into the hands of his banker certain bills, as short bills, and after the bankruptcy and choice of assignees, the assignees present them for payment, and receive the proceeds, and claim to hold the proceeds against the customer, they are liable in trover. *Tennant* v. *Strachan*, 1 C. & P. 31, s. c. 1 M. & M. 377. [Tenterden]

Where assignees are entitled to maintain trover against the original wrong-doer, for seizing the goods of the bankrupt after the bankruptcy, it is no answer to such an action to shew that the assignees have it in their power to take possession of the goods, or even that they have the possession, if the effect of that defence would be to throw the loss, which ought to be borne by the defendant, upon an innocent party. *Vaughan* v. *Wilkins*, 9 Law J. K.B. 100, s. c. 1 B. & Ad. 370.

Where a plaintiff assignee dies, the rule for entering a suggestion of the fact, and substituting the name of the newly-appointed assignee, in pursuance of section 67 of the 6 Geo. 4. c. 16, is absolute in the first instance. *Westall* v. *Sturges*, 8 Law J. C.P. 158, s. c. 4 M. & P. 217.

If a person, after notice of an act of bankruptcy, sets up a claim of lien upon certain deeds, and the bankrupt pay the sum he demands to get possession of the deeds; the assignees cannot question the amount of this lien, unless there be a count for money had and received to the use of the assignees; but if the person had really no just claim at all, the assignees may recover back the sum in an action for money had and received to the use of the bankrupt. However, if it appear that the defendant never received any money, but that A, who was to have conveyed a house to the bankrupt, at his desire mortgaged it to the defendant, an action for money had and received will not lie. *Noble* v. *Kersey*, 4 C. & P. 90. [Tenterden]

## (T) Pleading.

A general plea of bankruptcy, under the 6 Geo. 4. c. 16. s. 126, must pursue the exact words of the section, and must also conclude to the country. *Sheen* v. *Garrett*, 8 Law J. C.P. 270, s. c. 6 Bing. 606, s. c. 1 M. & P. 525.

Where a lessee becomes bankrupt, and seeks to discharge himself of the lease, under the 75th section of the Bankrupt Act, 6 Geo. 4. c. 16, he must plead the special matter; and cannot be let into such a defence by pleading his bankruptcy generally; as he can in the ordinary case of a debt proveable under the commission. *Hope* v. *Bent*, 9 Law J. K.B. 21, s. c. 1 B. & Ad. 498.

If a plea contain distinct allegations of a trading and petitioning creditor's debt, and then go on to state that the plaintiff "became bankrupt," and in the replication the plaintiff protest the trading and petitioning creditor's debt, and deny that the plaintiff "became bankrupt," this merely puts in issue the act of bankruptcy; and the words "became bankrupt," coupled with the other two allegations, will be held to extend to the act of bankruptcy only. *Cotton* v. *James*, 3 C. & P. 505, s. c. 1 M. & M. 273. [Tenterden]

## (U) Evidence.

### (a) *In general.*

[Certificate of appointment of assignees, purporting to be under the seal of the Court of Bankruptcy, to be deemed sufficient evidence of such appointment. 1 & 2 Will. 4. c. 56. s. 29.

The new Court may take evidence, either viva voce or upon affidavit before a Judge or Master. Sect. 32. 1 & 2 W. 4. c. 56.]

An assignment to the provisional assignee, is proved by its recital in the subsequent assignment. The 67th clause of the Bankrupt Act, 6 Geo. 4. c. 16. extends to penalties. *Bates* v. *Sturgis*, 9 Law J. C.P. 184, s. c. 7 Bing. 585, s. c. 5 M. & P. 568.

A certificate obtained after 6 Geo. 4. c. 16, on a commission of bankruptcy issued before that statute, is proved by the production of the certificate duly allowed. *Taylor and another* v. *Welsford*, 1 M. & M. 503. [Tindal]

It is *primâ facie* evidence that a promissory note was in existence before an act of bankruptcy, that

it is proved to have been in existence before the docket is struck, and bears date on the face of it before the act of bankruptcy. *Obbard and another, assignees of Blofield, a bankrupt*, v. *Betham*, 1 M. & M. 483. [Tenterden]

Where an uncertificated bankrupt sues for a debt for work and labour performed since his bankruptcy, and the debtor, after the commencement of the action, pays the assignee, such payment may be given in evidence, under the general issue, to defeat the action. *Crofton* v. *Poole*, 9 Law J. K.B. 59, s. c. 1 B. & Ad. 568.

In an action to recover money paid by a bankrupt in contemplation of bankruptcy, on the ground of fraudulent preference, the declarations of the bankrupt as to the state of his affairs, made about the time of the transaction, but unconnected with it, are receivable in evidence.

So also are letters received by him, refusing to advance him money, for the purpose of shewing the fact of such refusal, not as evidence of other facts stated in them. *Vacher* v. *Cocks*, 1 M. & M. 353. [Tenterden]

On an indictment against a bankrupt for concealing books, parol evidence of any thing that a bankrupt says at the time of his last examination cannot be received, although it should appear that no part of what he said was taken down in writing. *Rex* v. *Walters*, 5 C. & P. 138. [Park]

(*b*) *Notice to dispute.*

Where a commission is taken out against a person who has not obtained his certificate under a prior commission which has advanced as far as assignment, a defendant in an action brought by the assignee under the second commission is not bound to give the notice required in general by the 6 Geo. 4. c. 16. s. 90; but, on shewing the fact of the prior commission and assignment, may defeat the action under the general issue. *Pillett* v. *Hopwood*, 9 Law J. K.B. 94.

A notice given to assignees under the 6 Geo. 4. c. 16. s. 90, that the party giving it intends to dispute "the petitioning creditor's debt," (without adding anything more,) entitles him merely to call for proof that it was sufficient in amount at the time of issuing the commission; and he cannot call for proof that it was sufficient in amount at the time of the act of bankruptcy. *Wilson* v. *Davison*, 8 Law J. K.B. 250.

When the assignees seek to recover from a sheriff the amount of goods seized after an act of bankruptcy; and the sheriff has given no notice of his intention to dispute the commission; whether it is necessary for the assignees to prove, that at the time of the act of bankruptcy on which they rely, there was a good petitioning creditor's debt—*quære*.

According to Lord Tenterden and Mr. Justice Parke, such proof is not necessary, unless the defendant shew some other act of bankruptcy. According to Mr. Justice Bayley and Mr. Justice Littledale, such proof is necessary. *Norman* v. *Booth*, 8 Law J. K.B. 303. s. c. 10 B. & C. 705.

(*c*) *Of the debt, trading, and act of bankruptcy.*

A deposition by a petitioning creditor, stating that the bankrupt was, "at and *before the suing out of the commission*, and still is, justly indebted to him" in a certain sum on bills drawn by the bankrupt and indorsed to him:—Held, insufficient, it not appearing that the bills were indorsed to the petitioning creditor before the act of bankruptcy. *Key* v. *Cook*, 7 Law J. C.P. 153, s. c. 2 M. & P. 720.

On opening the commission, the debt of A, the petitioning creditor, was established on two bills of exchange, one of which was dishonoured and the other undue; and the adjudication took place. The running bill was lost immediately afterwards. The commission being disputed at law by a party whom the assignee sued in trover:—Held, that it was sufficient to prove the existence of the petitioning creditor's debt (giving secondary evidence of the bill) at the date of the commission; though it was contended that it ought to exist at the commencement of the action; whereas A, at that time, could not have recovered at law, as the bill might be in the hands of a *bonâ fide* holder. *Poolly* v. *Millard*, 9 Law J. Exch. 114, s. c. 1 C. & J. 411, s. c. 1 Tyrw. 331.

Where an action is brought by assignees of a bankrupt, notice is given to dispute the petitioning creditor's debt, and it appears that the petitioning creditors are assignees of another person, a bankrupt, the depositions under that bankruptcy are not evidence (under the 6 Geo. 4. c. 16. s. 92), although the debt was one for which the creditor bankrupt might have sued the debtor bankrupt. *Muskett* v. *Drummond*, 8 Law J. K.B. 130, s. c. 10 B. & C. 183.

Evidence of a trading before the 6 Geo. 4. c. 16. may be coupled with evidence of trading since that statute, not to warrant the commission, but to shew the character and intention of the latter trading. *Worth* v. *Budd*, 9 Law J. K.B. 237, s. c. 2 B. & Ad. 172.

If, in an action by the assignees of a bankrupt, notice of disputing the trading, &c. has been given; and it appear that part of the amount claimed could not have been recovered by the bankrupt; the proceedings under the commission are not sufficient proof of the trading, &c. to entitle the assignees to go for their whole claim, and they will, on such evidence, be restricted to that part of their claim which the bankrupt could have recovered. *Gibson* v. *Oldfield*, 4 C. & P. 313. [Tenterden]

A commission of bankrupt issued after the 1st of September 1825, cannot be supported by an act of bankruptcy committed before that day. *Palmer* v. *Moore*, 7 Law J. K.B. 29, s. c. 9 B. & C. 754.

The 92nd section of the 6 Geo. 4. c. 16, which makes the depositions taken before the commissioners *conclusive* evidence of the matters therein contained, unless the bankrupt within a certain period gives notice of his intention to dispute the commission, applies only to commissions issuing after the act came into operation. *Key* v. *Cook*, 7 Law J. C.P. 153, s. c. 2 M. & P. 720.

Although a commission issued since 6 Geo. 4. c. 16. may have been founded upon a petitioning creditor's debt concocted in fraud between the bankrupt and the petitioning creditor, still, where the bankrupt himself has not disputed the commission within the time allowed by section 92. of that act, viz. within two months if in the United Kingdom, or within twelve months if out of the United Kingdom, after the adjudication of bankruptcy, the depositions and proceedings under the commission

are conclusive evidence of the facts therein contained: and, consequently, where an action is brought by the assignees acting under such a commission, for a debt which the bankrupt himself, before the issuing of the commission, could have maintained; a defendant is estopped at the trial from disputing such commission.

*Semble*—That the validity of such commission may notwithstanding be impeached on petition in bankruptcy. *Young* v. *Timmins*, 9 Law J. Exch. 4, s. c. 1 C. & J. 148, s. c. 1 Tyrw. 226.

In an action by assignees of a bankrupt, admissions on the part of the defendant, that a commission *duly issued* against the bankrupt, under which he was *duly declared bankrupt*, dispense with the necessity of proof of the act of bankruptcy, and of proceedings under the commission. *Perring* v. *Tucker*, 8 Law J. C.P. 2, s. c. 3 M. & P. 557.

The declaration of a bankrupt on his return, that he had absented himself to avoid a writ against him, is sufficient evidence of an act of bankruptcy, without any other proof of the existence of the writ, or of the debt on which it was founded, or of creditors of the bankrupt. *Newman* v. *Stretch*, 1 M. & M. 338. [Parke]

A defendant, in a suit by assignees of a bankrupt, was told, at an interview with the attorney for the assignees, (which was arranged by his own attorney, but which he thought proper to attend alone,) that his attorney had proposed that he should admit every fact, except the merits, provided the plaintiffs would waive their right of holding him to bail; and he was asked, whether that proposal was made with his authority. He replied, that it was; and that he was ready to carry it into effect, as the only question he wished to try was, whether he was liable under the undertaking he had given:—Held, that this amounted to an admission of the right of the assignees to sue, although no mention was made of it in the conversation.

*Semble*, that it would have been otherwise, if, without further explanation, he had only said that he wished to try upon the merits.

Held, also, that having received advantage from the admission, in the waiver, of the right to hold to bail, he could not afterwards withdraw it, and insist upon proof of the bankruptcy. *Davies* v. *Burton*, 4 C. & P. 166. [Tindal]

(*d*) *Admissibility of proceeding under the commission.*

The 92nd, 95th, and 96th sections of the 6 Geo. 4. c. 16, relating to the enrolment of the proceedings in bankruptcy, apply only to commissions sued out after the passing of that act. *Key* v. *Goodwin*, 8 Law J. C.P. 212, s. c. 6 Bing. 576, s. c. 4 M. & P. 341.

If a bankrupt, before his bankruptcy, let a person have goods, telling him to keep them till he (the bankrupt) wants them back, and no demand be made of them till after the bankruptcy:—Held, that if, in an action of detinue by the assignees, notice is given of disputing the bankruptcy, the proceedings are evidence of the trading, &c. under section 92 of the Bankrupt Act. *Smith* v. *Woodward*, 4 C. & P. 541. [Patteson]

In an action by assignees of a bankrupt, where there are some counts or causes of action on which the bankrupt might have sued, and others on which he could not, the proceedings under the commission are admissible in evidence, if the plaintiffs elect to proceed only on those counts which the bankrupt might have sustained. *Jones* v. *Fort*, 2 M. & M. 196. [Tenterden]

(*e*) *Competency of witnesses.*

A bankrupt is not an admissible witness either to support or to defeat the commission. *Sayer* v. *Garnett*, 9 Law J. C.P. 30, s. c. 7 Bing. 192, s. c. 4 M. & P. 734.

A bankrupt may be a witness to defeat his bankruptcy, by proving it to have been concerted. *Miles* v. *Dawson*, Peo. A.C. 54. [Kenyon]

A bankrupt cannot be a witness for his assignees until he release his allowance.—*Quære*, whether he can release it before he obtains his certificate. *Schneider* v. *Parr*, Peo. A.C. 66. [Kenyon]

An uncertificated bankrupt cannot be a witness for his assignees. *Dixon* v. *Parrs*, Peo. A.C. 137.

In an action by the assignees of a bankrupt, the bankrupt is not rendered competent unless his certificate and release are produced, or the non-production of them is accounted for. *Goodhay* v. *Henry*, 1 M. & M. 319. [Best]

A creditor is not a competent witness to support a commission of bankrupt; but where the adjudication was founded upon the evidence of a shopman, who, although a creditor, had stated, at the time of his examination, that he had no claim against the bankrupt, the Court refused to supersede the commission.

*Semble*—That if the objection be not taken before the commissioners, at the time of the examination, it cannot afterwards be urged as an objection to the commission. *Ex parte Hills*, 1 M. & M'Ar. 272.

Whether, on an indictment for concealing books, the petitioning creditor is a competent witness to prove the petitioning creditor's debt—*quære*. *Rex* v. *Walters*, 5 C. & P. 138. [Park]

Witnesses examined after bankruptcy not evidence against assignees. *Hitchins* v. *Dunston*, 1 Mont. 225.

(W) PRACTICE OF THE COURT ON PETITIONS IN BANKRUPTCY.

Order 12. of the New Orders does not apply to cases in bankruptcy. *Ex parte Chester in re Yates*, 1 Mont. 17.

Petition of person in Ireland must be signed by the petitioner. *Ex parte Cumming*, 1 Mont. 106.

If a petitioner reside in Scotland, the signature of the petitioner is sufficient, and the petition need not be signed by an agent in England. *Ex parte Paul*, 1 Mont. 252.

Although a petition by a solicitor need not be attested, it must appear on the petition that he is a solicitor.

Petition cannot, if to stay certificate, be signed in court. *Ex parte Barrow*, 1 Mont. 92.

Unless the person attesting the signatures of the petitioners, under the general order of August 1809, be the solicitor actually presenting the petition, he should state himself in the attestation to be the attorney, solicitor, or agent of the party signing, in the matter of the petition. *Ex parte Clapham*, 1 M. & M'Ar. 51.

The signature of a petitioner attested in the following terms,—"I attest this to be the signature of A. Caldecott. W. H. Ashurst, his solicitor in the matter of this petition,"—is a sufficient compliance with the general order of the 12th August 1809.

*Semble*—That the word "authenticate" would also be sufficient.

Where a petition was presented by one of four assignees, describing himself as "acting assignee," and stating the absence of two of his co-assignees, the petition was permitted to proceed. *Ex parte Caldecott*, 1 M. & M'Ar. 433.

An insufficient attestation not waived by answer. *Ex parte Hutchinson, in re Weller*, 1 Mont. 130.

General order as to affidavit upon issuing country commission to be reconsidered. *Ex parte White*, 1 M. & M'Ar. 446.

An affidavit filed the evening before the hearing, not admissible, if there were laches. *Ex parte Hall*, 1 Mont. 5.

A petition to refer an affidavit, for impertinence, must be presented before the original petition is heard. The person scandalized must petition. *Ex parte Pelham*, 1 Mont. 209.

Petition to refer for scandal, need not state the scandal. It may be by the solicitor who complains; and the respondents to the original petition need not be served. *Ex parte Kirby*, 1 Mont. 68.

A formal objection successively urged on one occasion, is not a waiver of the respondent's right to refer for impertinence, when the same petition is again called for hearing. *Ex parte Cunningham*, 1 M. & M'Ar. 193.

On an application by a person against whom a commission of bankrupt had issued, that counsel might be permitted to attend the commissioners, on his behalf, before adjudication; the Lord Chancellor declined to make any order, but intimated his opinion, that under the circumstances it would be proper for the commissioners to comply with the request. *Ex parte Taylor*, 1 M. & M'Ar. 427.

Where a petitioning creditor died after the issuing of the commission, and before adjudication, it was ordered that the commissioners should be at liberty to adjudicate upon the deposition of his executors. *Ex parte Tanner and another*, 1 M. & M'Ar. 292, n.

Petition by many creditors to prove, not multifarious if they have a common object. *Ex parte Bousfield, in re Morgan*, 1 Mont. 128: s. p. *Ex parte Howell*, 9 Law J. Chanc. 196, s. c. 1 Mont. 129.

The petition of three creditors, for an order to prove three distinct debts, held to be multifarious.

The Court will not permit the claims of different persons to be united in the same petition. *Ex parte Seer*, 1 M. & M'Ar. 280.

If the usual four-day order to pay money, or stand committed, is served, but no demand made, and the party is committed; the Court will discharge the commitment, with costs. *Ex parte Dicas*, 1 Mont. 215.

An order to enrol the proceedings, under 6 Geo. 4. c. 16. s. 96, must be made on petition, and not on motion. *In re Stephens*, 7 Law J. Chanc. 77.

An application for the Judge's notes, on a petition for a new trial, is a motion of course. *Ex parte Harwood*, 1 Mont. 8.

An application to the Court to vary the minutes of an order, before they have been settled in the secretary's office, is irregular. *Ex parte Vittery*, 1 M. & M'Ar. 435.

There is no settled rule of the Court to prevent the Lord Chancellor from rehearing a petition of appeal in bankruptcy. *Ex parte Baker*, 1 M. & M'Ar. 279.

Where, on the hearing of the cause, the Court held, that there was not sufficient evidence of the insolvency of a person, within the meaning of the Bankrupt Act, 6 Geo. 4. c. 16. s. 75, so as to render void a settlement executed by him; and the plaintiff afterwards discovered further evidence of the insolvency, which, relying on the former evidence being sufficient, he did not obtain before the hearing, though he might have done so; the Court refused to grant a rehearing, the petition not being presented within six months from the date of the decree, according to the general order; the Court also considering, that the new evidence could not be received without allowing other evidence in explanation of or contradiction to it. *Cutten v. Sanger*, 3 Y. & J. 374.

### (X) Costs.

[See 1 & 2 Will. 4. c. 56. s. 5.]

In general, costs cannot be allowed on a petition not praying costs. *Ex parte Daintry*, 1 Mont. 7.

Extra costs, incurred by assignees of a bankrupt in conducting prosecutions for perjury and conspiracy, directed to be allowed, under 6 Geo. 4. c. 16. s. 106. *Ex parte Strange and another, in re Allmond*, 1 M. & M'Ar. 31.

An order was made by the Vice Chancellor, and confirmed, on appeal, by the Lord Chancellor, that the petitioner should be admitted to prove a debt which the commissioners had rejected from an error in judgment:—Held, that the costs of all parties should be paid out of the estate. *Ex parte Fiske, in re Lawrence*, 1 M. & M'Ar. 93.

Petition in the nature of an appeal from commissioners of bankrupt, though dismissed, is not dismissed with costs. *Ex parte Colvill*, 9 Law J. Chanc. 56.

Where an equitable mortgagee applies for leave to bid at the sale of the mortgaged premises, the ordinary and proper practice is, that he should pay the costs of the order. *Ex parte Robinson*, 1 M. & M'Ar. 261.

An equitable mortgagee, by deposit of deeds without writing, exempted from paying the costs of his petition, the mortgagor having subsequently written a letter directing him to hold the deeds, after payment of his own mortgage, for a second mortgagee. *Ex parte Reid*, 1 M. & M'Ar. 114.

An assignee of a bankrupt, although not a creditor, may apply for an order of reference to the Master for taxation of the solicitor's bills, notwithstanding such bills have been settled and ascertained by the commissioners under the statute 6 Geo. 4. c. 16. s. 14. *Ex parte Barlow*, 9 Law J. Chanc. 84, s. c. 1 Mont. 87.

A creditor may petition to refer the solicitor's bill, up to the choice of assignees, to the Master for retaxation, without stating in his petition items to which he objects as settled by the commissioners. *Ex parte Key*, 1 Mont. 133.

If the assignees neglect to have the solicitor's bill of costs taxed by the commissioners, the bankrupt may, after having settled with the creditors, apply to the general jurisdiction of the Court, and obtain an order to tax the bill. *Ex parte Bayley*, 1 Mont. 208.

Under the 6 Geo. 4. c. 16. s. 14, when a creditor is dissatisfied with the taxation of the commissioners, he must present a petition for an order of reference to have the bill settled by a Master in Chancery. Without such order, the Masters have no authority to retax a bill which has been taxed by the commissioners. *Ex parte Hickman*, 1 M. & M'Ar. 252.

If upon a petition to except to taxation, and which does not pray costs, an order to retax is made, the petition praying confirmation of the certificate of retaxation may pray the costs of the original petition. *Ex parte Spurr*, 1 Mont. 6.

A petition for the payment of costs, previously ordered, which stated additional allegations:—Held to be irrelevant. *Ex parte Hinton*, 1 M. & M'Ar. 207.

### (Y) Of the Solicitor.

[Attornies and solicitors of the superior courts may practise in the Court of Bankruptcy after admission and enrolment. 1 & 2 Will. 4. c. 56. s. 10.]

*Quære*, whether an attorney may lawfully guarantee the petitioning creditor against the expenses of working the commission of bankruptcy, on condition of being employed as attorney in it. *Gillett* v. *Rippon*, 1 M. & M. 406.

The Court will not permit the solicitor to the commission, nor his partner, to be assignee. *Ex parte Rice*, 1 Mont. 259.

An attorney employed to sue out a commission of bankrupt by a person who is not the petitioning creditor, may recover his charges against his employer, in cases where no effects are ever received under the commission. *Pocock* v. *Russen*, 2 M. & M. 357, s. c. 4 C. & P. 14. [Tenterden]

A solicitor to a commission of bankrupt may maintain an action for the amount of his bill up to the choice of assignees, without having had his bill taxed by the commissioners, under section 14 of the Bankrupt Act, 6 Geo. 4. c. 16, that provision applying only to cases between the assignees and the estate. *Taylor* v. *M'Gaugan*, 4 C. & P. 96.

If a true bill for perjury is found against the solicitor to a commission, who made an affidavit in opposition to a petition to supersede, and it is necessary to produce the commission and proceedings and the original affidavit at the trial; the Court will order the solicitor to deposit them in the secretary's office, to be produced. *Ex parte Tipton*, 1 Mont. 214.

### (Z) Of the Jurisdiction of the Great Seal.

[See 1 & 2 Will. 4. c. 56.]

The Chancellor has jurisdiction, under the 6 Geo. 4. c. 16. s. 8, to declare the forfeitures and enforce the repayment prescribed by that clause. *Ex parte Gorton*, 7 Law J. Chanc. 173.

The Court, sitting in bankruptcy, has no jurisdiction to direct that the personal representatives of a deceased assignee shall account for the personal estate of the bankrupt in his hands. *Ex parte Crowe*, 1 M. & M'Ar. 281.

The Chancellor has not jurisdiction in bankruptcy to interfere with the practice of a barrister as to a retainer. *Ex parte Elsee*, 1 Mont. 69.

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## BAPTISM.

If a parish register of baptisms state that the person baptized was born on a particular day, that is not evidence of the date of his birth. *Rex* v. *Clapham*, 4 C. & P. 29. [Tenterden]

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## BARON AND FEME.

(A) Husband, Liabilities of.
(B) Wife.
  (a) *Privileges and Incapacities.*
  (b) *Property.*
(C) Of a Separation.
(D) Actions and Suits, by or against.
  (a) *In general.*
  (b) *Pleadings.*
  (c) *Evidence.*

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### (A) Husband, Liabilities of.

The plaintiff engaged with the defendant for the services of his (the plaintiff's) wife on a voyage from the East Indies to this country; and the wife, being enceinte and unable to perform the duties she had undertaken, afterwards agreed to procure a substitute at St. Helena, and that the wages paid to such substitute should be deducted from the sum to be paid for her services: to which agreement the husband subsequently assented. By a second agreement, the wife released the defendant from the residue of the money due to herself:—Held, that by adopting the first contract made by the wife at St. Helena, the plaintiff impliedly gave her authority to enter into the second agreement, and was therefore bound by it. *Harrington* v. *M'Dowell*, 7 Law J. C.P. 47.

Where a man has so dealt with a tradesman, in respect of goods supplied to his wife, or a woman who passes for his wife, as to be liable for goods supplied to her during his absence, such liability is determined by his death; and his executor is not liable for goods supplied after the fact of his death, though before that fact was known.

But there is no objection, in point of law, to the entering into an express contract which shall cover the supply of goods after the death of the husband, or apparent husband. *Blades* v. *Free*, 7 Law J. K.B. 211, s. c. 9 B. & C. 167, s. c. 4 M. & R. 282.

If a husband treats his wife cruelly, and A takes her into his house and provides her with necessaries, he may maintain an action against the husband, but cannot maintain any action for the education of the children. *Hodges* v. *Hodges*, Peo. A.C. 79. [Kenyon]

Where husband and wife are separated by a sentence of divorce *à mensâ et thoro*, pronounced by the Ecclesiastical Court, on the ground of adultery on the part of the husband, and alimony decreed, *but not duly paid*, the husband is still liable for debts contracted by his wife for necessaries.

Furniture for a house comes within the description of necessaries for which the wife may, under such circumstances, pledge her husband's credit; provided it be such as is suitable to her rank and income. *Hunt* v. *Blaquiere*, 7 Law J. C.P. 198, s.c. 5 Bing. 550, s.c. 3 M. & P. 108.

Suit by the wife in the Consistory Court against the husband. Decree obtained by her for alimony *pendente lite*. The husband regularly obeyed the decree. The suit was removed to the Court of Arches; and the decree of the inferior Court could not be enforced; but the wife might have applied to the Arches Court for a fresh decree. She did not: the husband continued to pay and she to receive the same amount, although there was no existing decree which could bind:—Held, that the husband was not liable, in an action for necessaries supplied to the wife while the suit was thus in the Arches Court. *Wilson* v. *Smyth*, 9 Law J. K.B. 155, s.c. 1 B. & Ad. 801.

A husband is not liable, under the 5 Geo. 4. c. 83. s. 3, to indemnify a parish for the support of his wife, who has committed adultery under circumstances which exempt him from civil liability to maintain her; although he has himself committed adultery. *The King* v. *Flintan*, 9 Law J. M.C. 33, s.c. 1 B. & Ad. 227.

### (B) Wife.

[See *Gregg* v. *Taylor*, 4 Russ. 279; *Foden* v. *Tinney*, Dig. Law J. 106, s.c. 4 Russ. 428.]

#### (a) *Privileges and Incapacities.*

Where husband and wife are both arrested for a debt due from the wife before marriage, the Court will set aside the arrest as to her, however fraudulent may have been her conduct. *Lawson* v. *Shepheard and Ux.* 8 Law J. K.B. 104.

A feme covert who gave a bill of exchange, which she said she would pay out of her private funds, being afterwards arrested, was discharged from custody, but without costs. *Slater* v. *Mills*, 9 Law J. C.P. 181, s.c. 7 Bing. 606, s.c. 5 M. & P. 603.

A feme covert, described as such in the will of the testator, may, during the coverture, execute by deed the power of disposition given her by the will over real and personal estate. *Downes* v. *Timperon*, 4 Russ. 334.

Held, that the indorsee might recover against the acceptor on a bill of exchange drawn and indorsed by a married woman, with the consent of her husband. *Prestwick* v. *Marshall*, 7 Bing. 565, s.c. 5 M. & P. 513, s.c. 4 C. & P. 594.

The wife of the defendant in a suit cannot be examined as a witness for the plaintiff without the defendant's consent, although it appear that he married her after she was actually subpœnaed to give her evidence in the cause. *Pedley* v. *Wellesley*, 3 C. & P. 558. [Best]

Where man and wife are divorced by act of Parliament, the wife is not competent to prove a contract made by her husband previous to the divorce. *Monroe* v. *Twistleton*, Peu. A.C. 219. [Kenyon]

Persons who cohabit as man and wife after a marriage *de facto*, supposed by both to be a good marriage in law, may, after the marriage is found to be a nullity, give in evidence, in a court of justice, statements made by each other during the cohabitation. *Wells* v. *Fletcher*, 5 C. & P. 12, s.c. 2 M. & M. 99. [Patteson]

Whether a woman who has cohabited with a man for several years, and passed herself off as his wife, can recover in trespass for the taking, under an execution against the man, of her goods being in the house in which the cohabitation took place—*quære*. But in such a case it may be left to the jury to say whether they think that, under the circumstances, the property was given up by the woman to the man; and if they do, they may find a verdict against her. *Edwards* v. *Farebrother and others*, 3 C. & P. 564.

*Semble*—That if a man and woman live together as husband and wife, the goods of the woman, in the house in which they live, are liable to seizure under an execution against the goods of the man. *Glasspoole* v. *Young*, 7 Law J. K.B. 305.

#### (b) *Property.*

[See 1 Will. 4. c. 65, 8 Law J. Stat. 134.]

A testator left annuities of 20*l.* a year to two female servants: one of the devisees married during the testator's life, upon which, by a codicil, he left her annuity for her sole and separate use: the other having married after his death, and there being no such condition attached to her annuity:—Held, that it passed to the assignees of her husband, upon his becoming insolvent. *Caunt* v. *Ward*, 7 Bing. 608, s.c. 5 M. & P. 118.

Bequest to a married woman to her separate use; the Court would not order payment into her hands, but ordered the legacy to be carried to her account, with liberty to her to apply. *Owen* v. *Lys*, 1 Tam. 404.

A man whose wife was entitled to personalty, subject to a life interest in A, becomes bankrupt, and afterwards obtains his certificate: then A dies, and afterwards the wife; and the husband takes out administration to her:—Held, that his assignees are nevertheless entitled to the property. *Ripley* v. *Woods*, 2 Sim. 165.

A entitled for life to rents of houses, and for life or until he assigns them or becomes bankrupt, &c., and then his wife entitled to an annuity during A's life.

A mortgages (representing himself to be entitled to the estate charged with the annuity) in fee.

The mortgagee files a bill for foreclosure of the annuity, and the wife claims a provision for herself and children out of it:—

Held, that the assignee of the annuity for valuable consideration was entitled to it without making any such provision for the wife and children of A. *Stanton* v. *Hall*, 9 Law J. Chanc. 111.

The husband of a woman having a vested interest in possession in a legacy, becomes bankrupt; his assignee files a bill against the testator's executors, to compel payment of the legacy, and soon afterwards the husband dies:—Held, that the widow, and not the assignee, is entitled to the legacy. *Pierce* v. *Thornely*, 2 Sim. 167.

A testator, by his will, gave an estate to A for life, and, after his death, to B in fee, charged with the payment of a yearly sum of 50*l.* to Martha, the wife of C, for her life, for her separate use; and, after her death, to C, for his life, if then living; with powers of entry and distress.

C and his wife, during the life of A, mortgaged the two annuities to plaintiff. A then died; and then C died, leaving Martha, his wife, living.

The Court held, that the mortgage, being for a valuable consideration, and binding on the wife in equity during her husband's life, was also binding on her legal interest after her husband's death; and decreed accordingly. *Major* v. *Lansley*, 9 Law J. Chanc. 102.

The father of A, on her marriage, invested money in the purchase of 1,000*l.* stock in the name of trustees, upon trust to pay the dividends to A for life; then upon certain trusts for the benefit of the children of the marriage.

By a decree in a former suit, the Court decided that a daughter who was the only child of the marriage, took a vested interest in the stock under the settlement.

This daughter married, and died in the lifetime of her mother, leaving her husband surviving. Then the husband died without having taken out letters of administration to his wife's effects, having made a will and appointed executors:—Held, that the executors were entitled to this 1,000*l.*, to the exclusion of the wife's representatives. Collusion being shewn between defendants—costs decreed against both. *Platt* v. *M'Dougall*, 9 Law J. Chanc. 150.

Where a feme covert, having separate property, joins in a security for money advanced to her husband, the Court acts upon it, not as an agreement to charge her separate property, but as an equitable appointment under the settlement, to be satisfied from the rents and profits of that property.

The death of the husband, after the filing of the bill, and before the hearing, makes no difference.

If the feme covert insists upon the exercise of undue influence by the husband, she must prove it; and it is not for the plaintiff to prove a negative. *Field* v. *Sowle*, 4 Russ. 112.

A widow, administratrix of her husband, married again, and lent her second husband money, which she had in her character of administratrix. The husband and two other persons, as his sureties, gave the wife a promissory note payable with interest to her. She survived her second husband:—Held, that although no action could have been brought on the note during his life, she, having survived, was entitled to maintain an action upon it against the surviving makers.

In the above case, more than six years had elapsed between the making of the note and the bringing of the action, but less than six years between the death of the husband and the bringing of the action:—Held, that the Statute of Limitations was no bar.

And held, that interest was recoverable from the time of the making of the note, although no action could be brought until the death of the husband. *Richards* v. *Richards*, 9 Law J. K.B. 319, s. c. 2 B. & Ad. 447.

A feme covert having an interest for life to her separate use, and a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, and appointed the fund after her death, to trustees, upon trust to invest the fund in the immediate purchase of an annuity for her life. The Court ordered a transfer of the fund to the new trustees accordingly. *Lynn* v. *Ashton*, 1 R. & M. 188, s. c. 1 Tam. 328.

A feme covert, tenant in tail in remainder of money to be laid out in land, by arrangement with the tenant for life, and on a private examination, under the 7 Geo. 4. c. 45, consented to the payment of a proportion of the money to her husband; and the order was made accordingly. *In re Silcock's estate*, 3 Russ. 369.

Where the husband incurs a forfeiture under the 23rd section of 4 Geo. 4. c. 76, the Court has no discretion to mitigate the penalty; but is bound to settle and secure all property, present and future, of the wife for the benefit of herself or the issue of the marriage. *Attorney General* v. *Mulley*, 4 Russ. 329.

Possession of land by a woman during three months, while she continues sole, and by her husband afterwards for 40 years, is evidence of title in the heir of the wife, sufficient to rebut the inference of seisin in the father of the wife, grounded upon his prior possession; it appearing that the son and heir of the father lived in the immediate neighbourhood during the occupation of the husband. *Doe* d. *Carr.* v. *Billyard*, 3 M. & R. 111.

### (C) Of a Separation.

[See Divorce.]

Deeds of separation, in 1817 and 1818, between Lord and Lady W. By the deed of 1817, it is provided, that the parties shall continue to reside together and cohabit as husband and wife; but that on the renewal of dissensions, the separation shall immediately take effect. Disputes continue, and the deed of 1818 is executed, which provides for an immediate separation; but Lady W. is prevailed upon to allow her husband to occupy apartments in the same house with her till he can procure an appointment abroad. They accordingly live, dine, and visit together for about a year after the execution of the deed, but without cohabitation as husband and wife. Bill by Lord W. to set aside the deeds, chiefly on the ground of their being contrary to public policy, and the deed of 1817 is declared to be null and void, reserving the rights of a child of the marriage, and no appeal by Lady W. against the decree. As to the deed of 1818, the bill is retained for twelve months in the usual way, to give the parties an opportunity to try the question of its validity at law. Neither of the parties avail themselves of this opportunity; but Lord W. appeals against the decree to the House of Lords. The judgment of the Court below affirmed, enlarging the time of retaining the bill, so as to enable the parties still to try the question at law:

The Lord Chancellor and Lord Eldon being clearly of opinion that the deed of 1817, providing for a future separation, could not be supported; and the Lord Chancellor being decidedly of opinion that, under the circumstances of the parties living together, although without cohabitation as husband and wife, the deed of 1818 could not be sustained; and Lord Eldon being of the same opinion, but more cautiously, and with an anxiety that the question should still be tried at law, with the record put into such a shape that it might be again brought by writ of error before the House for final adjudication. *Westmeath* v. *Westmeath*, 1 D. & C. A.C. 519.

(D) ACTIONS AND SUITS, BY AND AGAINST.

(a) *In general.*

Husband and wife may join in an action upon a ause of action which appears to have accrued to he wife during coverture.

But they must join *as* husband and wife;—and ccordingly, where a declaration set out a cause f action as accruing to Samuel Barber and Sarah arber, not describing them as husband and wife, hough in fact they were; and the cause of action ppeared to have arisen to Sarah Barber during overture:—Held, that the evidence did not suport the declaration; inasmuch as that, except as usband, Samuel was a stranger to the cause of ction. *Barber* v. *Stokes*, 7 Law J. K.B. 206.

If the husband do not reduce the wife's choses in ction into possession during her life, he will not e entitled after her death to sue for them in a court f law, until he has taken out administration.

And his representatives, in such a case, must take ut administration to the wife before they can so sue t law.

But the husband, or his representatives, will be ntitled to the beneficial interest. *Betts* v. *Kimpton*, Law J. K.B. 192, s. c. 2 B. & Ad. 273.

(b) *Pleadings.*

Where freehold, copyhold, leasehold, and funded roperty, was settled to the separate use of a married woman, and she contracted a debt for law harges whilst living separate from her husband, nd wrote letters containing promises to pay; and, n a bill filed by her solicitor for his law charges, he put in a general demurrer:—Held, that she vas bound to answer, and the demurrer was overuled. *Murray* v. *Barlee*, 9 Law J. Chanc. 87.

(c) *Evidence.*

The onus of proving expressly that a married voman, living apart from her husband, has the neans of supporting herself, is not always cast upon he husband, in resisting a demand for necessaries upplied to her whilst so separated.

Where, therefore, it appeared that a married woman for some years subsequent to a separation from her husband maintained herself, and then went to ive with her son-in-law, who brought an action gainst the husband for necessaries,—the Court reused to disturb a verdict for the defendant on the round that it was against evidence. *Burge* v. *Jones*, Law J. K.B. 59, s. c. 3 M. & R. 121.

## BASTARD.

[See MISDEMEANOR and POOR.]

A husband and wife lived separate from each ther under articles of separation, their residence eing about fifteen miles apart; but they occasionally saw each other. The wife was living in adulery with her servant: she became pregnant, and was delivered of a child; the birth was concealed, nd was never known to the husband; the child was baptized as being base born—was never called by the name of the husband, and was treated by the mother as the child of the servant. Upon the trial of an issue on the point of legitimacy, the jury found that the child was the legitimate child of the husband. A new trial being directed, the second jury returned an opposite verdict: the Judge, who tried the issue, having stated that he was dissatisfied with this verdict, a third trial was directed; and on that occasion eleven of the jury being in favour of the legitimacy, but the twelfth refusing to concur, the jury were discharged without coming to a verdict:—Held, that the child was not in law the child of the husband. *Morris* v. *Davies*, 8 Law J. Chanc. 120, s. c. 3 Russ. 318.

A bond given by the putative father to the churchwardens and overseers for 2*s.* 6*d.* per week as long as the child should be provided for at the expense of the parish, is valid as an indemnity *pro tanto*, and may be sued upon by succeeding overseers.

It is not an answer to an action upon such bond, that the putative father was able and willing to maintain the child himself, and had requested the plaintiffs to deliver it to him for that purpose.

*Quære*, whether, as a general question, the putative father has a right to the custody of the child as against the parish officers. *Pope* v. *Sale*, 9 Law J. C.P. 150, s. c. 7 Bing. 477, s. c. 5 M. & P. 336.

## BEER.

[See LICENCE.]

## BENEFIT SOCIETY.

The word "Insolvent," in 33 Geo. 3. c. 54. s. 10, means a person who has taken the benefit of an Insolvent Debtors Act; and not one who has merely made an assignment of his effects for the benefit of his creditors. *In re Birmingham Benefit Society*, 3 Sim. 421.

The Court will not enjoin a society from dissolving itself where a great majority of its members agree to such dissolution, notwithstanding a rule, that if "three agree to hold the society, it shall not be dissolved." *Waterhouse* v. *Murgatroyd*, 9 Law J. Chanc. 272.

## BIGAMY.

In an indictment for bigamy, the second wife was described as "E. C., widow." She was in fact not a widow, nor had she ever been represented or reputed to be so:—Held, a fatal variance. *Rex* v. *Deeley*, 4 C. & P. 579. [Law, Com. Serjt.]

## BILL OF EXCEPTIONS.

The opinion of a Judge directing the plaintiff in an action to be nonsuited, if it does not appear on the record, cannot be questioned in a writ of error. The plaintiff, if he intends to bring a writ of error on the ground of misdirection in point of law, should not submit to be nonsuited; but appear, and put the Judge to express such opinion by way of direction to the jury; and thereupon tender a bill of exceptions to the Judge, and procure his signature thereto. *Doe* v. *Fisher*, 2 Bligh, N.S. 9.

A case cannot be argued or decided on the vagueness and generality of the direction of the Judge, if such an objection was not taken at the trial, and

does not form part of the bill of exceptions. *Ball* v. *Mannin*, 3 Bligh, N.S. 1, s. c. 1 D. & C. 380.

The defendant having sent to the plaintiff a draft of a bill of exceptions, after a writ of error brought, the latter refused to return it, considering it waived by the writ of error. A Judge's order having been obtained by the defendant for its delivery within a certain period—the Court refused to rescind that order. *Williams* v. *Taylor*, 8 Law J. C.P. 171, s. c. 6 Bing. 519, s. c. 4 M. & P. 257.

Where a bill of exceptions was virtually, but not in point of form, tendered to the Judge on the trial of a cause, and afterwards the plaintiff proceeded, urging on the defendant upon his writ of error; and the bill of exceptions had not been tacked to the record when the record was transcribed:—Held, that still the court of error had the power to allow the bill of exceptions to be afterwards tacked to the record. *Taylor* v. *Williams, in Error*, 9 Law J. K.B. 31.

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## BILL OF EXCHANGE.

[See Trover and Bankrupt.]

(A) Validity.
(B) Parties.
(C) Form and Construction.
(D) Consideration.
(E) Stamp.
(F) Cancellation.
(G) Alteration.
(H) Acceptance.
(I) Acceptor.
(K) Transfer and Indorsement.
(L) Presentment for Payment.
  (a) *Time.*
  (b) *Place.*
(M) Notice of Dishonour.
  (a) *When necessary.*
  (b) *Form.*
  (c) *Time.*
  (d) *When waived.*
(N) Actions and Suits.
  (a) *Where maintainable.*
  (b) *By and against whom.*
  (c) *Lost Bills and Notes.*
  (d) *Staying Proceedings.*
  (e) *Pleading and Evidence.*
  (f) *Witnesses.*
  (g) *Defence.*
  (h) *What recoverable.*
  (i) *Verdict.*
  (k) *Rule to compute.*

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### (A) Validity.

*Semble*—That a bill made and accepted on a Sunday would not be void, it being an act not in the exercise of an ordinary calling within the meaning of the statute 29 Car. 2. c. 7. *Begbie* v. *Levy*, 9 Law J. Exch. 51, s.c. 1 C. & J. 180, s. c. 1 Tyrw. 130.

A bill of exchange given for differences in stock-jobbing is not void in the hands of an indorsee for value without notice. *Day* v. *Stuart*, 7 Law J. C.P. 249, s. c. 6 Bing. 109, s. c. 3 M. & P. 334.

A bill of exchange for 185*l.*, drawn for a bet on the St. Leger stakes:—Held, invalid in the hands of a *bonâ fide* third indorsee, who took it for full valuable consideration without notice. *Shillito* v. *Theed*, 9 Law J. C.P. 135, s. c. 7 Bing. 405, s. c. 5 M. & P. 303.

### (B) Parties.

*Semble*—Where the parties intended that a promissory note should be joint and several, but through ignorance it is expressed to be joint only,—a Court of equity will relieve as well against the surety as against the principal.

But, where a joint promissory note, signed "J. and J. E. — J. P., surety," was given to a creditor of the firm of J. and J. E., and J. P. died, J. and J. E. being both alive, one of whom afterwards became bankrupt, and the other insolvent:—Held, that the promissory note could not be considered as several against J. P., the surety. *Rawlins* v. *Parr*, 8 Russ. 424.

### (C) Form and Construction.

An instrument purporting to be a promissory note, was given by a man and his wife, payable on demand to the father of the wife, "for value received in stock of ale, &c.; this being intended to stand against me, the undersigned Mary, as a set-off for that sum left me in my father's will above my sister Ann's share:"—Held, that this was a special agreement, and not a promissory note. *Clarke* v. *Percival*, 9 Law J. K.B. 296, s. c. 2 B. & Ad. 660.

A paper in these words—"Mr. L., please to let the bearer have 7*l.*, and place it to my account, and you will oblige your humble servant R S," is not a bill of exchange. *Little* v. *Slackford*, 2 M. & M. 171: [Tenterden]

### (D) Consideration.

[See *ante*, A.]

A bill of exchange was given for the amount of premium to the master upon an indenture of apprenticeship. For some months the apprentice continued with the master, and was boarded and instructed by him. Disputes then arose; it was discovered that the indenture was on a wrong stamp, and the apprentice left his master:—Held, that this was but a partial, and not a total failure of consideration for the bill; and, consequently, that the acceptor could be sued upon it. *Mann* v. *Lent*, 8 Law J. K.B. 269, s. c. 10 B. & C. 877.

Where a bill of exchange is given in payment for goods; and, some time after they have been in the possession of the buyer, the seller forcibly retakes them, this does not amount to a rescinding of the contract of sale, nor does it work an entire failure of consideration for the bill, so as to supply a defence by the acceptor (the buyer) to an action by the drawer (the seller) upon the bill. The remedy of the buyer for the retaking of the goods must be sought by action against the seller. *Stephens* v. *Wilkinson*, 9 Law J. K.B. 231, s. c. 2 B. & Ad. 320.

When a promissory note, payable on a given day, is made at the same time with an agreement for the sale and conveyance of an estate, of the consideration for which the sum secured by the note is a part, the maker of the note is bound to pay the amount at

the given day, although the estate has not been conveyed, provided the contract of sale remain open. *Spiller* v. *Westlake*, 9 Law J. K.B. 224, s. c. 2 B. & Ad. 155.

(E) STAMP.

A bill drawn in sets out of Great Britain, payable after sight, was, for a fraudulent purpose, by the drawer, accepted in all the parts, and at different days of sight:—Held, nevertheless, not to require an English stamp, under the 55 Geo. 3. c. 184. *Holdsworth* v. *Hunter*, 8 Law J. K.B. 149, s. c. 10 B. & C. 149.

If a promissory note be altered by consent of parties at any time after it has once been paid away, there must be a fresh stamp. *Wilson* v. *Justice*, Pea. A.C. 96. [Kenyon]

A bill of exchange upon a wrong stamp is so far unavailable, that the holder is not bound to give notice of its dishonour, or even to present it to the acceptor; and his failing to do either does not deprive him of his right of action against any party from whom, upon the faith of its being an available bill, he has taken it in payment. *Cundy* v. *Marriott*, 9 Law J. K.B. 70, s. c. 1 B. & Ad. 690.

(F) CANCELLATION.

Where an acceptance is cancelled by mistake, and the mistake is discovered immediately, and an explanation written on the face of the bill, the rights and liabilities of the different parties remain as they were before the cancellation.

Where such a bill, drawn in France upon a person in England, and there accepted and made payable, was so cancelled; and one of the indorsees brought the question before a French Court, which, in mistake of the English law, decided that the holder could not recover:—Held, nevertheless, that he might recover in an action against the indorser, who had so raised the question before the French Court; although he had by their decision lost his remedy against the drawer and prior indorsers. *Novelli* v. *Rossi*, 9 Law J. K.B. 307, s. c. 2 B. & Ad. 757.

(G) ALTERATION.

A bill of exchange drawn by A payable to his own order, and accepted by B generally, was altered with the consent of B, while it continued in the hands of A, by the addition of a particular place of payment to the acceptance. This alteration does not vitiate the bill, so as to prevent the acceptor from being liable to it. *Stevens* v. *Lloyd*, 1 M. & M. 292. [Tenterden]

Where a bill has been altered after acceptance, it is incumbent on the party seeking to enforce it, to shew under what circumstances the alteration was made. *Heuman* v. *Dickinson*, 7 Law J. C.P. 68, s. c. 5 Bing. 183, s. c. 2 M. & P. 289.

(H) ACCEPTANCE.

It is no objection that the acceptance was written before the bill was drawn; and it is no variance if the declaration alleges the acceptance of the bill, as when drawn. *Molloy* v. *Delves*, 9 Law J. C.P. 171, s. c. 7 Bing. 428, s. c. 5 M. & P. 275.

An acceptance in blank is sufficient to charge the acceptor, where the bill is afterwards drawn in pursuance of his authority. The 1 & 2 Geo. 4. c. 78. s. 2. does not affect such acceptances. *Leslie* v. *Hastings*, 2 M. & M. 119. [Lyndhurst]

An unsigned acceptance written on the face of a bill of exchange, is not made invalid by statute 1 & 2 Geo. 4. c. 78. s. 2; but it is a question for the jury, whether it was intended to operate in its present form, or to be subsequently completed by signature. *Dufaur* v. *Oresden*, 2 M. & M. 90. [Patteson]

A bill of exchange drawn in Ireland upon a person in England, is not an *inland* bill, according to the 9 & 10 Will. 3. c. 17.

Consequently, such a bill does not require a *written* acceptance on the bill, according to the 1 & 2 Geo. 4. c. 78, which is confined to inland bills. *Mahoney* v. *Ashlin*, 9 Law J. K.B. 264, s. c. 2 B. & Ad. 478.

A bill of exchange was drawn in America upon a house *in Liverpool*, payable to the order of L & Co. *in London*, and by L & Co. indorsed to the plaintiffs, merchants at Glasgow. Before the arrival of the bill at Liverpool to be presented, the drawees failed; but the bill was duly presented and protested for non-acceptance, and notice sent to L & Co. the payees in America:—Whereupon, the defendants, merchants in London, accepted for honour, in this form:—"Accepted, under protest, for honour of Messrs. L & Co., and will be paid for their account, *if regularly protested and* REFUSED *when due*." When due, the bill was again presented to the drawees at *Liverpool* and refused payment. It was then protested at *Liverpool*, and notice in due course, sent to the defendants. They refused to pay, contending, that, according to the body of the bill, and the custom among London merchants in such cases, the protest ought to have been in *London*. But the Court held, that, by the peculiar form of the acceptance for honour, the presentment and protest at Liverpool were necessary and sufficient.

Whether, in case the acceptance for honour had not the additional words, "*if regularly protested and refused when due*," a presentment and protest at Liverpool would have been necessary, or whether a protest in London would have been sufficient—*quære*. *Mitchell* v. *Baring*, 8 Law J. K.B. 18, s. c. 10 B. & C. 4.

(I) ACCEPTOR.

The holder of a bill purporting to be, but not in fact, accepted by the person to whom it is addressed, cannot recover against the apparent acceptor, by proving a fact subsequently discovered, that, on a former occasion the defendant had given a general authority to the person who accepted in his name, to accept bills for him. To make such authority available for such a purpose, he must shew, either that the authority remained unrevoked at the time of the acceptance, or that he took the bill on the faith of such authority. *Cash* v. *Taylor*, 8 Law J. K.B. 262.

The acceptor of a bill of exchange is entitled to maintain trover for it against indorsees, who received it from the drawer, with the full knowledge that as between him and the acceptor, there was no value received; and that he had no authority to part with it; provided it appear that the acceptor supplied the stamp and paper, or that he is liable to be charged with it, in account between him and the drawer.

Bunn v. Hymer, 9 Law J. K.B. 92, s. c. 1 B. & Ad. 239.

The accommodation acceptor of a bill, who pays it to a bona fide holder after action brought by him, cannot recover the costs of such action against the person who is bound to him for the sum paid on the bill. Bunn v. Thompson, 2 M. & M. 497, s. c. 4 C. & P. 239. [Tenterden.]

Where the drawer of a foreign bill of exchange drawn in sets, accepts several parts of the same set, the majority in the whole, as between the different holders, belongs to the party to whom any part is first transferred.

But the acceptor, under such circumstances, cannot resist the claim of either of the holders. Hounsworth v. Hunter, 8 Law J. K.B. 149, s. c. 10 B. & C. 622.

Where the drawer or indorser of a bill is sued by the holder, and pays the costs of the action, he has no legal remedy over, against the acceptor, for the amount of those costs, unless there be an express promise to pay them. Dawson v. Morgan, 7 Law J. K.B. 304.

(K) Transfer and Indorsement.

The indorsement by a married woman, with her husband's consent, of a bill of exchange drawn by her, in banking upon him, and will pass the interest in the bill to the indorsee, so as to enable him to sue the acceptor. Prentwick v. Marshall, 4 C. & P. 594, s. c. 7 Bing. 565, s. c. 5 M. & P. 513. [Bosanquet]

Where a person accepts a bill of exchange payable to order, drawn by a person in a fictitious name, and knows at the time that it has been drawn in such a name, his acceptance binds him to pay upon the indorsement made in the same handwriting as the drawing; and he cannot, in an action by an indorsee for value, take any advantage of the indorsement having been made in such fictitious name.

Where a bill is drawn by procuration, and it appears to have been the course of dealing in the business of the drawer, that bills are drawn, accepted, and indorsed by that procuration, the acceptor of a bill so drawn, and payable to order, binds himself to pay upon an indorsement by the same procuration. Cooper v. Meyer, 8 Law J. K.B. 171, s. c. 10 B. & C. 468.

Where A draws a bill on B, payable to his own order, to enable him, by accepting it, and passing it away, to raise money, and sends it to him with his name indorsed in blank,—*quere*, whether he can maintain its general negotiability, by inserting the words "pay to the order" over the name of A written on the back. Bland v. Ryan, Pea. A.C. 39. [Kenyon]

A bill of exchange may be indorsed on a certain condition, as for a particular purpose; and if such condition or purpose be expressed on the face of the indorsement, the person who receives such a bill, must receive it liable to all the consequences resulting from a breach of the condition, or a failure of the purpose.

Whether such a restriction will apply to every subsequent indorsee *quere*.

A bill of exchange drawn in America, on a house in London, payable to order, was indorsed by the payee generally to A, and by him in these words, "Pay to B, or his order, for my use." B applied to his bankers to discount the bill, and they, without making any inquiry, did so, and applied the proceeds to the use of B:—Held, that the indorsement was restrictive; that the property in the bill remained in A; and that he was entitled to recover the amount from the bankers. *Sigourney* v. *Lloyd*, 7 Law J. K.B. 73, s. c. 8 B. & C. 622, s. c. 3 M. & R. 58: in error, 3 Y. & J. 220, s. c. 5 Bing. 525, s. c. 3 M. & P. 229.

(L) Presentment for Payment.

(*a*) *Time.*

Bill accepted, made payable at a place in London, not a banker's, taken on the evening of the day it became due, between seven and eight; the bell of the house rung unsuccessfully, and no answer obtained:—Held, to be a good presentment, and not at an unreasonable hour, the place not being a banker's. *Wilkins* v. *Jadis*, 9 Law J. K.B. 173, s. c. 2 B. & Ad. 188, s. c. 2 M. & M. 41.

(*b*) *Place.*

Where a promissory note mentions the place of payment in the body of the note, the plaintiff must aver and prove a presentment.

But, where the place of payment is mentioned at the foot of the note, it is considered merely as a memorandum; as no part of the contract; and, consequently, it should not be noticed in the declaration, and presentment need not be proved. *Williams* v. *Waring*, 8 Law J. K.B. 7.

Although a bill of exchange, accepted "payable at," &c., is a general acceptance, and does not compel the holder, in an action against the acceptor, to prove presentment at the place expressed, yet presentment at that place is a good presentment to the acceptor for the purpose of an action against the drawer. *Hartley* v. *Spittal*, 7 Law J. K.B. 83.

A foreign bill of exchange, drawn on Liverpool, payable to order in London, and refused acceptance, was afterwards accepted for honour in London. When it became due, it was presented, and protested for non-payment at Liverpool, where the drawer lived. *Semble*, that this is sufficient; and that it is not necessary to protest it in London for non-payment. *Semble*, that a protest in London on that day would generally have been sufficient also. The acceptance for honour being in these words—"Accepted under protest for honour of L H & Co., and will be paid on their account, if regularly protested and refused when due:"—Held, that presentment at Liverpool was proper and necessary under this form of acceptance. *Mitchell* v. *Baring*, 8 Law J. K.B. 18, s. c. 10 B. & C. 4, s. c. 2 M. & M. 381, s. c. 4 C. & P. 35. [Tenterden]

(M) Notice of Dishonour.

(*a*) *When necessary.*

The holder of a bill of exchange, which has been accepted for the accommodation of the drawer, is bound to present the bill and to give notice to the drawer of its non-payment, although the acceptor never had any effects of the drawer in hand to meet it. *Norton* v. *Pickering*, 7 Law J. K.B. 85, s. c. 8 B. & C. 601, s. c. 3 M. & R. 23.

The drawer of a bill of exchange is in all cases entitled to notice of its dishonour, where he has

reason to expect that he will not be called upon to pay it.

Therefore, where one T, at the instance of one R (who was indebted to the defendant), accepted a bill drawn on him by the defendant, having no assets in his hands belonging to the defendant:—Held, that, on the dishonour of the bill, the defendant was entitled to notice; and notwithstanding he had, previously to the maturity of the bill, been informed by T, the acceptor, that he had not the means of paying the bill. *Lafitte* v. *Slatter*, 8 Law J. C.P. 273, s. c. 6 Bing. 623, s. c. 4 M. & P. 457.

Where the drawer of a bill of exchange made it payable at his own house:—Held, that the jury might fairly infer that it was an accommodation bill, which made it unnecessary to give him notice of non-payment by the acceptor. *Sharp* v. *Bailey*, 9 B. & C. 44, s. c. 4 M. & R. 4.

(*b*) *Form.*

In an action, indorsee against indorser, a letter written by the holder's attornies, saying, "A bill for 683*l.* drawn by K upon I, and bearing your indorsement, has been put into our hands by A, with directions to take legal measures for the recovery thereof, unless immediately paid to—Yours, &c.:" Held, not to be a sufficient notice of the dishonour. *Solarte* v. *Palmer*, 9 Law J. Exch. 121, s. c. 7 Bing. 530, s. c. 5 M. & P. 495, s. c. 1 C. & J. 417, s. c. 1 Tyrw. 371.

(*c*) *Time.*

Notice of the dishonour of a bill by the acceptor, may be given to the other parties, on the same day that the bill has become due, although the dishonour by the acceptor may have been not an absolute refusal, but a mere neglect to pay on presentment. *Clowes* v. *Chaldecott*, 7 Law J. K.B. 147.

(*d*) *When waived.*

Where the plaintiff, in an action against the drawer of a bill of exchange, does not prove express notice given in due time of the dishonour of the bill, but relies upon certain facts in the defendant's own conduct subsequently, as shewing that he had notice, and knew that he was liable to pay, those facts must be left to the jury; and the Judge at Nisi Prius will not pronounce upon their legal effect without submitting the case to the jury. *Ricketts* v. *Toulmin*, 7 Law J. K.B. 108.

Where the defendant was sued as the DRAWER of a bill; the acceptance of which made the bill payable at the defendant's own house; and the words which so made it payable were in the handwriting of the defendant; and the bill when due was presented at the house of the defendant, and the answer given was, "no effects:"—Held, that this was evidence to go to the jury, in the absence of proof of positive notice, to satisfy them that the defendant knew the bill was not paid by the acceptor; and, the jury having found a verdict for the plaintiff, the Court refused to set it aside. *Slark* v. *Bailey*, 7 Law J. K.B. 138.

(N) ACTIONS AND SUITS.

[*Firth* v. *Thrush*, 2 M. & R. 359, Dig. Law J. 119; *Edmunds* v. *Lowe*, 2 M. & R. 427, Dig. Law J. 121.]

(*a*) *Where maintainable.*

An indorsee of a bill of exchange, dated on a Sunday, brought an action against the acceptor thereof. There was no evidence of the bill being accepted on that day:—Held, that the indorsee could recover. *Begbie* v. *Levy*, 9 Law J. Exch. 51, s. c. 1 C. & J. 180, s. c. 1 Tyrw. 130.

(*b*) *By and against whom.*

A person discounting a bill payable to a fictitious payee, for the benefit of the drawer, and with knowledge of the transaction, cannot recover against the acceptor. *Hunter* v. *Jeffery*, Pea. A.C. 146. [Kenyon]

An indorsee of a bill or note taking it under an agreement not to sue the indorser cannot sue such indorser, though the indorsement be unqualified. *Pike* v. *Street*, 2 M. & M. 226. [Tenterden]

If A permits B to draw bills in his name, he is liable as drawer to ignorant indorsees, although he had no interest, or knew of the particular bills drawn; but he is not liable to a payee having knowledge of the transaction. *Smith* v. *Stanger*, Pea. A.C. 116: s. P. *Curtis* v. *Barrs*, Pea. A.C. 119. [Kenyon]

If A authorise B to draw bills upon him, and B do so, A is not liable to be sued as the drawer of those bills. *Ducarrey* v. *Gill*, 4 C. & P. 121, s. c. 1 M. & M. 450. [Tenterden]

Where a person signs a promissory note, on a representation that others are to join, and one afterwards refuses to sign, the payee cannot recover in an action on the note against the person who signed it, unless the jury are satisfied that such person, knowing the facts, and being aware of his rights, had consented to waive his objections. *Leaf* v. *Gibbs*, 4 C. & P. 466. [Tindal]

(*c*) *Lost Bills and Notes.*

A bill will lie by the last indorsee of a lost bill of exchange, to recover the amount from the acceptor; and prior indorsees need not be made parties to the suit. *Macartney* v. *Graham*, 2 Sim. 285.

The person entitled to a bill of exchange, which had been lost, having offered the acceptor a sufficient indemnity, and the latter still declining to pay the amount, the Court made a decree for payment, with costs. *Macartney* v. *Graham*, 9 Law J. Chanc. 198.

(*d*) *Staying Proceedings.*

In an action on a bill of exchange (by indorsee against acceptor) a rule requiring the plaintiff to deliver up the bill on payment of debt and costs, was held to be complied with by the plaintiff's delivering it up in such a state of obliteration as to render it totally useless—the names of the drawer and indorsers being blotted out. *Tomlins* v. *Lawrence*, 8 Law J. C.P. 111, s. c. 6 Bing. 376, s. c. 4 M. & P. 54.

Courts of equity have a concurrent jurisdiction with the courts of law in relieving against promissory notes, taken when over-due. *Hodgson* v. *Murray*, 2 Sim. 515.

(*e*) *Pleading and Evidence.*

The averment of the acceptance of a bill of exchange need not state such acceptance to be in writing. *Chalis* v. *Belshaw*, 8 Law J. C.P. 176, s. c. 6 Bing. 529, s. c. 4 M. & P. 275.

In an action by the indorsee against the acceptor of a bill of exchange, it is no objection to the plaintiff's right of recovery, that the acceptance actually took place before the drawer's name was signed, although the declaration be in the usual form—viz. that the bill being drawn, the defendant afterwards accepted, and that the transaction was according to the custom of merchants. And it is not necessary that the plaintiff, in such action, should offer any evidence to shew that it is the custom of merchants so to transact business. *Molley* v. *Delzes*, 9 Law J. C.P. 171, s. c. 7 Bing. 428, s. c. 5 M. & P. 275, s. c. 4 C. & P. 402.

The declaration in an action on a bill of exchange stated it to have been drawn by one Hannah P, accepted by the defendant, and indorsed by the said Hannah P. to the plaintiffs. The drawing and indorsement appeared to be in this form:—"Per pro. H P." John P, a clerk of the plaintiffs, proved that the drawing and indorsement were of the handwriting of a Mr. John P, whom he understood to be the son of a Mrs. P, whom he had never seen, but with whose house the house of his employers had dealings, and that he had seen bills drawn and accepted in the same form as the bill in question, some of which bills had been paid. The plaintiffs, on this evidence, had a verdict; and a rule *nisi* for a new trial having been obtained, an affidavit, in consequence of an observation made by the Lord Chief Justice, was produced, stating the name of the party to be Hannah P, and that the bill was drawn by her authority. And the Court of King's Bench, on the whole evidence, refused to make the rule for a new trial absolute. *Jones* v. *Turnour*, 4 C. & P. 205. [Tenterden]

In an action on a bill of exchange, which the defendant contends is a forgery, other bills of the defendant may be produced to the jury (if literate) to compare the handwriting. *Allesbrook* v. *Roach*, Peas. A.C. 26. [Kenyon]

In an action by the indorsee against the acceptor of a bill of exchange, the witness called to prove the handwriting of the drawer, stated that neither the drawing nor indorsement was of the handwriting of the person whose they purported to be. But it was proved that the defendant had acknowledged the acceptance to be his, and it was contended, that, as the acceptance admitted the drawing to be correct, the jury might find for the plaintiff, if they thought, upon inspection of the bill, that the drawing and indorsement were of the same handwriting. But it was held to be necessary that some proof should be given as to whose the handwriting was. *Allport and another* v. *Meek*, 4 C. & P. 267. [Tindal]

In an action against partners, on a bill of exchange, where the defence is, that one partner, with the knowledge of the plaintiff, accepted the bill in the name of the partnership firm for his private debt; other bills of exchange, accepted by that partner and paid by the other, are not so necessarily connected with the subject of the trial, as to render a notice, served on the attorney of a defendant, too late for him to procure the bills from the defendant himself, sufficient to let in secondary evidence. *Aflalo* v. *Fourdrinier*, 1 M. & M. 335, n. [Tindal]

Promissory note, on the face of it payable on demand. Evidence that, at the time it was made, the parties agreed it should not be payable until the payee gave up possession of certain premises (part of the consideration) held to be inadmissible. *Mady* v. *Hanford*, 8 Law J. K.B. 261, s. c. 10 B. & C. 729.

A promissory note was given by a widow, which purported to be "for value received by my late husband:"—Held, that the note was valid on the face of it, and that evidence could not be given of a consideration inconsistent with the terms of it. *Ridout* v. *Bristow*, 9 Law J. Exch. 48, s. c. 1 Tyrw. 84, s. c. 1 C. & J. 231.

In an action by the indorsee against the acceptor of a bill of exchange, the defendant may shew that the bill was originally given without consideration, though he has given no notice of disputing the consideration. *Mann* v. *Lent*, 2 M. & M. 240. [Tenterden]

*Semble*—That where it appears that a bill or note has been given without consideration as between the original parties, that circumstance alone is sufficient, in an action by the holder, to call upon him to give proof of consideration; although no previous notice has been given that such proof would be required. So held, by Lord Tenterden, Mr. Justice Littledale, and Mr. Justice Patteson.

*Dubitante* Mr. Justice Parke, whether the defendant should not go further, and either give a previous notice that he intended to call for proof of consideration; or shew, not only that there was no consideration for the bill or note in the first instance, but that it was obtained by felony, fraud, or duress. *Heath* v. *Sanson*, 9 Law J. K.B. 246, s. c. 2 B. & Ad. 291.

By an instrument, purporting to be a promissory note, S J, nine years after the date thereof, promised to pay to J M and S M the sum of 75*l.*, with lawful interest, provided D M should not return to England, or his death be duly certified in the meantime, for value received.—Held, first, that the words "value received" in such instrument did not imply a money consideration to support an averment, in special counts, of money lent by the plaintiffs to the defendant. And, secondly, that such instrument, being void as a promissory note, could not be given in evidence on the common money counts, or on a count for an account stated, although sued on by the original payee. *Morgan* v. *Jones*, 9 Law J. Exch. 41, s. c. 1 Tyrw. 21, s. c. 1 C. & J. 162.

Proof that the drawer of a bill knew, two days after its maturity, that it was unpaid, and in the hands of a particular indorsee, and objected to pay it on the ground of fraud in the obtaining of it, is evidence to go to a jury that he had received regular notice of dishonour. *Wilkins* v. *Jadis*, 2 M. & M. 41. [Tenterden]

In an action on a bill of exchange, where the declaration alleges that notice of dishonour was given to the defendant, it will satisfy the allegation to shew that notice was given before action brought, although, from the party's not being to be found, it was not given at the proper time. But, *semble*, that such an allegation is not satisfied by proof of the use of due diligence in endeavouring to find the party, where no notice had been given at all. *Harris* v. *Richardson*, 4 C. & P. 522. [Tenterden]

Declarations by payee of a promissory note, made during a treaty for giving the note—Held inadmissible, in an action by an indorsee against the maker, in support of a defence that the note was given for

in illegal consideration. *Beauchamp* v. *Parry*, 8 Law J. K.B. 367, s. c. 1 B. & Ad. 89.

In an action on a promissory note, a declaration made by the plaintiff before he became the holder, is evidence to invalidate the note. *Williams* v. ——, 5 M. & R. 121.

Where an indorsee sues the acceptor of a bill, which is upon an insufficient stamp, and seeks to cure this defect by evidence of admissions from the defendant, those admissions, to be available, must be complete in shewing the specific sum of money admitted to be due from the defendant to the plaintiff. If the admission be incomplete without reference to the bill, it will be unavailable.

Accordingly, where such an admission was contained in a letter to the plaintiff's attorney, in answer to one from him which did not name the indorsee (who was not known to the defendant), and the defendant's letter promised to pay, but spoke of the attorney's "client," without naming him:—Held, that this did not entitle the plaintiff to recover upon an account stated without putting in the bill. *Jarvine* v. *Payne*, 9 Law J. K.B. 129, s. c. 1 B. & Ad. 63.

(*f*) *Witnesses.*

Action by the indorsee against the acceptor of a bill of exchange; the defendant had taken the benefit of the Insolvent Debtors Act, and had set down the drawer as a creditor in his schedule:—Held, that the drawer was, notwithstanding this, a competent witness for the plaintiff in this action. *Cropley* v. *Horner*, 4 C. & P. 21. [Tenterden]

(*g*) *Defence.*

[See PARTNERS.]

Where a bill of exchange is drawn with a reasonable expectation that it will be paid by the acceptor, it is not an accommodation bill. *Bagnall* v. *Andrews*, 9 Law J. C.P. 21, s. c. 7 Bing. 217, s. c. 2 M. & P. 839.

Where, in an action by the payee against one of the makers of a joint promissory note, to which the defendant pleads his discharge under the Insolvent Debtors Act, it appears that no notice of the defendant's intention to apply for his discharge was given to the plaintiff, but that the note was drawn by the other maker, and signed by the defendant for his accommodation; it will be for the jury to say, whether the defendant knew to whom the note was made payable, for if he did, notice would be necessary, otherwise not. *Sharpe* v. *Gye*, 4 C. & P. 311. [Tenterden]

To justify the jury in giving a verdict for the plaintiff, in an action against an insolvent debtor by the indorsee of a bill of exchange, accepted by such debtor, as a security for a debt due to the indorser, and from which he had been discharged under the Insolvent Debtors Act, they must be satisfied, not only that the plaintiff gave value for the bill, but that he took it *bonâ fide* for his own purposes, without any concert with the indorser, and without any knowledge of the defect in the indorser's title. *Cortham* v. *Latouche*, 4 C. & P. 140. [Tindal]

Where a warrant of attorney was given to confess judgment for a sum of money borrowed at usury, and defendant is in execution on that judgment, in an action on a bill accepted by him, in order to procure his discharge, he may dispute the legality of the consideration on which such warrant of attorney was given. *Edmondson* v. *Hawkins*, Peas. A.C. 173. [Kenyon]

A partial failure of consideration cannot be given in evidence in answer to an action on a bill of exchange even between the original parties. The remedy for such partial failure of consideration is to be obtained by a cross action.

But a total failure of consideration may be given in evidence between the original parties as an answer to the action.

In an action by the drawer against the acceptor of bills of exchange given for goods supplied, which were to be "of good quality and moderate price," and were estimated at about 400*l.*, and the bills given for that amount, it is no defence that the goods turned out to be worth much less than the estimated price, and that the acceptor has paid more than the real value of the goods on the bills. *Obhard* v. *Betham*, 8 Law J. K.B. 254, s. c. 1 M. & M. 483.

Although a bill of exchange, payable to the order of a third person, would not of itself be evidence of an account stated between him and the acceptor, yet if, in such an action, the plaintiff have one count upon the bill, and another upon an account, and the defendant pay into court upon the latter count, enough to cover all that is due, his so doing will answer the action; and the plaintiff, unless he shew some other cause of action than the bill, will not be entitled even to nominal damages upon the count on the bill. *Early* v. *Bowman*, 9 Law J. K.B. 156, s. c. 1 B. & Ad. 889.

The indorser of a bill is not discharged by reason of the holder having given the bill to the acceptor, and received his cheque for the amount, which cheque was returned for want of effects. *Schneider* v. *Parr*, Peas. A.C. 66. [Kenyon]

Whether an accommodation acceptor of a bill, or a joint maker, as surety for the other maker of a promissory note, is discharged by time being given to the principal without his knowledge—*quære.*

A person joined another as surety in a promissory note. The creditors sued the principal, and took from him a cognovit payable by instalments, the first of which fell due before the time at which the plaintiff in the ordinary course would have obtained judgment. There was a proviso, that in case of default in payment of the first instalment, the whole should be payable:—Held, that this was not a giving of time to the principal; so that the first of the above questions did not arise in the case. *Price* v. *Edmunds*, 8 Law J. K.B. 119, s. c. 10 B.& C. 578.

One of the makers of a joint promissory note may shew that he was a mere surety for the other party, and so known to the plaintiff, the payee of the note, and that the plaintiff has taken a composition from the principal debtor. *Hall* v. *Wilcox*, 2 M. & M. 58. [Tenterden]

Where two persons were joint agents of the Royal Veteran Battalion, but were not otherwise connected in business, and were in the habit of accepting bills, by means of a clerk, in this form:—"For agents of the R. V. B.—J. G.";—it was held to be no answer to a joint action against them by the indorsee of such a bill, to shew that it was accepted for the private advantage of one without the knowledge of the other, although it appeared that the indorsee

might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact. *Sanderson* v. *Brooksbank*, 4 C. & P. 286.

(*h*) *What recoverable.*

A bill or note payable on a day certain, carries interest from that day, unless the non-payment has been occasioned by the negligence of the holder. *Laing* v. *Stone*, 2 M. & R. 561.

(*i*) *Verdict.*

In an action on a promissory note, and also for goods sold and delivered, if the plaintiff prove the delivery of the goods before the note was given, and do not shew the consideration of the note to have been distinct from them, the defendant must have a verdict on one of the counts; the plaintiff cannot take a verdict on one, and have the jury discharged from giving a verdict on the other. *Mutris* v. *Harris*, 1 M. & M. 322.

(*k*) *Rule to compute.*

After judgment by default, in an action on a bill of exchange, if the Court be satisfied by the defendant upon affidavit, that there is a fair question for a jury as to the amount really due, they will leave the plaintiff to his writ of inquiry, and will not send the matter to the Master by the usual rule to compute. *Jardine* v. *Williams*, 7 Law J. K.B. 31.

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## BOND.

(A) Validity.
(B) Stamp.
(C) Construction.
(D) Surety. [See Principal and Surety.]
(E) Actions and Proceedings.
(*a*) *Pleadings and Evidence.*
(*b*) *Assignment of breaches.*
(*c*) *Staying proceedings.*
(*d*) *Damages.*

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### (A) Validity.

[See Bastard.]

The rule of law is, that if a bond be conditioned for the performance of a thing *malum in se*, or against a positive law, not only is the condition void, but the obligation also: yet, where a bond contained a condition repugnant to the rest of the bond, which was complete and legal without such condition:—Held, that such condition, though not a valid one, might be rejected; and the bond was held valid. *Collins* v. *Gwynne*, 9 Law J. C.P. 130, s. c. 7 Bing. 423, s. c. 5 M. & P. 276.

A person had obtained letters patent for the *distillation of potatoes*. They contained a proviso making them void in case they should be assigned to, or the benefit divided among more than five persons. He and others entered into a scheme by which one of them, who was supposed to have influence, should exert himself among his friends and connexions, to induce persons to form a company of many persons for carrying on the business of the patent, and to pay their money for *shares* in the concern. He who was to do this, took a bond from his companions in fraud, for the payment of 10,000*l.*, as soon as he should have induced his different friends and connexions to pay calls on their shares to the amount of 45,000*l.*:—Held, that the bond was void; the condition being to commit a fraud; as the persons who would pay, must of necessity be cheated—inasmuch as the letters patent would become void by the imaginary benefit being divisible among more than five persons. *Duvergier* v. *Fellowes*, 8 Law J. K.B. 270, s. c. 10 B. & C. 826.

Bond to remove a nuisance, if good, the nuisance must be entirely done away.

A private person cannot take a bond conditioned to remove a public nuisance. *Fellowes* v. *Taylor*, Pea. A.C. 155. [Kenyon]

### (B) Stamp.

A bond is valid, though not duly stamped till after the death of the obligor. *Handley* v. ——, 8 Law J. Chanc. 49.

A bond conditioned for securing 1,000*l.*, interest, and bankers' charges of commission, is not a bond properly stamped with only a 5*l.* *ad valorem* stamp, as a bond to secure a sum exceeding 500*l.* but not exceeding 1,000*l.*, according to the Stamp Act, 55 Geo. 3. c. 184. *Dickson* v. *Cass*, 8 Law J. K.B. 396, s. c. 1 B. & Ad. 343, s. c. 5 C. & P. 96.

A bond conditioned for the payment of 1,000*l.* and interest on a day certain, requires only a 5*l.* stamp. *Dixon* v. *Robinson*, 2 M. & M. 115. [Lyndhurst]

A mortgage and a bond were prepared for securing the same sum of money, and were executed at the same time: but they did *not bear the same date*. The *ad valorem* duty appeared, by the mortgage, to to have been paid; but the bond had not the denoting stamp, indicating that the *ad valorem* duty had been paid according to the title "Mortgage," in the schedule, part 1, of the 55 Geo. 3. c. 184. The bond had a 1*l.* stamp only:—Held, that the bond was not exempt from the *ad valorem* duty, according to the title "Bond," in the schedule, part 1, of the 55 Geo. 3. c. 184. *Wood* v. *Norton*, 8 Law J. K.B. 72, s. c. 9 B. & C. 885, s. c. 4 M. & R. 673.

Where a bond was to secure to creditors a composition on the amount of their debts, and contained also an indemnity by one of the sureties for the composition to his co-surety:—Held, first, that the stamp of 1*l.* 15*s.* was sufficient, without requiring an *ad valorem* stamp on the amount of the debts. Secondly, that the distinct provision for indemnifying one of the sureties, did not render a second stamp necessary. *Annandale* v. *Pattison*, 8 Law J. K.B. 66, s. c. 9 B. & C. 919.

### (C) Construction.

A covenant by the obligee not to require payment of the bond during the life of the obligor, and that, in case the bond should be assigned by the obligee to any person who should demand and receive interest from the defendant, the obligee, his heirs, &c., should repay all money so paid for interest, and, in case such assignee should require the obligor to pay the principal sum, the obligee should pay him interest for the same during his life:—Held, no answer to an action on the bond by an assignee. *Morley* v. *Frear*, 8 Law J. C.P. 176, s. c. 6 Bing. 547, s. c. 4 M. & P. 305.

Bond conditioned for the faithful performance of the duties of an annual office, extends only to the duties of the current year; unless it be distinctly expressed that it is intended to apply to future years.

The annual re-appointment to the office is evidence that it is an annual office, for the purpose of such a bond. *Smith* v. *Holtzmeyer*, 8 Law J. K.B. 105.

By lease and release, by way of mortgage, reciting that I H B the mortgagor was seised in fee tail, I H B conveyed certain hereditaments, to the intent that a recovery should be suffered thereof, to enure to I E in fee, subject to a proviso for redemption; and, by bond, bearing even date, I H B, with *two sureties*, became bound to I E, subject to a condition that, if the recovery so covenanted to be suffered should be suffered in manner and form mentioned in the said indenture of release, *and so and in such manner as that under and by virtue thereof, and of the said indenture of lease and release*, the hereditaments should become and be vested in the said I E, his heirs and assigns for ever, according to the true intent and meaning of the said indenture of lease and release, and subject to the proviso for redemption, the bond should be void:—Held, that the legal effect of the bond was not restrained to the suffering of a recovery merely, upon the title as disclosed by such lease and release, but that it extended to guarantee a perfect fee to I E; and that, I H B having in fact a life estate only, the bond was forfeited. *Edwards* v. *Brown*, 9 Law J. Exch. 84, s. c. 1 C. & J. 307, s. c. 1 Tyrw. 182.

By a clause empowering a company to raise money by bonds, it was enacted, that every holder of them should be equally entitled to a claim or lien on the rates and sums of money to be taken by virtue of the act, in proportion to the amount advanced by such holders, as if the same had been advanced upon mortgages or annuities also grantable by the act, "without any preference by reason of the priority of date of any of such securities, or on any other account whatsoever":—Held, that an individual bondholder might sue the company upon his own bond, though there were other bonds, mortgages, &c. unsatisfied; the lien given by the act being only an additional security. *Hill* v. *the Manchester and Salford Water-works Company*, 2 B. & Ad. 544.

A bond was given by the father of an illegitimate child to her intended husband, in contemplation of their intended marriage, in the penal sum of 2,000*l.*, conditioned to pay the husband 1,000*l.* and interest.

It was recited in the condition, that, in consideration of the intended marriage, the obligor had proposed to the obligee to surrender certain copyhold property then let on lease at a rent of 50*l.* per annum, to the uses thereinafter mentioned; and if such surrender should not be so made within eighteen months after the marriage, the husband and wife, or the survivor, should receive after the death of the obligor 1,000*l.*; and he was in the meantime to pay the husband and wife 50*l.* a year for the interest thereof, until the said principal sum should be fully discharged.

The condition was to the effect of the recital; and that, if the estate should be so settled in substance to the use of the husband and wife for life, remainder to the survivor, remainder to their issue; and if the 4,000*l.* and interest should be paid, or if the obligor should make such surrender in his lifetime, and pay the arrears of interest up to the time of the surrender, the obligation to be void.

The obligor died without making the surrender, having regularly paid the 50*l.* per annum; and by his will he devised the copyhold estate to his daughter, the wife of the obligee.

Held, that the bond was not forfeited by reason of the breach of the condition; that it was merely an agreement to settle the land, and, as such, satisfied by the devise, although absolute to the wife; and that it was an agreement of which equity would enforce the specific performance, the penalty being only meant to secure the settlement recited in the condition.

Time for the performance of the condition is not of the essence of the contract.

The obligor held to have no power to elect either to pay the money or settle the land. *Roper* v. *Bartholomew*—*Butler* v. *Bartholomew*, 12 Price, 797.

So important a question improperly brought before the Court in point of form of proceeding, it should have been raised by bill filed on the part of the children of the obligee and his wife.

The Court will supply the want of a settlement of the estate in favour of the husband and the issue of the marriage, by decreeing that the lands shall be settled according to the agreement. *Roper* v. *Bartholomew*—*Butler* v. *Bartholomew*, 12 Price, 798.

Compensation claimed by the person disappointed by the devise refused by the Court.

But they ordered a competent part of the fund in court to be retained, and set apart to answer the eventual claim of the parties. *Roper* v. *Bartholomew*—*Butler* v. *Bartholomew*, 12 Price, 833.

Two ladies borrowed 10,000*l.* of Coutts & Co. on the bond of themselves and G N; they gave a bond for 12,000*l.*, at the same date, to G N. A question having arisen, whether the bond was for indemnity, or a gift for services, or otherwise, the Court directed issues to be tried before a jury. *The Earl of Winchelsea* v. *Garretty*, 1 Tam. 63.

### (E) Actions and Proceedings.

#### (*a*) *Pleadings and Evidence.*

[See Variance.]

Where the condition of a bond is not to indemnify, but to do substantive acts, the plea in discharge should shew what has been done to satisfy the condition. *Collins* v. *Gwynne*, 9 Law J. C.P. 130, s. c. 7 Bing. 423, s. c. 5 M. & P. 276.

The plaintiff having obtained letters patent containing a proviso, making them void in case they should be assigned to, or the benefit divided among more than five persons, entered into a scheme with others to induce his friends and connexions to take shares and form a company to carry on the concern, receiving a bond from those other parties for the payment of 10,000*l.*, as soon as he should have induced his friends and connexions to pay calls on the shares to the amount of 45,000*l.*:—Held, that the pleadings need not aver as a fact that the plaintiff *knew* that there was such a proviso in the letters patent, as he must be presumed to have known it; and that he was estopped from setting up his pretended ignorance of that which it was his duty to know before he began to obtain money from the different persons who were to be defrauded. *Duvergier* v. *Fellows*, 8 Law J. K.B. 270, s. c. 10 B. & C. 826.

An obligor, sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his plea that the real transaction was fraudulent or unlawful.

Where a company, authorised by act of parliament to raise money for certain purposes, has given a bond purporting to be for a sum borrowed and advanced conformably to the Act, it is not sufficient for them to plead to an action on such bond, that it was executed colourably, and that the money was not in fact borrowed or lent for the purposes of the statute, as the obligee well knew; the plea not disclosing any fraud, or injury done to the shareholders in the company. *Hill* v. *the Manchester and Salford Waterworks Company*, 2 B. & Ad. 544.

A, with B and C his sureties, entered into a bond to D, the condition of which, after reciting that A was seised in tail of an estate of which he had covenanted to suffer a recovery at a future day, to enure to the use of D in fee, was, that the bond should be void if the recovery should be suffered "so and in such manner as that, under and by virtue thereof, the estate should be vested in D for ever." The recovery was duly suffered; but A, being seised for life only, D brought an action upon the bond, to which one of the sureties pleaded, that if A had been seised in tail, the recovery was suffered so as to vest the estate in D in fee:—Held, that this plea was bad, because the recital in the condition did not estop D from disputing that A was seised in tail, nor release the surety from his obligation, it being the intention of the parties that D should have an estate in fee. *Edwards* v. *Brown*, 3 Y. & J. 423.

In an action of debt, it was averred, that before the making of the instrument and obligation thereinafter mentioned, the plaintiffs carried on business in Scotland, and that one A B and the defendant were resident and domiciled therein; and that by a certain instrument and obligation in writing, which was set out, the said A B and the defendant became bound, and obliged themselves conjointly and severally to pay to the plaintiffs the sum of 400*l.* sterling. It was then averred, that, by the law of Scotland at the time of making such instrument, and thence hitherto in force, the time for bringing any suit or instituting any legal proceeding by the plaintiffs against the defendant upon the instrument, and the cause and right of action accruing thereon, had not yet elapsed; that is to say, by virtue of the said law, the plaintiffs had the right and privilege of suing and bringing any action thereon, at any time within forty years from the time of making and signing the bond. Plea, that the cause of action did not accrue within six years:—Held, upon demurrer, that the plea was an answer to the action. *British Linen Company* v. *Drummond*, 10 B. & C. 903.

Where a bond, after reciting that A B was Colonial Secretary of Tobago, and had appointed C D to be his deputy, to execute the office and receive the fees, in consideration of his paying thereout to A B the annual sum of 450*l.*, by equal half-yearly payments, was conditioned for the punctual payment of that sum, without saying "out of the fees," and defendant pleaded that the bond was given in pursuance of an agreement to pay that sum at all events; upon which issue was taken, and found for the defendant:—Held, that even supposing the agreement to be inconsistent with the language of the bond, it was competent to the defendant to plead and prove it, in order to shew that the bond was given upon an illegal consideration; and that the fact found by the jury shewed that the bond was illegal, and void by virtue of the statute 49 Geo. 3. c. 126. *Greville* v. *Atkins*, 9 B. & C. 462, s. c. 4 M. & R. 372.

Where a bond is lost, and the plaintiff does not know who the subscribing witnesses are, he may call another person. *Aliter* if it appears who the subscribing witnesses are. *Keeling* v. *Ball*, Peo. A.C. 88.

Where the attesting witness to a bond cannot be produced, proof of his signature is sufficient evidence of the execution by the defendant, the obligor, though the defendant only sign by mark. *Mitchell* v. *Johnson*, 2 M. & M. 176. [Tenterden]

Where a party executing an instrument is competent at the time to execute it, he cannot, under a plea of *non est factum*, shew that his execution of it was brought about by fraud, or that he was misled as to the legal effect of it. *Edwards* v. *Brown*, 9 Law J. Exch. 84, s. c. 1 C. & J. 307, 354, s. c. 1 Tyrw. 182.

If, in an action on a bond against a surety, non-payment by the principal, after a notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue. If the breach be assigned under the statute on the record after judgment,—*Semble*, that it will be otherwise. *Barwise* v. *Russell*, 3 C. & P. 608. [Tenterden]

Payment of a bond is not to be presumed after more than twenty years, if the money was lent to enable the obligee to go abroad, where he died shortly after, and there is evidence that his administrator never received any assets. *Elliott* v. *Elliott*, 2 M. & M. 44. [Tenterden]

Payment, within twenty years, of interest accruing before twenty years, indorsed on the bond, is an acknowledgment that the principal was then due, sufficient to negative a plea of *solvit post diem*. *Sanders, clerk*, v. *Meredith*, 3 M. & R. 116.

Where, to debt on bond against the heir or devisee of the obligor, the defendant pleads *riens per descent* and *riens per devise* at the time of the commencement of the suit, or at any time before or since; and the plaintiff in his replication avers, that after the death of the obligor, and before the commencement of the suit, the defendant had divers lands and tenements by descent and by devise, wherewith he might and ought to have satisfied the debt, the replications may properly and usefully conclude with an averment *paratus verificare*, in order to give the plaintiff the advantage of the statute 3 W. & M. c. 14. [Graham, Baron, *dubitante*]

The defendant cannot, by such a plea, so far anticipate the replication as to compel the plaintiff, in replying to it, to conclude to the country.

The issue raised on the value would be sufficient to justify a conclusion of the replication with an averment—*semble*. *Middleton* v. *Gravelay*, 12 Price, 513.

*Scire facias* on single bond to the King, conditioned that Slade, a person holding an office under

the Crown, should duly and faithfully execute and perform the duties and trusts thereof, and pay over all monies received by him, or which should be intrusted to him, or placed under his power or control, as such clerk, according to instructions; and that he should, when required, account for all monies expended by him, and pay over balances.

Plea—performance by the clerk of every particular of the condition.

Replication—that he did not, nor would, &c.; but failed and neglected, &c.; and embezzled, purloined, and converted to his own use divers sums, amounting to a large sum of money, which he had received, and which had come to his hands and been intrusted to him, and placed under his power and controul, as such clerk, contrary to the duty and trust of his said office or employment, and the form and effect of the said condition of the said writing obligatory.

The evidence given on the trial of the issues on these pleadings was furnished by the testimony of two persons. The first witness was a person who, at the time of his examination, was a clerk in the office of the Treasurer of the Navy in Somerset House. Having been formerly second clerk in the Navy Treasury Office at Chatham, he was called for the proving, by the course of office in that establishment, the nature of the employment and duties and trusts of the first and second clerks in the office. The other witness was the second clerk in the office at the time when the embezzlement was discovered. The last witness proved the discovery of the absence of the money on the investigation set on foot for the purpose; and the facilities afforded to the chief clerk of abstracting money, from his constant and sole access to the place where it was deposited. The last witness (Ottley) it appeared was, as second clerk, joint cashier with Slade, the first clerk; that he (Ottley) was, as joint cashier by course of office, keeper of one of the two keys, of which both were required to open the chest which contained the cash; and that Slade, whose duty it was to pay the money, was necessarily obliged to obtain the witness Ottley's key to enable him to open the chest to get the cash for that purpose; and that the key was always, on the regular periodical occasions, given by Ottley to Slade, and afterwards returned by Slade to Ottley. It was also the duty of Slade and Ottley to sign certificates (jointly) of the correctness of the balance of the money in the chest, after payment of the periodical disbursements.

Objections to verdict for the Crown on such evidence in a case so pleaded:—

First. The incompetency of Ottley as a witness for the Crown against the surety of Slade.

Secondly. The insufficiency of the breach assigned by the replication, with reference to the condition of the bond: and,

Thirdly. The inadequacy of the evidence to the support of the breach of the bond, as assigned by the replication.

Held, that the witness was competent; that the breach was well assigned, and that the proof of it was sufficient. *Rex* v. *Chalk*, 12 Price, 662.

(*b*) *Assignment of breaches.*

The 8 & 9 Will. 3. c. 3. s. 8, enabling and requiring the plaintiff in an action on bond to assign breaches, extends to a liability created by the breach of an indemnity bond, whereby the obligee is so far damnified as that he may be required to pay money in consequence of a forfeiture, although the matter of a liability should be in some sort collateral to the direct breach, and actual damnification has not ensued.

Thus, where a party indemnified by bond was sued for damages in respect of the matter of the indemnity, and the plaintiff recovers, if the defendant in that action recover over against the indemnifier, he must assign as breach, not only the damages and costs recovered against him, but also his own costs sustained in defending the suit, although he have, as yet, in fact paid nothing in respect or on account of such costs; or, if he do not so assign, he will be estopped by the statute from recovering, by *scire facias* on the judgment obtained on the bond, what he may afterwards be compelled to pay on that account.

Demurrer on a plea in *scire facias*, that the plaintiff might have suggested and assigned the damages as further breach of a bond already recovered on, under the judgment obtained in the action on the bond on which the *scire facias* was founded, overruled. *Harrap* v. *Armitage*, 12 Price, 411.

Where the plaintiff suggests further breaches under the statute 8 & 9 Will. 3, after a verdict in an action on bond, he should serve the defendant with a copy of the suggestion, or he cannot regularly proceed to execute a writ of inquiry of damages; and the irregularity may be taken advantage of at the time of holding the inquisition.

Such an irregularity is waived, if the defendant, being present, suffer the inquiry to proceed to an assessment of damages; and he cannot afterwards set aside the inquisition on the ground of surprise, unless as matter of indulgence, and on terms.

Such an application refused (the defendant declining to accept it on terms) with costs. *Gillingham* v. *Myers*, 13 Price, 791.

(*c*) *Staying proceedings.*

Reference ordered to the Master, to ascertain the sum due for principal and interest in an action on a bond, upon motion on the part of the defendants.

Money paid for interest on bond by representatives of an obligor, through misrepresentation of the terms of the condition, which provided that the property-tax should be deducted from the interest, of which, not having obtained sight of the bond, the executors were not aware:—Held, to have been improperly paid, and that they were entitled to be allowed it by the Master on such reference.

*Aliter* as to so much of the interest as had been paid by the obligor himself. *Smith* v. *Alsop*, 13 Price, 823.

(*d*) *Damages.*

Obligees in a bond entitled to be paid, out of the assets of a deceased obligor, a sum exceeding the penalty of the bond. *Jeudwine* v. *Agate*, 3 Sim. 129.

Where an obligor has, by vexatious proceedings, delayed the obligee from recovering on his bond, a court of equity will decree payment of the full amount of principal and interest, although it exceeds the penalty of the bond. *Grant* v. *Grant*, 3 Sim. 340.

## BOTTOMRY.

[See INSURANCE.]

## BOUNDARIES.

In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief; and where the quantity of the land of the plaintiff, in the possession of the defendant, is doubtful upon the evidence, the Court will direct a commission or an issue, as will best answer the justice of the case. *Godfrey* v. *Littel*, 1 Russ. & M. 59, s. c. 1 Tam. 221.

## BRAWLING.

[See CHURCH.]

## BREWER.

[See 1 Will. 4. c. 51, 8 Law J. Statutes, 107.]

## BRIBERY.

[See PARLIAMENT.]

## BRIDGE.

The definition of a bridge, for the purpose of considering the liability of the county to repair, is, that which is erected for passage "over water flowing in a channel between banks, more or less defined."

The circumstance of such channel being occasionally dry, will not free the county from the liability to repair.

Where a bridge was erected over meadows which were occasionally flooded by a river; with arches which were necessary for the safety of the main bridge, in order to let off the flood water:—Held, that the county was not liable to repair such of the arches as were at the distance of more than three hundred feet from the end of the main bridge. *The King* v. *the Inhabitants of Oxfordshire*, 8 Law J. K.B. 354, s. c. 1 B. & Ad. 289.

Although the inhabitants of the county are, in general, liable to the repairs of the highway within 300 feet of the bridge as well as of the bridge itself, an indictment, which charges merely a non-repair of the bridge, is not sufficient to charge them with the not repairing of the highway within that distance. If it be intended to complain also of not repairing that part of the highway, it should be specifically mentioned in the indictment. *The King* v. *the Inhabitants of the county of Gloucester*, 8 Law J. K.B. 97, s. c. *ib.* M.C. 120.

## BROKER.

[See PRINCIPAL AND AGENT, and SHIP AND SHIPPING.]

## BUILDING.

The custom of London allowing parties to build to any height upon an old foundation, does not authorize them to do so, unless the whole of the foundation be their own. *Semble*, that if the foundation built on is less ancient than the window obstructed, the custom does not authorize the building. *Quære*, whether the custom of London may now be proved by the production of the Privilegia Londini. *Shadwell* v. *Hutchinson*, 2 M. & M. 350, s. c. 3 C. & P. 615. [Tenterden]

The Building Act, 14 Geo. 3. c. 78. s. 100, limits actions to be brought within three months. A had begun to build a party wall on the soil of B, more than three months before the action, but had not completed it till within that time:—Held, that B might recover for such part of the trespass as was committed within the time limited, but that, if nothing had been done within the three months, he must bring ejectment. *Trotter* v. *Simpson*, 5 C. & P. 51. [Parke]

## BURGLARY.

The lifting up of a trap-door covering a cellar, which was merely kept in place by its own weight, and which had no fastenings, because, it being a new trap-door, they had not been put on, is not a sufficient breaking to constitute a burglary; but unlocking and opening a hall-door, and running away, is a sufficient breaking out of the house. *The King* v. *Thomas Lawrence and Thomas Weaver*, 4 C. & P. 231. [Bolland]

## BURIAL.

[See CHURCH.]

A mandamus lies to compel the clergyman to bury the corpse of a parishioner; and yet, if he has not refused to bury at all, but only to bury in a particular mode, or in a particular part of the churchyard, no mandamus lies. *The King* v. *St. Aubyn*, 8 Law J. K.B. 384, s. c. 1 B. & Ad. 122.

A faculty for the appropriation of a vault, to the use of a family, so long as they continue parishioners and inhabitants of the parish, will be granted, if it may be done without probable inconvenience to the parish. *Magney and others* v. *the Rector, &c.* 1 Hag. Ec. 48.

## CANADA.

Laws relating to lands holden in free and common soccage in Lower Canada, explained and amended, 1 Will. 4. c. 20, 9 Law J. Statutes, 19.

## CANAL.

[See STATUTE and RATE.]

## CANDLES.

Duties and drawbacks on candles repealed by 1 & 2 Will. 4. c. 19, 9 Law J. Statutes, 22.

## CARRIERS.

[See LIEN and STAGE COACH.]

(A) LIABILITY.
(B) NOTICE LIMITING RESPONSIBILITY.
(C) ACTIONS AGAINST.

### (A) LIABILITY.

[See 1 Will. 4. c. 68, 8 Law J. Statutes, 150, protecting mail contractors, stage-coach proprietors, and other common carriers for hire, in respect of loss of, or injury to parcels, &c. the value and contents of which are not declared.]

A porter removing goods is not liable for accidents, unless he has been guilty of negligence.

He is not obliged to put a person at the head of his horse while he removes goods from his cart. *Hayman* v. *Hewitt*, Pea. A.C. 70. [Kenyon]

A stage coachman is responsible for the loss of a parcel which he receives to carry without reward, if it is lost through gross negligence on his part. *Beauchamp* v. *Powley*, 2 M. & M. 38. [Tenterden]

If a common carrier demand a certain sum for booking, and refuse to take charge of goods unless such sum be paid, he is not liable to an action, if they be left without being paid for, and are lost. —— v. *Jackson*, Pea. A.C. 185. [Kenyon]

The law implies a duty in the owner of a vessel, whether a general ship, or hired for the special purpose of the voyage, to proceed without unnecessary deviation, in the usual and customary course. *Davis* v. *Garrett*, 8 Law J. C.P. 253, s. c. 6 Bing. 716, s. c. 4 M. & P. 540.

The plaintiff received from one G a parcel containing certain papers, and a 50*l.* note, for the purpose of booking at the coach-office of the defendants. Instead, however, of booking the parcel as he was directed, he put it with his own luggage, intending to carry it up to town himself by the defendant's coach. The bag containing his luggage was lost. In an action against the defendant in respect of such loss, the jury returned a verdict for the plaintiff for the value of the property contained in the bag, excluding the parcel containing the notes. The Court refused to disturb that verdict. *Miles* v. *Cattle*, 8 Law J. C.P. 271, s. c. 6 Bing. 743, s. c. 4 M. & P. 630.

### (B) NOTICE LIMITING RESPONSIBILITY.

In an action against coach proprietors for the loss of a parcel, which was delivered at the office of one of the defendants, a notice limiting the responsibility of "the proprietor of that office" to parcels or packages not exceeding the value of five pounds, was held insufficient to bar the plaintiff's right of action against the joint proprietors.

*Semble*—That a notice issued at a coach-office in London, stating that the proprietors of coaches running *from that office*, will not be answerable for any package above the value of five pounds, applies as well to the journey back to London as to that from London. *Macklin* v. *W. Waterhouse*—*Riley* v. *Horne*, 7 Law J. C.P. 32, s. c. 5 Bing. 212, 17, s. c. 2 M. & P. 319—31.

### (C) ACTION AGAINST.

In an action on the case against stage-coach proprietors for an injury done by the mis-management of the coach, whereby a person was struck by the luggage on the coach, the guard of the coach is not a competent witness for the defendants, without a release; but a release given by one of the defendants is sufficient. *Semble*—that in such an action the proprietors and the coachman may be sued jointly. *Whitamore* v. *Waterhouse*, 4 C. & P. 383. [Parke]

The defendant received on board his barge certain lime of the plaintiff's, to be carried from B to R. The master deviated unnecessarily from the usual and customary course of the voyage, and during such deviation encountered a storm, in consequence of which the lime, becoming wetted, ignited and set fire to the barge, whereby the barge and cargo were lost:—Held, that the plaintiff was entitled to recover the value of the lime, on a count charging it to have been the *duty* of the defendant to have carried the lime—"by and according to the direct, usual, and customary way, course, and passage, without any unnecessary deviation or departure from, or delay or hindrance in the same." *Davis* v. *Garrett*, 8 Law J. C.P. 253, s. c. 6 Bing. 716, s. c. 4 M. & P. 540.

## CASE.

[See ACTION.]

## CATTLE.

On an indictment for administering sulphuric acid to eight horses, with intent to kill them, the prosecutor may give evidence of administering at different times, to shew the intent; but if the jury are satisfied that the prisoner administered the poison under an idea that it would improve the appearance of the horses, they ought to acquit him.

If a prisoner mix poison with the corn intended for the feed of eight horses, and then gives each horse his feed from this mixture, an indictment charging that he did administer the poison to the eight horses, is correct. *Rex* v. *Mogg*, 4 C. & P. 364. [Park]

## CERTIORARI.

(A) WHERE IT LIES.
(B) RESTRAINTS ON BY STATUTE.
(C) RECOGNIZANCE.
(D) COSTS.

### (A) WHERE IT LIES.

A *certiorari* to bring up a warrant of distress for a poor-rate, on the ground that the party had not been previously heard or summoned, refused.

The remedy in such a case must be by appeal or action.

*Semble*—That the warrant is not a judicial act, and would not be evidence of the facts stated in it. *The King* v. *the Justices of Surrey*, 9 Law J. M.C. 120.

(B) Restraints on by Statute.

An act (42 Geo. 3. c. 73), which imposed certain penalties to be recovered before Justices, provided that no conviction before them should be removed by *certiorari*. A subsequent act (6 Geo. 4. c. 63,) upon the same subject, extended the penalties to persons not liable under the first; and it provided, that all the powers, matters, and things, &c., in the former act, should be good and effectual, *for carrying that act into execution*, as if they were repeated and re-enacted. A person who would not have been liable under the first, was convicted under the second act:—Held, that, by the terms of the second act, the writ of certiorari was taken away; as the provision in the first act for taking it away must be considered as a provision for *carrying that act into execution*. *The King* v. *Fell*, 9 Law J. K.B. 37, s. c. 1 B. & Ad. 380.

(C) Recognizance.

The recognizance required by the 19 Geo. 3. c. 70. s. 7, and 7 & 8 Geo. 4. c. 71. s. 6, on the removal of a cause from an inferior court where the cause of action does not amount to 20*l*., is required in an action of trover as well as in an action which is brought for the recovery of a debt. *Furnish* v. *Swan*, 8 Law J. K.B. 224, s. c. 10 B. & C. 458.

(D) Costs.

Where an indictment for felony is removed by certiorari, neither the Judge at Nisi Prius, nor the Court of King's Bench, has power to award costs to the prosecutor, under the 7th Geo. 4. c. 64. s. 22. *The King* v. *the Treasurer of Exeter*, 8 Law J. M.C. 120, s. c. *ib.* K.B. 89, s. c. 5 M. & R. 167.

The father of a deceased person, whose body has been disinterred for the purpose of dissection, and who prosecutes to conviction the parties guilty of the offence, is a party grieved, so as to be entitled to costs under 5 W. & M. c. 11. s. 2.

But where it appeared that money had been raised by the prosecutor by public subscription, towards carrying on the prosecution, the Court refused to allow him his costs.

The costs incurred by the prosecutor previous to the removal by certiorari are never allowed. *The King* v. *Davies*, 8 Law J. M.C. 104, s. c. 10 B. & C. 89.

If a prosecutor, having removed an indictment by certiorari, give notice of trial for the assizes, and bring down the record, and withdraw it after it has been entered for trial, the Judge at the assizes cannot order the prosecutor to pay the defendant the costs of the day; but a motion must be made in the Court of King's Bench. *The King* v. *Watton*, 4 C. & P. 229. [Bolland]

## CHAMPERTY.

An agreement between the seller and purchaser of an estate, that the purchaser, bearing the expense of certain suits commenced by the seller against an occupier for arrears of rent, should have the rent to be so recovered, and any sum that could be recovered for dilapidations, and that the purchaser, bearing the expenses, might use the seller's name in actions he might think fit to commence against the occupier for arrears of rent or dilapidations, is not void, as savouring of champerty. *Williams* v. *Pretheroe*, 5 Bing. 309, s. c. 2 M. & P. 770, s. c. 3 Y. & J. 129.

The plaintiff entered into an agreement with the defendant to furnish and to procure evidence to enable him (the defendant) to maintain an action against third persons, in consideration of the defendant's paying him a clear eighth part of the sum recovered:—Held, that this contract in substance and effect amounted to champerty, and consequently was illegal. *Stanley* v. *Jones*, 9 Law J. C.P. 51, s. c. 7 Bing. 369, s. c. 5 M. & P. 193.

## CHARITY.

(A) Jurisdiction over.
(B) Devise and Bequest to.
(C) Grant.
(D) Administration of.
  (*a*) *Trustees.*
  (*b*) *Objects.*
  (*c*) *Property and Revenue.*
  (*d*) *Leases and Alienations of charity estate.*

[See Lease and Trust, and 1 & 2 Will. 4. c. 34, 9 Law J. Statutes, 61, as to appointing Commissioners to continue the inquiries concerning charities in England and Wales for two years.]

(A) Jurisdiction over.

A petition for the regulation of abuses in a charity, if preferred by one person only, cannot be sustained under the 52 Geo. 3. c. 101, though certified by the Attorney General.

A petition to the Lord Chancellor, as exercising the visitatorial power vested in the King, cannot be sustained, if the facts upon which the right of the crown to be visitor depends, are controverted, and the visitatorial power of the crown be denied. *In the matter of the Garstang Church Town School*, 7 Law J. Chanc. 164.

(B) Devise and Bequest to.

[See Legacy.]

If a trustee, to whom a legacy is bequeathed upon trust to purchase lands for charitable purposes, receives the money and lays it out in lands, which are conveyed to him upon the trusts expressed in the will, the trust thus executed is contrary to the Mortmain Act, and will not be carried into effect by the Court. *Attorney General* v. *Ackland*, 1 Russ. & M. 243.

(C) Grant.

An advowson may be given to a charitable use. *Attorney General* v. *Ward*, 7 Law J. Chanc. 114.

A grant, from the Crown, of certain privileges and property, for the defence of and preservation of peace within a city, is a charitable gift—*semble*. *The At-*

*torney General* v. *the Mayor and Corporation of Carlisle*— *Dobinson* v. *Same*, 2 Sim. 437.

The mayor, bailiffs, and burgesses of Berwick-upon-Tweed, in consideration of 50*l.* left by will for the erecting and maintaining of a house of correction there, by feoffment dated the 28th of May 1653, conveyed the moiety of a property there to the churchwardens and overseers for the erecting and maintaining of a house of correction within the borough, and for maintaining and ordering the poor therein for ever, and all other sturdy and idle persons coming and being therein, and for the setting them and every of them to work. By another feoffment of the same date, in consideration of 350*l.* owing by them to the poor, the mayor, &c., conveyed the other moiety, and some other lands, for the like purposes: —Held, that this town never having at this time raised poor-rates under the statute of Elizabeth, these were gifts in aid of the poor-rates. As to a part of the land, the rates of which had been duly applied down to the eighteenth century, when their application ceased for the use of the poor, and was wholly carried to the corporate-chest,—the Court, being satisfied, upon the evidence, it was intended to be comprised in the second feoffment, declared it to be a part of the charity, and that the rents should be accounted for from 1823, when the same were claimed for the use of the poor; and the rents thereof were also declared to be applicable in aid of the poor-rates. The costs of the relators to be taxed as between party and party, and paid by the mayor, bailiffs, and burgesses; the extra costs of the relators to come out of the fund. *Attorney General* v. *the Corporation of Berwick-upon-Tweed*, 1 Tam. 239.

A, by a deed executed in 1616, for a nominal consideration, conveyed to certain persons therein named, certain premises which were then let upon lease for forty-one years, at a rent of 150*l.* By another deed of the same date, reciting among other purposes, a desire to relieve the poor of the Mystery of Mercers, of which the grantor was free, and the better to manifest his love and affection towards his brethren, the freemen of the said company, it was declared that the grant of the premises comprised in the former deed, and of the rent of 150*l.* reserved upon the lease, was made upon trust as to the premises, and the rent reserved, and all future rents and profits; that the grantees should receive and pay the monies arising therefrom to the wardens of the Mystery of Mercers of the city of London, and their successors, and that the said wardens and commonalty should dispose of the monies to the uses therein mentioned. The schedule annexed to the deed then enumerated various charitable objects to which the money was to be applied, among which was a donation to poor brethren of the Mercers' Company. These donations amounted altogether to 149*l.* 11*s.*, leaving a sum of 9*s.* of the reserved rent of 150*l.* unapplied in the hands of the Mercers' Company. By improvements of and additions to the estate in consequence of an act of inclosure, the rent increased to a sum of 1,000*l.* a year, at which rent the premises were let in 1817: of this increased rent the Mercers applied 521*l.* 2*s.* in various payments according to the trusts; the residue of the rents of the estate they had for many years carried to the general account of the company, and applied them to their own use.

Upon an information filed to regulate the charity, held, in the Court below, and on appeal, that the Mercers' Company were trustees of the rents and augmented rents, and that the surplus after answering the payments directed by the deed, were applicable to such and the same purposes as directed by the deed, without prejudice to the question, how far the Mercers' Company were entitled to share in the increased rents, with reference to their share of the original rent of 150*l.* *The Mystery of Mercers* v. *Attorney General*, 2 Bligh, N.S. 165.

By a deed granting lands, &c. to a corporation of the city of London, to be applied to charitable uses, it was provided, that if the premises should be evicted, the company should be discharged from any further payment or continuance of the uses; and if the premises, by alteration of times, should so much decay in rent that the uses could not be supported therewith, the company should only be chargeable with the payments appointed to Christ's Hospital and to the company of Barber Surgeons, being 6*l.* yearly; and from thenceforth it should be lawful for the said company to make such abatement of the sums before limited, except the 6*l.* to Christ's Hospital and the Barber Surgeons, as should be answerable to the full of the rents which should so happen: —Held, that this was conditional, and not a positive charge upon the grantees to be paid by them; at all events, so as to furnish an inference, that, being subject to such charge, they must be entitled to a surplus of the rents arising by an increase in the value of the property. *The Mystery of Mercers* v. *Attorney General*, 2 Bligh, N.S. 184.

A conveyance made to the parish officers for the time being, "in trust for the churchwardens and overseers of the poor and inhabitants of the parish for the time being, to the intent that the rents and profits might be paid and applied for their use from time to time, in aid of the rate for the relief of the poor," is a conveyance within the 9 Geo. 2. c. 36.

The consideration for such a conveyance being money expended for a considerable time by different parish officers in support of the wife and children of the grantor, by whom they had been deserted—held, not a valuable consideration actually paid within the meaning of the 2nd section of the above statute, so as to dispense with the necessity of inrolment. *Doe* d. *Preece* v. *Howells*, 9 Law J. K.B. 332, s. c. 2 B. & Ad. 744.

A trust settlement, providing that the fund should accumulate till it should amount to —— sterling, when it was to be applied to the building of an hospital, and to the maintenance of —— boys, leaving blanks as to the amount of the accumulation, and as to the number of boys, reduced on the ground of uncertainty.

The direction that the hospital should be governed according to such rules and regulations as E should, by a separate deed, appoint, (no such appointment made,) or failing any such appointment, by the rules and regulations of another well-known hospital referred to, would have been sufficiently certain, if the deed were good in other respects. *Ewen* v. *Bannerman*, 2 Dow. & C. 74.

A testator gave 400*l.* a year to the governors of Christ's Hospital, upon condition to receive four boys or four girls annually, to be nominated by the president and governors of Guy's Hospital. For a time they received the income and admitted the no-

minees, and then refused. The Court held, that, having once accepted the gift, subject to the condition, they could not repudiate it; and decreed accordingly. *Attorney General* v. *Christ's Hospital*, 9 Law J. Chanc. 186, s. c. 1 Russ. & M. 626, s. c. 1 Tam. 393.

(D) ADMINISTRATION OF.

[*Attorney General* v. *Mayor of Exeter*, 3 Russ. 95, Dig. Law J. 135-6.]

(*a*) *Trustees.*

A trustee of a charity estate, who has used the balances of the rents in carrying on his trade, will be charged with interest at 5*l.* per cent., but not with annual rests. *The Attorney General* v. *Solly*, 2 Sim. 518.

(*b*) *Objects.*

Provisions for instructing the boys in writing and arithmetic, made part of the scheme of a grammar school. *Attorney General* v. *Dixie*, 3 Russ. 534, n.

Provision for giving instruction in writing and arithmetic, introduced into a scheme for the administration and management of a free grammar school. *Attorney General* v. *Haberdashers' Company*, 3 Russ. 531.

Under what circumstances, as to original foundation and subsequent usage, a school shall be held to be endowed for the purpose only of teaching the learned languages.

The master of a free school has an estate of freehold in his office, and is not removable at the pleasure of the patrons of the school.

The Court will, upon petition, restrain an ejectment brought by the patrons to evict the master from the possession of the school-house.

Agreements entered into between the master and the patrons as to the mode of conducting the school, which have a tendency to alter its character, are invalid, and do not bind the master; and the patrons are guilty of a breach of duty, when they require or induce a master, or a candidate for the office of master, to enter into such agreements. *In the matter of the Free Grammar School of Chipping Sodbury*, 8 Law J. Chanc. 13.

Where a controlling power of assenting to, or dissenting from, the appointment of a master of a free school, is given to the lord of the manor, such lord cannot himself be master.

If he is appointed master, he may be removed, upon an application by petition in the Court of Chancery. *In the matter of Risley School*, 8 Law J. Chanc. 129.

At a meeting held to appoint a successor to an office in a charity, after a candidate has been elected, and a minute of his election has been entered by the clerk, it is competent for the majority of the electors, before the meeting is dissolved, to reverse their vote, rescind the minute of election, and postpone the election to a subsequent day, provided in so doing they act *bonâ fide*, and with a view to the welfare of the charity. *Attorney General* v. *Matthew*, 3 Russ. 500.

(*c*) *Property and Revenue.*

*Quære*—Whether the trustees of a charity will be permitted to present to a vicarage, the advowson to which has been given to the charity, without making profit of the presentation by selling it for the benefit of the charity. *Attorney General* v. *Ward*, 7 Law J. Chanc. 114.

Where funds were given to trustees, to apply the profits of the same, as they should in their discretion think fit, for the benefit of the town of H; the Court refused to interfere with that discretion, and dismissed an information praying for a scheme of distribution of the charity benefits. *Attorney General* v. *Gaskell*, 9 Law J. Chanc. 188.

The Court orders a legacy to a foreign charity to be paid over, as it will not administer the funds of a foreign charity.

Legacies to charities in Ireland are administered by commissioners there, under an act of the Irish parliament. *Collyer* v. *Burnett*, 1 Tam. 79.

The charitable object having failed, the Court will not apply the funds; where a charitable object fails, from whatever cause, the Crown has a right to interfere. The Crown must signify the charitable purpose the fund shall be applied to. *Simon* v. *Barber*, 1 Tam. 14.

*A*, by her will, gave 7,000*l.* to the governors of Christ's Hospital, upon trust for certain specific charities, and to pay certain annuities, and to apply 40*l.* per annum to the scholars of Christ's Hospital. In case the governors refused to accept the trust, then the 7,000*l.* was given to the trustees of the Rev. William Hetherington's charity, for the like trusts, except as to the 40*l.* per annum, which was to be applied to the purposes of the latter charity. The testatrix also gave 2,000*l.* to the University of Oxford. The governors and trustees refused to accept these trusts, and the legacy of 40*l.* per annum. The University also refused to accept the legacy of 2,000*l.*:—Held, that whenever a charitable legacy, from whatever cause, fails, the Crown has a right to interfere, and that the legacies of 2,000*l.* and 40*l.* per annum must be applied to such charitable purposes as the Crown shall direct. Held, that as to the 7,000*l.* a reference be made to the Master to appoint new trustees. The bill dismissed as against the governors, trustees, and University. *Denyer* v. *Druce*, 1 Tam. 32.

The Court will not compel a corporation, being trustees of a charity, to account for the income further back than the filing of the information, where that income has been applied to other charitable purposes, and no particular misconduct is imputed. *Attorney General* v. *the Stationers' Company*, 9 Law J. Chanc. 229.

(*d*) *Leases and alienations of charity estate.*

A man, out of favour and kindness towards the son of A, demised certain premises, including the advowson of a vicarage, to A and B for a term of ninety-nine years, at a rent of 40*l.* a year: shortly afterwards, he conveyed the same premises to trustees, upon trust to pay, out of the profits thereof, 20*l.* a year to his sister during her life; and, after her death, to her children; and, after the death of the survivor of the children, to pay the said 20*l.* a year to one charitable purpose; and, out of the residue of the rents and profits, to pay 15*l.* a year to a second charitable purpose; and, out of the residue of the rents and profits, to pay 5*l.* a year to a third charitable purpose:—Held, that the whole profits of the

property were devoted to charity; and that a lease of the premises for 500 years was void, as being an improvident act in the management of a charity estate. *Attorney General* v. *Ward*, 7 Law J. Chanc. 114.

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## CHURCH.

[7 & 8 Geo. 4, for building and promoting the building of additional churches, amended and rendered more effectual by 1 & 2 Will. 4. c. 38. 9 Law J. Stat. 71. And see SACRILEGE.]

Proprietary chapels are anomalies unknown to the constitution, and to the ecclesiastical establishments of the Church of England, and can possess no parochial rights.

*Primâ facie*, all parochial duties are committed to and imposed upon the parish incumbent; and all fees and emoluments arising therefrom belong to him; and such rights can only be granted to a chapel, or its officiating minister, by composition with the patron, incumbent, and ordinary.—*Quære*, whether not also with a compensation to future incumbents.

The performance of baptisms, marriages, and burials, in a chapel existing from time immemorial, might possibly be presumptive evidence of consecration, and of a composition. *Aliter* as to a chapel the origin of which is ascertained.

Alms, collected in chapels as well as in parish churches during the reading of the offertory, are by the direction of the rubric at the disposal of the incumbent of the parish and churchwardens thereof, and not of the minister or proprietors of the chapel.

A chapel being shortly before 1735 built by private subscription, and the subscribers agreeing, out of the pew rents, to pay the rector of the parish a yearly stipend for performing divine service, a licence was obtained from the bishop to the rector and his successors, who from time to time performed therein parochial duties; but there was no proof of consecration, nor of any composition between the patron, incumbent, and ordinary;—such chapel is merely proprietary, and the minister, nominated by the rector of the parish and licensed by the bishop, cannot perform parochial duties therein, nor distribute the alms collected at the Lord's Supper.

The incumbent of a parish has a right, without licence, to perform divine service in any consecrated building within the parish. *Semble*, therefore a licence to the rector, from the ordinary, to perform divine service in a chapel, tends to shew that the chapel was not consecrated. *Moysey* v. *Hillcoot*, 2 Hag. 30—46.

Under the general law, the erection of a new public chapel (properly so called) requires the joint consent of patron, incumbent, and ordinary, and (generally) compensation to future incumbents. *Bliss* v. *Woods*, 3 Hag. 509.

The minister has, in the first instance, the right to the possession of the key of the church, and the churchwardens have only the custody of the church under him: if he refuses access to the church on fitting occasions, complaint must be made to higher authorities. *Lee* v. *Matthews*, 3 Hag. 173.

Pews in a church belong to the parish, for the use of the inhabitants, and cannot be sold, nor let, without a special act of Parliament.

A pew can only be appropriated to a house by faculty or by prescription.

The occupier of a pew, ceasing to be an inhabitant of a parish, cannot let the pew with, and thus annex it to, his house; but it reverts to the disposal of the churchwardens.

Churchwardens must exercise a just discretion in the allotment of pews, subject to the correction of the Ordinary.

In a libel for perturbation of seat, a title must not be pleaded as founded on purchase, sale, letting, or bequest, all which are illegal and void. The suit may rest on a possessory title, and acquiescence of former churchwardens, and on the fitness of the party, from the number of family, amount of property, &c.

And if it appears that the churchwardens have acted properly in displacing the plaintiff, the Court will dismiss them; but will not proceed to confirm the possession of the person seated by them, as it does not form part of the question before the Court, and may be injurious to the parish, by taking the pew more out of the power of the churchwardens. *Wyllie* v. *Mott and French*, 1 Hag. 28—41.

A faculty for annexing a pew to a messuage, obtained by surprise and undue contrivance, may be revoked. *Butt* v. *Jones*, 2 Hag. 417.

A right to a family, owners and occupiers of a certain messuage, may become apportioned, if the messuage itself be subdivided: and in case of such a subdivision, the churchwardens have no right to interfere with the pew; at least, so long as the different parties entitled in subdivision agree among themselves. *Harris* v. *Drewe*, 9 Law J. K.B. 200, s. c. 2 B. & Ad. 164.

In collegiate churches organs may be necessary, but not in a parish church.

The Ordinary is to judge whether the circumstances of the parish offer an objection to the erection of an organ: the parish alone is to decide on any expenses to be incurred.

A faculty confirming the erection of an organ, binds the parish to nothing prospectively.

A clause providing against any future expense falling on the parish, need not be inserted in a faculty confirming the erection of an organ by voluntary contributions, and with the consent of the vestry, in a parish church. *Jay* v. *Webber*, 3 Hag. 4.

It is no sufficient objection to the issuing of a decree with intimation to lead a faculty for erecting an organ in a parish church, that there is no provision for the future repairs, nor for the permanent salary of an organist.

In a parish church an organ cannot be legally erected without a faculty; nor will a faculty be granted without a decree with intimation, in order that any of the parishioners may object; on which objection the Court, considering all the circumstances of the case, is to decide. *Pearce* v. *the Rector of Clapham*, 3 Hag. 10.

Where no substantial inconvenience was shewn by one individual, who opposed the faculty, and when the plan had been adopted at a vestry, on the unanimous report of a committee, the Court will grant a faculty to level a churchyard, and lay flat upright head and foot stones, with a clause that no expense shall fall on individuals. *Sharpe* v. *Hansard*, 3 Hag. 335.

In a vestry meeting for civil purposes, as a full latitude of discussion must be allowed, mere coarse expressions do not constitute "brawling;" but on proof of an act of "smiting," the Court is bound, whatever may be the origin of the dispute, to proceed to award punishment, under the 5 & 6 Edw. 6. c. 4, and 53 Geo. 3. c. 127. *Hoile* v. *Scales*, 2 Hag. 566.

Brawling and smiting at a vestry attended only by five persons, and held in a room situate within the churchyard, are, *ratione loci*, offences within stat. 5 & 6 Edw. 6. c. 4, though of very slight ecclesiastical character. In such a case, where the promoter, a private individual, was proceeding vindictively, and had in the articles exaggerated the smiting, and suppressed his own brawling expressions, which provoked the smiting,—the Court directed the matter to stand over for private arrangement; but, that failing, on a subsequent day pronounced the brawling and smiting proved; decreed the defendant to be suspended *ab ingressu ecclesiæ* for a week for brawling, and to be imprisoned twenty-four hours for smiting, and ultimately condemned him in costs. *Lee* v. *Matthews*, 3 Hag. 169.

A threatening posture is not smiting, under the statute.

The 5 & 6 Edw. 6. c. 4. was not intended to abridge the ecclesiastical jurisdiction in cases of brawling. *Jenkins* v. *Barrett*, 1 Hag. 15.

Provocation is no defence to a criminal suit for brawling in a church at a vestry meeting. On proof of the offence, the defendant suspended for a fortnight *ab ingressu ecclesiæ*, and condemned in costs. *North and Little* v. *Dickson*, 1 Hag. 730.

In a criminal suit for smiting, under 5 & 6 Edw. 6. c. 4, the proof must not admit of a doubt. Two concurrent sentences, pronouncing the smiting proved, reversed, and both parties left to pay their own costs. *Scales* v. *Hoile*, 3 Hag. 371.

On debating the admissibility of articles in a suit for brawling, the question is, whether they contain a substantive charge of brawling and riot in a sacred place; and no occasion nor provocation can exempt from the penalties of the law; nor can the Court listen to a suggestion that the articles do not truly detail the circumstances.

Articles for brawling at a vestry held in a room within the church, being only proved in part, the Court monished the defendant to abstain from future misconduct, and condemned him in 20*l.* *nomine expensarum*. *Jarman* v. *Bagster*, 3 Hag. 356—60.

On proof of violent conduct, and great personal abuse, at a vestry held in a room within the church, the Court suspended the defendant *ab ingressu ecclesiæ* for fourteen days; but, under the circumstances, condemned him only in 35*l.* *nomine expensarum*. *Jarman* v. *Wise*, 3 Hag. 360.

In a suit for brawling, under 5 & 6 Edw. 6. c. 4. s. 1, the words of brawling must be set forth in the articles. The words, "other enormous ecclesiastical offences," in a citation, are surplusage, and will not support a charge of smiting under 5 & 6 Edw. 6. c. 4. s. 2. *Jenkins* v. *Barrett*, 1 Hag. 14.

A defendant, on giving affirmative issue, suspended *ab ingressu ecclesiæ* for a month, and condemned in costs for brawling on two occasions at a vestry held in the chancel. *Field* v. *Cosens*, 3 Hag. 178.

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## CHURCH LEASE.

[See LEASE.]

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## CHURCH RATE.

[See RATE.]

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## CHURCHWARDENS AND OVERSEERS.

[See RATE.]

(A) APPOINTMENT.
(B) RIGHTS AND DUTIES.
(C) LIABILITIES.
(D) ACCOUNTS.

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### (A) APPOINTMENT.

[See MANDAMUS.]

The Clerk of the Treasury of the Court of Common Pleas is not liable to serve the office of overseer. *Ex parte Jeffries*, 7 Law J. C.P. 263, s. c. 6 Bing. 195, s. c. 3 M. & P. 450.

The same person cannot at the same time fill the offices of churchwarden and overseer. *The King* v. *Hewett*, 7 Law J. M.C. 3.

Where the person first elected churchwarden has, on payment of a fine, been excused,—a person elected in his place, at the same vestry meeting, is bound to serve, unless some exemption is shewn. *Birnie* v. *Weller and Elliott*, 3 Hag. 474.

The ecclesiastical officer, the commissary, cannot try the validity of an election of churchwardens so as to bind the contending parties. *The King* v. *Williams*, 7 Law J. M.C. 46, s. c. *ib.* K.B. 48, s. c. 8 B. & C. 681.

The Court will not entertain a motion to confirm an appointment of overseers with a view to try the question as to the validity of their appointment; though, with that view, they will hear a motion to *quash* such an appointment. *The King* v. *the Justices of Peterborough*, 8 Law J. M.C. 130.

### (B) RIGHTS AND DUTIES.

[See COSTS.]

Churchwardens are entitled to protection, if they proceed fairly; if not, they are peculiarly responsible to the Court. *Lloyd* v. *Poole*, 3 Hag. 485.

### (C) LIABILITIES.

An assistant overseer, appointed under the statute 59 Geo. 3. c. 12, is within the statute 17 Geo. 2. c. 3, and liable to a penalty for not producing the rate to an inhabitant when lawfully demanded, if by his appointment he be authorized to take care of the poor, or have a limited authority to have the legal custody of the rate.

A declaration for penalties under the statute 17 Geo. 2. c. 3, alleged that the defendant was an assistant overseer, that a rate was duly made, &c., and that the plaintiff, an inhabitant, &c., at a reasonable time demanded an inspection of the rate, and tendered 1*s.*; and that although the defendant, as such assistant overseer, had the rate in his possession, he refused to produce it, whereby, &c.:—Held, after verdict, that it was sufficient, because

the allegation, that the defendant was an assistant overseer, could only be proved by the production of his appointment, in which his duties must be specified; and unless it had appeared, from the appointment, that he had a general authority to take care of the poor, or a limited authority to have the legal custody of the rate, the Judge would have directed the jury to find a verdict for the defendant. *Edwards* v. *Bennett*, (in error,) 3 Y. & J. 458, s. c. 6 Bing. 230, s. c. 3 M. & P. 749: *Bennett* v. *Edwards*, 7 Law J. M.C. 49, s. c. 8 B. & C. 702.

If a governor of a colony has the authority of the Ordinary, he has no power to commit a churchwarden who refuses to account; he ought to proceed upon a citation, and must excommunicate. *Basham* v. *Lumley*, 3 C. & P. 489.

Where an ejectment has been clearly and indisputably defended by parish officers in the name of one of their paupers, but at the expense and upon the alleged title of the parish, the Court will order the parish officers to pay the taxed costs after a judgment has been obtained by the lessor of the plaintiff. *Doe* d. *Masters* v. *Gray*, 8 Law J. M.C. 75, s. c. 10 B. & C. 615.

(D) ACCOUNTS.

[See 1 & 2 Will. 4. c. 60, 9 Law J. Stat. 107.]

Accounts rendered by parish officers under the 17 Geo. 2. c. 38. should state the items of expenditure; and are not sufficient if they state merely the gross amount of expenditure for every fortnight, or other given period.

Such accounts, so insufficient, are not rendered sufficient by the circumstance of the parish being governed by a select vestry under the 59 Geo. 3. c. 12, and the items composing the aggregate charge having been submitted to, and examined and allowed by them, and having been also seen and examined by the Magistrates on passing the general accounts. All the items should appear in the accounts passed before the Magistrates; so that each parishioner, on obtaining a copy of those accounts, will see each item. *The King* v. *the Justices of Hertfordshire*, 7 Law J. M.C. 73.

A parishioner rated for the relief of the poor is entitled to inspect and take copies of the accounts of the disbursement of the money intrusted to the guardians of the poor, under the 22 Geo. 2. c. 83; although the accounts have been allowed by the visitor.

Whether an appeal lies to the Sessions against such accounts—*quære*. *The King* v. *the Guardians, Churchwardens, and Overseers of Great Faringdon*, 8 Law J. M.C. 1, s. c. 9 B. & C. 541.

Where two overseers keep separate accounts, one may (in his character of a rated inhabitant) appeal against the accounts of the other, although they were both present at the passing of their several accounts before the vestry and the special Sessions, and the appellant then made no objection to the accounts of his co-overseer. *The King* v. *the Justices of Gloucestershire*, 8 Law J. M.C. 108, s. c. 1 B. & Ad. 1.

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## CIDER.

Duties on, repealed, 1 Will. 4. c. 51, 8 Law J. Stat. 107.

## CLERGY.

[See CHURCH, DILAPIDATIONS, and LEASE; and, as to nomination to churches built and endowed by private persons, see 1 & 2 Will. 4. c. 38, 9 Law J. Stat. 71.

[Provisions of 29 Car. 2, as to augmentations of small vicarages and curacies, extended by 1 & 2 Will. 4. c. 45, 9 Law J. Stat. 84.]

A grant of a prebend by the Crown, prior to the 1 Ann. st. 1. c. 7. s. 5, held to be good.

The annexing a prebend to an archdeaconry by grant from the Crown, held good; there being nothing in the charter of foundation of the cathedral in question (Rochester) against it.

When once such annexation has taken place, the Crown cannot sever the prebend from the archdeaconry.

Accordingly, under the circumstances before mentioned, the bishopric being vacant, the Crown presented B to the prebend, and K afterwards to the archdeaconry:—Held, that the archdeaconry carried the prebend; and that the prior grant of the mere prebend to B was void. *Rex* v. *Bayley*, 9 Law J. K.B. 131, s.c. 1 B. & Ad. 761.

The earlier church-building acts, 58 Geo. 3. c. 45, 59 Geo. 3. c. 134, 3 Geo. 4. c. 72, carefully protect the rights and interests of patrons and incumbents, especially existing incumbents; and 5 Geo. 4. c. 103. only allows a departure from that principle for a limited time, and under very special circumstances. *Semble*, that the sole object of 7 & 8 Geo. 4. c. 72, authorizing the church-building commissioners to declare the right of nomination to be in the endower, with lands or money in the funds, of a chapel, without compensation made to the incumbent, was to encourage such endowments; and that such chapel must (save as to compensation) be built either in conformity to the general law, or under the provisions of the earlier church-building acts.

A clerk cannot, under 7 & 8 Geo. 4. c. 72. s. 3, officiate, without consent of the incumbent of the parish, in a newly erected chapel, consecrated and endowed as a chapel of ease, unless the right of nomination has by deed under seal been previously declared to be in the endower. *Bliss* v. *Woods*, 3 Hag. 486—517.

By general law the church service ought to be regularly performed every Sunday morning and evening. Any relaxation is to be supposed to have been permitted by the diocesan, owing to the circumstances of the parish; and the terms prescribed must be strictly observed.

To constitute in a clergyman criminal neglect of duty, requiring censure and correction, there must be neglect without just cause; but unless such cause be shewn, the law will infer its absence.

The Court is bound to admit articles by a churchwarden against an incumbent, for frequent irregularities in the performance of divine service, and of parochial duties, and also for his violating the churchyard: nor (the suit being commenced in April 1828, and the alleged offences being laid from September 1824, till January 1827,) is the lapse of time any bar.

In a criminal suit against a clergyman of unimpeachable moral character, remote charges of omission or irregularity in performing divine service,

being shewn generally not to be "without just cause;" more recent charges being completely rebutted; no neglect of duty being imputed for the two years next before the institution of the suit; the clergyman, as to one charge of misconduct, having erred from mistake; and as to two of the remaining charges, (one of which totally misrepresented the fact,) having acted properly:—the Court pronounced the articles not proved; and, as no fair ground for a suit existed at the time of its institution, dismissed the defendant with his costs. *Bennett* v. *Bonaker*, 3 Hag. 24—39.

The whole cure of souls, and all the emoluments of a parish, belong, under the original endowment, to the incumbent and his successors, and vest in the existing incumbent by institution and induction. *Bliss* v. *Woods*, 3 Hag. 511.

Defendant, being incumbent of a living with cure of souls, valued at less than 8*l.* a year in the King's books, accepted another benefice without having a dispensation to hold both, whereby the first became void *de jure;* but he continued in possession. The patron presented another clerk, and afterwards brought *quare impedit*, and recovered against the defendant, upon which the new presentee was instituted and inducted. In an action by the latter against the defendant, founded on the statute 28 Hen. 8. c. 11. s. 3, which gives the profits of every benefice during vacation to the next incumbent:—Held, that the plaintiff could not recover the profits, either from the time of his being presented, or from the suing out of the *quare impedit*, the vacation contemplated by the statute being a vacation *de facto*. *Halton* v. *Cove*, 1 B. & Ad. 538.

By the Irish statute, 10 & 11 Car. 1. c. 2. s. 7, it is enacted, "That charges imposed by any person upon his benefice, shall be effectual for such time only as he shall be resident upon his benefice, without absence above eighty days in any one year; and that all covenants, bonds, statutes merchant and of the staple, recognizances, judgments, and all other like assurances, made, acknowledged, or suffered by any such beneficer, or collaterally on his behalf, for the enjoying the houses, lands, tithes, and other profits of such benefices, or any part thereof, otherwise, or for any longer or other time, or whereby any such beneficer shall be inforced to resign, &c.; and likewise all covenants, bonds, and other assurances, made to the intent to force such beneficer to be resident, for the upholding of every grant, lease, alienation, or charge, &c. shall be void to all intents and purposes." By the Irish statute, 10 & 11 Car. 1. c. 3, it is enacted, "That all grants, leases, alienations, charges, and incumbrances, made, &c. by any archbishop, or other dignitary ecclesiastical, parsons, vicars, &c. of any lands, tenements, or hereditaments, parcel of their possessions, other than such leases and grants as therein, or in any other act passed in the then present session of parliament, authorized, shall be void."

R W being possessed of a certain vicarage, and also a rectory and chantorship, in Ireland, in consideration of a sum of 6,000*l.* advanced to him by the Globe Insurance Company, granted them, and charged upon his said benefices, an annuity of 825*l.* 5*s.* Irish currency, for a term of ninety-nine years, if R W should so long live. By a bond and warrant of attorney of the same date with, and reciting the indenture, and reciting that the annuity should be still farther secured by the bond and warrant of attorney, R W and O W became bound to certain trustees by the Globe Company, in a penal sum of 6,000*l.* conditioned for payment of the annuity:—Held, that the collateral security by the bonds was valid, although the charge on the benefice was void under the statutes. *Wynne* v. *Robinson*, 4 Bligh, N.S. 27, s. c. 1 Dow. & C. A.C. 27.

The minister of a dissenting chapel has not in that character any legal estate in the buildings; and he is removable from them at the instance of the trustees in whom the legal estate is vested. After a demand of possession by them, and a refusal to deliver up, he becomes a trespasser. *Doe* d. *Jones* v. *Jones*, 8 Law J. K.B. 310, s. c. 10 B. & C. 718.

A clergyman may be deprived for fornication without previous monition or suspension. Sentence of deprivation affirmed with costs. *Free* v. *Burgoyne*, 2 Hag. 662.

Upon the proof against a clergyman of repeated and habitual acts of incontinency, coupled with neglect of duty, and other conduct affording just scandal and offence to his parishioners, the Court is bound to proceed to deprivation. *Burgoyne* v. *Free*, 2 Hag. 456.

*Note.*—It was objected that the Dean of the Arches could not deprive without a bishop; but it was overruled by the whole Court; that the cause did not affect the archbishop; besides, that it was the constant practice for the Dean of Arches to deprive. *Appendix*, 1 Hag. 4.

The Court of Chancery will not interfere to prevent the removal of the minister of a dissenting chapel vested in trustees, when the deed is silent as to the mode of electing the minister and his continuance in office, and contains no provision for his support, but he is dependent for it on the voluntary contributions of his flock. *Porter* v. *Clarke*, 2 Sim. 520.

## CLERK OF THE PEACE.

The appointment to the office of clerk of the peace is in the *custos rotulorum* of each county, and King's county in Ireland is not an exception—Bayley, J. *dissentiente*. *Harding* v. *Pollock*, 6 Bing. 25, s. c. 3 Bligh, N.S. 161, s. c. 1 Dow. & C. 453.

Balances in the hands of clerks of the peace, on account of lunatic asylum licences, to be paid over to the treasurers of county, and appropriated to the county rates, 11 Geo. 4. c. 1, 8 Law J. Statutes, 1.

## CLOTH.

*Semble*—That there is not any custom in the cloth trade by which a tailor, who receives cloth from a clothier which he does not approve, is bound to pay for it, if, when sent back, it does not reach the seller, unless he shews that he has delivered it to the seller's order in writing. *Davies* v. *Halton*, 5 C. & P. 69. [Tindal]

## COALS.

Alteration of duties on, 1 & 2 Will. 4. c. 16, 9 Law J. Statutes, 15.

Coals sent from Newcastle to London pay a port-duty according to the Newcastle chaldron. *Linskill* v. *Read*, Pea. A.C. 68.

A person generally employed on commission to buy coals for a retail coal-merchant, but who sometimes, before the receipt of such orders, bought coals, and then let his employer have what he pleased of them, paying him at the same rate as when he had ordered them beforehand, is not to be considered, even with respect to the latter coals, as the vendor of them, so as to be liable to the coal-meter for an inspection fee under 47 Geo. 3. c. 68. s. 95. *Bigg* v. *Megarey*, 2 M. & M. 35. [Tenterden]

The Coal Act, 47 Geo. 3. c. 68. s. 116, enacts, "That if a purchaser be dissatisfied with the measure of his coals, he shall send a notice to the office of the principal land coal-meters," whereupon a meter, within the space of two hours next after such notice left at the office, shall "attend from the office at the house of the purchaser" to re-measure the coals; and section 120 imposes a penalty upon the principal meter, if he shall "neglect or refuse within the space of two hours after the receipt of the notice, to send a meter to the house of the purchaser":—Held, that these two sections must be read together, and that it is sufficient to satisfy the words of the 117th section, if the meter leave the office within two hours after the receipt of the notice, and proceed with due diligence to the house of the purchaser, although he do not arrive there within that time. *Loader* v. *Thomas*, 3 Y. & J. 525.

By the act 47 Geo. 3. c. 68. s. 113, certain regulations are made to prevent frauds in the coal trade. Among them it is directed, that upon a sale of coals by wharf measure there shall be two tickets; one a vendor's ticket, the other a meter's ticket. The vendor's ticket is to be signed by the meter, and is to express the quality of coal sent; and the meter is not to sign it until he be satisfied that the coal actually sent corresponds in quality with that which is expressed in the ticket. In an action for coals sold and delivered, in which it appeared that the vendor's ticket had not been signed by the meter,—Held, that the plaintiff was not entitled to recover; although the defendant had paid the amount of the debt after the commencement of the action; and the action itself was continued merely to recover the costs. *Little* v. *Poole*, 7 Law J. K.B. 158, s. c. 9 B. & C. 192.

Where the vendor of coals himself inserts in the vendor's ticket the description of them, it is not necessary, in an action for penalties under the 47 Geo. 3. c. 68. to produce the ship-meter's certificate, required by the 55th section of that statute. *Reeve*, qui tam, v. *Starey*, 4 C. & P. 17. [Tenterden]

The statute 47 Geo. 3. sess. 2. c. 68. s. 29. provides, that all contracts for the sale of coals at the London coal-market shall be signed by the buyer and the factor; that the factor shall deliver a copy of the contract to the clerk of the market; and that the clerk shall enter it in a book. The 32nd section makes such entries "evidence in all cases, suits, and actions touching anything done in pursuance of this act:"—Held, that the production of such an entry of a contract, purporting to be signed by the buyer and factor, is not evidence of the sale, in an action brought for the price of the coals, unless the buyer be proved *aliunde* to have signed the contract. *Brown* v. *Capel and another*, 1 M. & M. 374. [Tenterden]

## COGNOVIT.

[See PARTNERS and JUDGMENT.]

## COIN.

Salary of the master and worker of his Majesty's Mint reduced to 2,000*l.* per annum, 1 & 2 Will. 4. c. 10, 9 Law J. Statutes, 10.

## COLONY.

[See CHURCHWARDENS AND OVERSEERS.]

[Trade of British possessions abroad, as to duties, &c. regulated by 1 Will. 4. c. 24, 9 Law J. Stat. 23.]

*Semble*—That the governor of a British colony has the ecclesiastical power of an ordinary, without that authority being expressly named in his commission. *Barham* v. *Lumley*, 3 C. & P. 489.

## COMMISSIONERS.

[See BANKRUPT, INCLOSURE, HIGHWAY.]

Where a number of persons have powers given to meet and do certain acts, which are of a public nature, the general rule is, that a majority of those who are appointed must meet; and that, of those who do meet, the majority then present may exercise the powers. *The King* v. *Whitaker and others*, 7 Law J. K.B. 332, s. c. 9 B. & C. 648.

## COMMON.

The statute 52 Geo. 3. c. 71, for the better cultivation of navy timber in the forest of Woolmer, in the county of Southampton, which (section 8) enacts, "For the regulating and securing to the several persons now having right of common of pasture in and over the said forest, the power of cutting peat and turves within such parts of the said forest as shall not be inclosed by virtue of this act, that after the inclosure shall be made and completed, it shall be lawful for all persons having right of common in the said forest, to cut and take peat and turves in any part of the said forest not inclosed under this act, without payment of any fee or sum of money to any keeper or other person having the care or superintendence of the said forest for taking the same," merely regulates the previous existing rights, but confers no new right, and authorizes those only who before had the right of estovers and common of pasture, to cut without payment of fees, for the necessity of the dwelling-house, in respect of which the original right existed.

In pleading a right of common by prescription, the defendant must shew a seisin in fee of the land, in respect of which he claims, and prescribe in the *que* estate for the right.

Where a defendant justified under right of common of pasture, by shewing a demise from a freeholder for life of the land in respect of which he claimed.

and averred that he, the defendant, and all those whose estate he then had, and his landlord, from time, &c., had common of pasture in respect of the demised premises:—Held, upon demurrer, that the plea was bad. *Attorney General* v. *Gauntlett*, 3 Y. & J. 93.

To trespass on the case, by a freeholder having right of common against a defendant for an encroachment, a plea of leave and licence was held to be supported, by evidence that the plaintiff had permitted a former encroachment by the defendant, the plaintiff being then under age, and had since, when at full age, countenanced a further encroachment by expressing his assent, and requiring an increase of the rent or annual acknowledgment paid by the defendant.

*Quære*—What acts amount to a revocation of leave and licence, and what conclude the party giving the licence. *Harvey* v. *Reynolds*, 12 Price, 724.

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## COMPANY.

[See PARTNERS.]

(A) RIGHTS, POWERS, AND DUTIES.
(B) LIABILITIES OF SHAREHOLDERS AND OTHER PERSONS.
(C) SUITS AND ACTIONS.

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### (A) RIGHTS, POWERS, AND DUTIES.

The 39 & 40 Geo. 3. c. 28. does not extend to prevent persons, exceeding six in number, paying their own debts by their own bills. *Harvey* v. *Kay*, 7 Law J. K.B. 167, s. c. 9 B. & C. 356.

Where a company was formed for the purpose of taking and working mines,—Held, that the partnership thus formed was not such as to confer upon the directors or other managers of the company a power (without express authority,) to draw and accept bills in the name of the company, as a power incidental and necessary to the carrying on of the business of the company. *Dickinson* v. *Valpy*, 8 Law J. K.B. 51, s. c. 10 B. & C. 128, s. c. 5 M. & R. 126.

An act of parliament, creating a joint-stock railway company, gave power from time to time to make calls, not to exceed 10*l.* per share; so that no call be made but at the distance of two months from each other, and twenty-eight days' notice of all such calls should be given by advertisement:—Held, that this did not justify a general sweeping call of 10*l.* on the 28th of October, 10*l.* on the 28th of December, 10*l.* on the 28th of February, 10*l.* on the 28th of April, and 4*l.* on the 28th of June. *The Stratford and Moreton Railway* v. *Stratton*, 9 Law J. K.B. 268, s. c. 1 B. & Ad. 518.

Where a company is incorporated for certain purposes, and the majority of proprietors petition Parliament for an alteration of those purposes, the Court will not, at the instance of another proprietor, restrain them from so petitioning—but it will not allow an application, by the proprietors, of the funds or property of the company, to any purposes not sanctioned by the authority of Parliament. *Ware* v. *the Grand Junction Waterworks Company*, 9 Law J. K.B. 169.

### (B) LIABILITIES OF SHAREHOLDERS AND OTHER PERSONS.

[*Teague* v. *Hubbard*, 2 M. & R. 369, Dig. Law J. 145.]

A mere shareholder in an inchoate joint stock company, who does not interfere with the management of the company, and has not signed any deed or in any way *held himself out as a partner* in the concern, is not liable to be sued for debts contracted by the company. *Fox* v. *Clifton*, 9 Law J. C.P. 257, s. c. 6 Bing. 776, s. c. 4 M. & P. 676.

The members of a building society held liable for work done in pursuance of a resolution at which they were present, and in which they concurred, although they had no communication with the plaintiff, who did the work, and although they might be presumed to have an interest in the land upon which the house were built. *Braithwaite* v. *Schofield*, 7 Law J.K.B. 274, s. c. 9 B. & C. 401.

Where parties have been held out to the world, and have acted as directors of a joint-stock company, and have not done anything to divest themselves of the character of directors, they are liable for contracts entered into on the part of the company; although the contracts be entered into after they have ceased to attend the meetings of the directors. *Doubleday* v. *Muskett*—*Same* v. *Lousada*, 9 Law J. C.P. 35, s. c. 6 Bing. 109, s. c. 4 M. & P. 750.

A prospectus for the formation of a joint stock company upon certain terms, was signed by the defendant. The terms were never fulfilled. The defendant ceased to take any part in the concern. Subsequently, the plaintiff was shewn the prospectus signed by the defendant, and supplied goods for the use of the company:—Held, that the defendant had not made himself liable as a partner in the company. *Bourne* v. *Freeth*, 7 Law J. K.B. 298, s. c. 9 B. & C. 632, s. c. 4 M. & R. 512.

The defendants had been shareholders in a joint stock mining company, but had parted with their shares. They had attended meetings of the company, but had not signed the deed of trust by which the affairs of the company were to be regulated:—Held, that they were liable for goods furnished to the company. *Ellis* v. *Schmæck and Thomas*, 7 Law J. C.P. 231, s. c. 5 Bing. 521, s. c. 3 M. & P. 220. Sed vide, contrà, *Fox* v. *Clifton*, supra.

A member of a committee of management taking an active part in the concerns of a charitable institution, supported by voluntary contributions, is liable for goods furnished by a tradesman for the use of the institution, although it appear that such tradesman did not furnish them on any contract with the committee, but having at first furnished goods on the credit of an individual, who, previously to the formation of a committee, had the sole management, continued to send them in afterwards on orders given as before, by the servants of the institution, without any inquiry as to who was liable to pay him. *Glouester* v. *Hunter*, 5 C. & P. 62. [Tindal]

A proprietor who has attended the meetings, at which a call was made, joined in making it, and paid the two first parts of it, is not precluded, in an action against him for the remainder, from objecting that the calls were improperly made. *The Stratford and Moreton Railway* v. *Stratton*, 9 Law J. K.B. 268, s. c. 2 B. & Ad. 518.

Where a company was formed with a nominal capital, and a person applied for shares, paid instalments on the amount of them, attended a meeting of the company, and made another payment on his shares, signed a deed, the contents of which did not appear, but took no further part in the proceedings of the company, the capital of which was never completed:—Held, that these circumstances were not sufficient to infer an authority by that person to the directors, or other members of the company, to draw or accept bills of exchange in the name of the company, for debts incurred by them, although the resolutions for the drawing and accepting certain bills, (one of them being that upon which the person was sued,) were entered in the books of the company, to which that person might have had access. *Dickinson* v. *Valpy*, 8 Law J. K.B. 51, s. c. 10 B. & C. 128, s. c. 5 M. & R. 126.

By a resolution of the directors of a mining company, four directors were necessary for the doing of any act. Three of the directors were called trustees, and those three gave a power of attorney, to the agent of the company to draw bills:—Held, that the other directors were not liable on those bills, as the power of attorney was not executed by four directors.

An agent for an association who draws bills in his own name, for the purposes of the company, does not bind the partners as drawers, though authorized to draw bills. *Ducarry* v. *Gill*, 1 M. & M. 450, s. c. 4 C. & P. 121. [Tenterden]

(C) Suits and Actions.

[*Hitchins* v. *Congreve*, 4 Russ. 562, Dig. Law J. 145.]

The holders of shares in a joint stock company, purchased immediately from the company, are entitled to relief in equity, against the fraudulent conduct of the directors.

Some of the shareholders in a joint stock company may file a bill to have their deposits repaid, without making all the other shareholders parties, if they are ignorant of their names. *Blain* v. *Agar*, 2 Sim. 289.

But all the members, however numerous, must be parties to a suit for the dissolution of partnership. *Long* v. *Yonge*, 2 Sim. 369.

If a railway company are empowered to do certain acts, making compensation, estimated in a certain manner, to the persons whose property may sustain damage or injury from their operations, and they proceed, in pursuance of their powers, to erect an arch over a mill-race of such dimensions as will be injurious to the mill—The Court will interfere by injunction to restrain them from so doing. *Coates* v. *the Clarence Railway Company*, 8 Law J. Chanc. 72, s. c. 1 Russ. & M. 181.

An act of parliament enabling a joint stock company to sue and be sued in the name of their chairman, does not enable them to sue a shareholder in that manner. *M'Mahon* v. *Upton*, 7 Law J. Chanc. 125, s. c. 2 Sim. 473.

The statute, establishing a particular company, provided that "The whole of the said sum of 100,000*l.* shall be subscribed before any of the powers and provisions given by the act shall be put in force." The company made a call on the shares before the subscriptions were complete, and commenced an action for the call after they were so:—Held, that such action was not maintainable; the completion of the subscription list being necessary to enable the company to make the call, as well as to bring the action. *The Norwich and Lowestoft Navigation Company* v. *Theobald*, 2 M. & M. 151. [Tenterden]

In debt on bond, the defendant pleaded that the bond was void, it being conditioned for the payment of a certain sum to the plaintiff, on his forming a company which would be illegal at common law, and on his transferring to such company, when formed, his interest in certain letters patent, in which it was expressly provided that they should not be assigned to, or for the use of, any number of persons exceeding *five*:—Held, on general demurrer, that the plea was good, and an answer to the action. *Duvergier* v. *Fellowes*, 7 Law J. C.P. 15, s. c. 5 Bing. 248, s. c. 2 M. & P. 384.

If a deed be produced, purporting to bind a trading company, proof that the person executing it was their general law agent, is *primâ facie* sufficient, without shewing that he was authorized to execute the particular deed. *Macleod* v. *East London Waterworks Company*, 2 M. & M. 149. [Tenterden]

An act of parliament, 6 Geo. 4. c. 30, to enable a company to form a railway, prescribed the form of action against the proprietors for calls, and enacted, that it should only be necessary to prove that the defendant was a proprietor, and that the calls had been made in pursuance of the act; it also recited that a sum of money had been subscribed by the proprietors, under a contract binding their heirs; whereas, in fact, that sum had not been subscribed, and no contract under seal had been executed by the proprietors:—Held, that a defendant who, with a knowledge of the mis-recital, had paid previous calls, and acted as a proprietor, was estopped from questioning the validity of the act, upon the ground of the mis-recital; and that it was not incumbent upon the plaintiffs to shew that the defendant had executed a contract under seal, in order to prove that he was a proprietor within the meaning of the act. *Cromford Railway Company* v. *Lacey*, 3 Y. & J. 80.

Where a plaintiff sued the members of a joint stock company for goods sold and delivered, and the defence was, that he was himself a member of the company:—Held, that his own letters, in which he spoke of himself as a member, were evidence to shew, that he was a member, although it was provided by the partnership deed, that none should be members who did not execute the deed, and it did not appear that the plaintiff had executed it.—Held, also, that those letters were evidence of his being a member at the time at which they were written, although his shares had been entered in the books of the company as transferred to another person; the provisions of the deed requiring the execution of a formal transfer, which it did not appear had ever been executed. *Harvey* v. *Kay*, 7 Law J. K.B. 167, s. c. 9 B. & C. 356.

Where an act of parliament, creating a public company, declared that they might be sued in the name of their secretary, and that, judgment being obtained against him, any member of the company should be liable to execution:—Held, that under such a judgment the plaintiff was not authorized to sue out an execution against a person whom he contended to be (and who in fact might be) a member

of the company, without first applying to the Court for leave to enter the special facts on the roll, in order to give the defendant an opportunity of traversing, or demurring to them. *Bartlett* v. *Pentland*, 9 Law J. K.B. 109, s. c. 1 B. & Ad. 704.

## COMPENSATION.

A local act (for re-establishing the Hungerford Market,) empowered an incorporated company to purchase houses, &c., and provided that all tenants for years, from year to year, or at will, who, by reason of the passing of the act, should sustain any loss, damage, or injury, in respect of any interest whatsoever, for *good-will*, improvements, tenant's fixtures, or otherwise, which they then enjoyed, should receive compensation from the company. The company purchased certain premises from the owner, which were occupied many years by a yearly tenant; and then gave that tenant notice to quit in six months, ending with the year:—Held, that the tenant was still entitled to compensation for the good-will of the premises; as, although the tenancy might have been determined at a short notice, as between her and her landlord, the good-will was a valuable interest, of which it was not likely she would have been dispossessed had it not been for the passing of the act. *The King* v. *the Hungerford Market Company*, 9 Law J. K.B. 255, s. c. 2 B. & Ad. 204.

## COMPOUNDING AND COMPROMISE.

[*Harvey* v. *Cooke*, 4 Russ. 34, Dig. Law J. 146.]

If, in an indictment for compounding felony, it be averred that the defendant did desist, and from that time hitherto hath desisted from all further prosecution; and it appears that after the alleged compounding he prosecuted the offender to conviction, the Judge will direct an acquittal. *The King* v. *Stone*, 4 C. & P. 379. [Bosanquet]

A deed of compromise with respect to doubtful rights will not be set aside, because the bargain was such as would have seemed disadvantageous to one of the parties, if she had been certain as to the full extent of her legal right.

Costs will be given against a party, who endeavours unsuccessfully to impeach a compromise, after a contingency has happened, which renders the compromise less for his benefit. *Naylor* v. *Wynch*, 7 Law J. Chanc. 6.

An offer of a specific sum by way of compromise is admissible in evidence, unless accompanied with a caution that the offer is confidential. *Wallace* v. *Small*, 1 M. & M. 446. [Tenterden]

A landlord was sued for repairs done upon his estate; the plaintiff failed in endeavouring to prove that the defendant had given orders for the repairs. He then offered evidence of an agreement made after the action was brought, between the plaintiff, the defendant, and the landlord's tenant, by which the tenant was to pay to the plaintiff 100*l.* out of the rent which he would have to pay the defendant; and that the defendant should pay two-thirds of the plaintiff's costs. The tenant paid the plaintiff the 100*l.*: but the defendant did not pay the two-thirds of the costs. The plaintiff then carried down the record for trial, and now contended that he was entitled upon this evidence to a verdict, with nominal damages.

Held, by Mr. Justice Littledale and Mr. Justice Holroyd, that even if the evidence were admissible in an action upon the agreement, it was not evidence in the present action to charge the defendant with a nominal verdict.

Held, by Mr. Justice Bayley, that it was evidence to go to the jury in this action, upon the question whether the defendant had admitted a general liability. *Leftus* v. *Hudson*, 7 Law J. K.B. 242, s. c. 2 M. & R. 481.

## CONCESSIT SOLVERE.

[See WALES.]

## CONSOLIDATION OF SUITS.

[See TITHES.]

## CONSPIRACY.

*Semble*—That an indictment charging the defendants with conspiring "to cheat and defraud the just and lawful creditors of W F," (without any further statement of the conspiracy, or any overt act,) is bad as being too general. *The King* v. *Fowle*, 4 C. & P. 592. [Tenterden]

## CONSTABLE.

[See MALICIOUS INJURY.]

(A) POWER, DUTY, AND LIABILITY.
(B) ACTIONS AGAINST.

[Laws relative to the appointment of special constables amended by 1 & 2 Will. 4. c. 41, 9 Law J. Statutes, 80.]

### (A) POWER, DUTY, AND LIABILITY.

[Duties of high constables increased by severance of hundred or district under 9 Geo. 4. c. 43, may be regulated and partially dispensed with by the quarter sessions, 10 Geo. 4. c. 46, 7 Law J. Statutes, 92.]

A constable is not liable to an action of trespass for arrest and false imprisonment for apprehending a person charged with felony, if he have reasonable or probable cause for suspecting that a felony has been committed, and that the party charged is the felon. *Davies* v. *Russell*, 7 Law J. M.C. 52, s. c. 5 Bing. 354, s. c. 2 M. & P. 590.

A police constable is not justified under the statute 10 Geo. 4. c. 144. s. 7. in laying hold of, pushing along the highway, and ordering to be off, a person found by him conversing in a crowd with another, merely because the person with whom he happens to be conversing, is known to be a reputed thief. *Stocken* v. *Carter*, 4 C. & P. 477. [Gaselee]

A went to a house at night, demanding to see the servant. He was told to depart, and would not. A constable was sent for, and A went from the house to the garden. When the constable arrived, A said,

"That if a light appeared at the windows, he would break them;" upon which the constable took him into custody:—Held, that the constable was not justified in so doing. *The King* v. *Bright*, 4 C. & P. 387. [Parke]

(B) ACTIONS AGAINST.

A party cannot maintain trover against a constable for a wrongful taking of goods under a justice's warrant, without joining the justice as a defendant, if perusal and copy of the warrant have been given under the statute 24 Geo. 2. c. 44. s. 6. *Lyons* v. *Golding*, 3 C. & P. 586. [Park]

A refusal by a constable, on demand, to re-deliver goods taken under a magistrate's warrant, is not sufficient evidence to support an action of trover against such constable.

*Quære*—If trover be an action within 24 Geo. 2. c. 44. s. 6. *Miers* v. *Golding*, 7 Law J. K.B. 222.

The defendant (a constable) seized, under a warrant of distress for poor-rates, goods that were already in the custody of the landlord of the premises under a distress for rent:—Held, that he was not within the protection of the 6th section of the 24 Geo. 2. c. 44, and consequently, that a demand of a copy of the warrant was not necessary to enable the landlord to maintain trespass. *Kay* v. *Grover*, 9 Law J. C.P. 112, s. c. 7 Bing. 312, s. c. 5 M. & P. 140.

## CONTEMPT.

[Laws regarding commitments by courts of equity for contempt, and taking bills *pro confesso*, altered and amended by 1 Will. 4. c. 36, 8 Law J. Stat. 83.]

Exhibiting in an assize town inflammatory publications, respecting a crime about to be tried at the assizes, is not a contempt which the Judge of assize can interfere to stop by committing the party exhibiting. *The King* v. *Gilham*, 2 M. & M. 165. [Littledale]

The Court will pronounce an Irish peer in contempt for non-payment of costs, and direct such contempt to be signified, leaving the Lord Chancellor to decide whether the writ *de contumace capiendo* should issue. *Westmeath* v. *Westmeath*, 2 Hag. 653.

Whether the Court will make an *ex parte* order, that a person guilty of a contempt shall stand absolutely committed, upon the testimony of a single witness—*quere*.

An *ex parte* order of commitment for a contempt is not irregular, because it has been granted absolutely in the first instance, although the person guilty of the contempt is not a party in a cause. *Ex parte Clarke*, 1 Russ. & M. 563.

An order was made that the defendant should pay a sum of money by a certain day, or, on default, should stand committed. The plaintiff having been unable to serve that order in time, obtained, as of course, a second order to enlarge the time allowed for the payment, and make service of it on the defendant's clerk-in-court good service; the second order was irregular; it ought to have been made on notice. *Leake* v. *Nalder*, 1 Russ. & M. 357.

Three defendants were ordered to deliver up possession of estates to the receiver, within a certain time, or to stand committed; but no writ of execution of the order was served on them. The defendants refused to obey the order, the serjeant-at-arms was ordered to go against them. On the defendants being brought up in custody, it appeared that one of them was an infant, and he and another of them expressing contrition, were ordered to be discharged on payment of costs; the third, persisting in his contempt, was committed. The two others remained in custody, being unable to pay their costs. A motion afterwards made by the defendants to discharge the orders of commitment, for irregularity, was granted. *Green* v. *Green*, 2 Sim. 394.

Orders made *ex parte* to discharge a defendant in contempt for not answering, on certificate of answer filed and tender of costs.

The like order made *ex parte* without payment of costs, on certificate that the bill had been amended since the contempt. *Gray* v. *Campbell—Smith* v. *Campbell*, 1 Russ. & M. 323.

The "Suitors' Fund" not to be charged with the costs of contempt in any but especial cases of prisoners who are ordered to be discharged. *Nodder* v. *Harris*, 9 Law J. Chanc. 19.

A party in the custody of the marshal of the Marshalsea being brought into court, may be charged with a writ *de contumace capiendo*. *The King* v. *Bailey*, 9 B. & C. 67.

A party who is in contempt for disobedience to an order in a cause, is not thereby precluded from making a motion in another cause, having reference to a distinct subject, though between precisely the same parties—*semble*. *Clark* v. *Dew*, 1 Russ. & M. 103.

## CONTRACT.

(A) CONSTRUCTION.
(a) *In general.*
(b) *Condition precedent.*
(c) *Penalty or liquidated damages.*
(B) WHEN VALID OR ILLEGAL.
(C) STAMP.
(D) PERFORMANCE.
(E) WHEN ENFORCED OR RELIEVED AGAINST IN EQUITY.
(F) ACTION ON.
(a) *In general.*
(b) *Pleading and Evidence.*

(A) CONSTRUCTION.

[See LANDLORD AND TENANT.]

(a) *In general.*

An offer made by one party to an intended contract, allowing a given time to the other to accept or refuse it, does not bind the person who offers, until it has been accepted; and he may therefore withdraw his offer within the limited time.

And *semble*, that if the acceptance of such an offer, and the withdrawing of it, be simultaneous, the withdrawing shall be preferred; and neither party will be bound. *Head* v. *Diggon*, 7 Law J. K.B. 36, s. c. 3 M. & R. 97.

Contract for sale of "*about*" 300 quarters of rye, "*more or less*," shipped on board the Ann Elizabeth:—Held, that the words "about" and "more or less," did not justify the seller in forcing upon the buyer

45 quarters above the 300, which came by the Ann Elizabeth.

*Semble*, that evidence of mercantile men is not admissible to fix, by usage, the extent of the meaning of those words. *Cross* v. *Eglin*, 9 Law J. K.B. 145, s. c. 2 B. & Ad. 106.

The master and part owner of a ship delivered the ship's register to the agents of the ship, with a letter, stating that he deposited it with them as a security for the payment of *all* demands and charges *on account* of the ship. At this time there were debts due to the agents, and also to other persons. The agents received the register, and refused to deliver it back:—Held, that the letter, combined with the facts, did not amount to an agreement between the owners and the agents, that the letter, in consideration of the delivery of the register, would pay the debts due to other persons on account of the ship. *Bowen* v. *Fox*, 9 Law J. K.B. 101.

The plaintiff was engaged by the directors of a mining company, in the capacity of superintendant of their mines in South America, for a period of three years from the date of his arrival there. The agreement provided "that the directors might dissolve it at any time on giving the plaintiff twelve months' notice or twelve months' salary, and defraying *his* expenses to England; and also that, if the plaintiff served three years, he should in like manner be entitled to a reasonable sum for the expenses of his return, *and that of his family*, to England." The plaintiff arrived in South America in April 1826. In October 1827 he received notice to hold himself from that moment dismissed. The plaintiff thereupon sued the directors for the breach of contract, claiming a sum of 1815*l.*, including 700*l.* for a year's salary from the date of the dismissal, 470*l.* for further salary to the expiration of the three years of the contract, and a further sum of 320*l.* for the expenses of bringing home *his family* to England. A verdict was taken for the plaintiff, excluding these two sums of 470*l.* and 320*l.*, with leave to move to increase the damages by adding them, if the Court should think fit:—Held, that the plaintiff was not entitled to recover them. *French* v. *Brooke*, 8 Law J. C.P. 91, s. c. 6 Bing. 354, s. c. 4 M. & P. 11.

On a contract by the owner of a ship to take out a *boat*, not exceeding certain dimensions, there is an implication that the boat will be so constructed as not to impede the navigation of the ship. *Haynes* v. *Halliday*, 9 Law J. C.P. 179, s. c. 7 Bing. 587, s. c. 5 M. & P. 572.

In a negotiation for the advance of a sum of money by way of mortgage, where the proposed mortgagor undertakes, in writing, to pay to mortgagee all "fair and reasonable expenses in ascertaining the value of the property;" if the negotiation goes off by the default of the mortgagee, the mortgagor is not bound to pay such expenses.

In such negotiation, agreement by mortgagee to advance a given sum, "subject to the approval of the title, and execution of such mortgage securities as shall be recommended and approved by his conveyancer," does not entitle the mortgagee to insist upon the appointment of a receiver, as part of the "securities," although such appointment be recommended by the conveyancer. *St. Leger* v. *Robson*, 9 Law J. K.B. 184.

(*b*) *Condition precedent.*

The plaintiff, a surveyor, was retained by the defendant to negotiate with the Commissioners of Woods and Forests for the sale to them of certain premises of the defendant, for which he was to receive a commission of 2*l.* per cent. "on the sum which might be obtained, either by private treaty, arbitration, or trial by jury." The value of the property was assessed at 4,000*l.*; but there being an annuity charged upon the premises, which the Commissioners required the defendant to buy off, (of which annuity the plaintiff had had no notice,) the money was placed in the hands of the Accountant General, to await the adjustment of the difference:—Held, that the plaintiff was not entitled to his commission until the sum was ascertained, and received by the defendant. *Ball* v. *Price*, 9 Law J. C.P. 78, s. c. 7 Bing. 237, s. c. 5 M. & P. 2.

A and B were litigant parties in several actions. C was the attorney of B; and, at a meeting to settle the actions, it was agreed between A and B, in the presence of C, *inter alia*, that C should give his promissory note at two months as a collateral security for the payment, by B to A, of the sum of 450*l.* And it was added, that all the effects which A had of B's should be delivered up to C, as B's attorney. C signed the note at the meeting, immediately after the signing of the agreement:—Held, in an action on the note by A against C, that the delivery up of the effects was not a condition precedent to the right of A to claim the money. *Irving* v. *King*, 4 C. & P. 309. [Tenterden]

Where it was part of a condition precedent to the claim of a sum of 80*l.* in addition to the purchase money for a new house, that the pavement in front of the adjoining houses should be laid down by the 21st April; it was held, that the delay of four days, though occasioned by bad weather, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim. *Maryon* v. *Carter*, 4 C. & P. 295. [Tindal]

(*c*) *Penalty or liquidated damages.*

A "penalty" and "liquidated damages" are contradictory words. The Court leans against construing words to mean liquidated damages. *Horner* v. *Graves*, 9 Law J. C.P. 198, s. c. 7 Bing. 735, s. c. 5 M. & P. 768.

By an agreement containing various stipulations of different degrees of importance, some relating to matters of certain and some of uncertain nature and amount, it was provided, that, in case of the breach by either party of *any* stipulation therein contained, he should pay to the other 1000*l.*, which sum was declared to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. In an action for the breach of a clause of an uncertain nature:—Held, that the sum agreed upon as stipulated damages, was a penal sum only. *Kemble* v. *Farren*, 7 Law J. C.P. 258, s. c. 6 Bing. 141, s. c. 3 M. & P. 425.

In an action on the case for breaking up a road, the defendant gave the plaintiff a cognovit to confess judgment for 200*l.*, with a defeasance that no execution should issue if the defendant, within a certain time, reinstated the road. The road was

not completed within the time, nor in the precise manner stipulated. The plaintiff thereupon issued execution, and levied the 200*l.* and costs:—The Court held, that the 200*l.* was in the nature of a penalty, and not of stipulated damages; and they referred it to the Prothonotary to ascertain what damages the plaintiff had sustained, and whether any and what portion of the damages levied should be restored to the defendant. *Charrington* v. *Laing*, 8 Law J. C.P. 50, s.c. 6 Bing. 242, s.c. 3 M. & P. 587.

### (B) When valid or illegal.

[*Murray* v. *Reeves*, 2 M. & P. 423; and see Action—Frauds, Statute of.]

The plaintiff's servant bargained with the defendant on a Saturday evening, for the sale of cattle; the defendant agreeing to take them if he approved them on the *Sunday* morning. On the *Sunday* the defendant did consent to take the beasts, and they were accordingly delivered to him on that day, and some time afterwards he promised the plaintiff to pay for them:—Held, that although the contract was completed on the Sunday, and therefore void by the statute of *Charles*, yet that, the defendant having kept the beasts and subsequently promised to pay for them, he was liable *for their value*, on a *quantum meruit*. *Williams* v. *Paul*, 8 Law J. C.P. 280, s.c. 6 Bing. 654, s.c. 4 M. & P. 538.

It is illegal to purchase obligations or securities purporting to be granted by the government of a foreign country, which government has not been recognized by the King of England. *Taylor* v. *Barclay*, 7 Law J. Chanc. 65, s.c. 2 Sim. 213.

Whenever a contract is made in this country, for receiving or paying money, whether the money is payable here or not, if more than 5*l.* per cent. interest is stipulated for, that contract is void for usury.

A contracts for a loan to a foreign state, not acknowledged by this country; B purchases part of the loan, and sells some of the scrip to C; C makes several payments, according to his agreement, and then ceases to make them upon the representations of B; C then files a bill against A and B, to get back his money; B is out of the jurisdiction. A demurs generally—and the demurrer is allowed, the Lord Chancellor most seriously doubting the soundness of the decisions, in accordance with which he felt bound to decide. *Thompson* v. *Barclay*, 9 Law J. Chanc. 215.

An agreement between two persons, having expectations from a third, to divide equally whatever he might leave them, is valid. *Harwood* v. *Tooke*, 2 Sim. 193.

An agreement between two sons, to divide equally whatever property they may receive from their father in his lifetime, or become entitled to under his will, or by descent or otherwise from him, is not contrary to public policy, but will be enforced in equity. *Wethered* v. *Wethered*, 2 Sim. 183.

An agreement operating as a partial restraint of trade is void, unless supported by an adequate consideration; and a promissory note given to one of the parties to such agreement, for the amount of forfeitures incurred in breaches of it—held also to be void, and, in the hands of such party, not the subject of set-off. *Young* v. *Timmins*, 9 Law J. Exch. 68, s.c. 1 Tyrw. 226, s.c. 1 C. & J. 331.

An agreement between three persons carrying on the trade of trunk and box makers, and travelling, by themselves and their servants, into various parts of England, to vend trunks and boxes, to divide, and not interfere with certain districts of the several cities, boroughs, towns, and villages, as set forth by them on Bowles's Post Map of England, and that each, during his life, by himself and his agents duly authorized, shall travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by either of the other two, during their joint lives, in certain cities, boroughs, towns, and villages, and not to suffer any goods in the said trade to be manufactured at their respective shops or warehouses, or to be sent from their respective shops, houses, or warehouses, or from any other place, for the purpose of being sold or disposed of on the ground to be travelled by the other parties thereto; and not to aid or assist any person to oppose all or any and either of the parties; and not to purchase any tea chest or chests, black or green, at a higher price than 6*d.* or 8*d.* each in Oxford; and in case, at any time during their joint lives, any person or persons shall set up and oppose any or either of the parties, to meet together, and enter into such mutual agreement, to the intent therein agreed to, as shall be beneficial to the mutual interests of the parties, it being declared to be their intentions not to do any act prejudicial to the interests of each other; but to aid and assist each other in their said trade and business to the utmost of their power,—does not operate in general restraint of trade; and, as an agreement contemplating a partial restraint only, is founded on a sufficient and valid consideration. Therefore, counts setting forth the same, and averring, by way of breaches, that the defendant travelled into the districts of the plaintiff, and sold boxes therein—held good, on general demurrer. *Wickens* v. *Evans*, 3 Y. & J. 318.

It is no legal objection to a written contract, that it gives separate rights of action to different persons. *Best* v. *Saunders*, 7 Law J. K.B. 50, s.c. 3 M. & R. 4.

At the time of executing a bond to secure a sum of money, the obligors procure a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest were regularly paid:—the letter is a binding undertaking. *Norton* v. *Wood*, 1 Russ. & M. 178.

A and B worked a colliery in partnership equally. A died, having by his will made a provision for his widow and infant children out of the accruing profits. The accounts were referred to arbitrators, who awarded 3,150*l.* to be due to B out of A's share, and to be retained by B out of the first proceeds. B, however, agreed with A's widow, to pay her 200*l.* a year out of the profits of A's share, and in every year in which they should not amount to 200*l.* to pay her 100*l.* certain, towards the maintenance of herself and children, to be placed to account of the provision under A's will; and she, on behalf of herself and infant children, agreed, that so long as B should manage the concern he should retain a salary of 150*l.* per annum.

Held, that (independently of the clause as to

management) there was no consideration for B's promise to pay the annuity to the widow.

*Semble*, that such clause, had it been binding, would have afforded a consideration.

Held, that here, however, it did not amount to a consideration, because she had no power to bind the estate or the children to the payment of the salary; and that her ability to bind herself to the extent of her own interest, giving only a partial validity to the clause, did not create a binding consideration. *Thackeray* v. *Ellam*, 9 Law J. Exch. 132.

(C) STAMP.

[See STAMP.]

Where a plaintiff declares upon a contract, which appears to have been afterwards rescinded, and a new contract entered into, but which new contract has not been stamped, the plaintiff cannot resort for his remedy to the old contract, on the ground of the new one not having been stamped.

But if the defendant has no means of proving that the old contract was rescinded, except by shewing the new one, and that new contract requires a stamp, he cannot offer it in evidence, unless it be properly stamped. *Sweeting* v. *Halse*, 7 Law J. K.B. 156, s. c. 9 B. & C. 365, s. c. 4 M. & R. 287.

An unstamped agreement is admissible in evidence between the parties to it, for the purpose of proving usury. *Nash* v. *Duncomb*, 2 M. & M. 104. [Tenterden]

(D) PERFORMANCE.

[See VENDOR AND PURCHASER.]

In general, the time appointed for the performance of a contract, is of the essence of the contract itself.

But where, from the nature of the subject matter, the exact day does not appear to be material, a party who seeks to exact a forfeiture in case of failure on the appointed day, must give notice to the other party that he intends to hold him to the day. *Carpenter* v. *Blandford*, 7 Law J. K.B. 58, s.c. 8 B. & C. 875, s. c. 3 M. & R. 93.

Where work is undertaken on contract at a given price, the employer is not liable to any greater amount by consenting to alterations from the original plan, unless he is either expressly informed, or must necessarily, from the nature of the work, be aware that the alterations will increase the expense. *Lovelock* v. *King*, 2 M. & M. 60. [Tenterden]

If A agrees to make an article of certain materials for a stipulated price, but puts in materials of a better kind, he is not at liberty on that account to charge more than the stipulated price; nor can he require the articles to be returned, because the buyer will not pay an increased price on account of the better materials. *Wilmott* v. *Smith*, 3 C. & P. 453, s. c. 1 M. & M. 238. [Tenterden]

If an agreement be in part unperformed, the principle of a court of equity is compensation, not forfeiture. *Page* v. *Brown*, 4 Russ. 6.

In general, an entire contract is not divisible; and a part-performance cannot therefore be the subject of an action, either upon the contract itself, or for the value of labour applied to, and materials wrought up with, the property of the defendant, the subject of the contract. *Sinclair* v. *Bowles*, 7 Law J. K.B. 178, s.c. 9 B. & C. 92, s.c. 4 M. & R. 1.

Where a carriage is hired for a certain time, and sent back before the expiration of it, if the party of whom it was hired sell it within the time, he cannot recover his charge for the hire. *Wright* v. *Melville*, 3 C. & P. 542. [Best]

Where a contract is made to sell and deliver a certain quantity of goods, and a smaller quantity is sent to the buyer, and received and retained by him; the seller may, at the expiration of the time agreed for the delivery, maintain an action to recover the value of the quantity which he has delivered, although he may be subject to an action at the suit of the buyer, for damages for breach of the original contract. *Oxendale* v. *Wetherell*, 7 Law J. K.B. 264, s. c. 9 B. & C. 386, s. c. 4 M. & R. 429.

An author was engaged to write, for a certain sum, an article to appear among others in a work called the Juvenile Library. Before he had completed his article, and before any part of it was published, the work in which it was to appear was discontinued:—Held, that the publishers were not entitled to claim the completion of the article, that it might be published in a separate form for general readers, but were bound to pay the author a reasonable sum for the part he had prepared. *Planché* v. *Colburn*, 5 C. & P. 58. [Tindal]

A party published a prospectus for the publication of a county map and gazetteer, stating that the map would contain "the exact limits of every parish and township in the county." The defendant agreed to take a copy of each. They were published, and there were lines on the map denoting the boundaries of townships, but no distinct lines to shew the boundaries of those parishes which consisted of several townships:—Held, that the map was not according to the prospectus, and that the defendant was not bound to take the map, although by reference to the gazetteer it could be ascertained what townships were in each parish. *Teesdale* v. *Anderson*, 4 C. & P. 198. [Tenterden]

On an undertaking by the obligee of a bond, not to call in the money within a specified period, if the interest be regularly paid,—payments of interest made one, or even two days after they became due, are no defeasance of the undertaking, if the grantor accepts them without objection. *Norton* v. *Wood*, 1 Russ. & M. 178.

A sold to B, for 95*l.*, two pictures, representing them as "a couple of Poussins." They were, in fact, not originals, but very excellent copies. B did not offer to return them:—Held, that if the jury thought that B believed, from the representation of A, that they were originals, he was not bound to pay the price agreed upon; but that, as he kept them, he was liable to pay such sum as the jury might consider to be the value. *Lomi* v. *Tucker*, 4 C. & P. 15. [Tenterden]

On a representation that a ship will sail with convoy, whereby the plaintiff was induced to put his goods on board; the promise is complied with if she follows the convoy and joins it, so as to prevent the plaintiff from maintaining an action against the owner for a loss arising from another cause after she had joined.

*Aliter* if by reason of this representation the owner of the goods, in an insurance made thereon, was induced to warrant that she would sail with convoy. *Christin* v. *Ditchell*, Pea. A.C. 141. [Kenyon]

If A, for valuable consideration, undertakes to surrender a copyhold to B, who, on borrowing money from C, enters into a written agreement with C, that he, B, will surrender the same copyhold to C by way of mortgage security, A is not justified in refusing to surrender the copyhold to B, because he, A, has received notice from C of the agreement between him and B.

The surrender by A to B does not prejudice, but promotes, that agreement. —— v. *Walford*, 4 Russ. 372.

The owners of a ship applied by letter to S and G, shipwrights, to lengthen and repair the ship, requesting them "to further an estimate of the probable cost, and also to note the prices of timber, and the rate of wages." The letter contained this passage:—"The timber must be all English oak, and, if you have a sufficient quantity on hand, for the repair of the ship, besides her lengthening." S and G, by letter in answer, say the expense of lengthening, on a rough calculation, will be 900*l.*; and as the vessel would require other repairs, it would be best for both parties to do the whole by day-work. The letter then contains this passage:—"The captain will have it in his power to keep an exact account of the articles expended, and to turn off any workman that does not please him. We have on hand an excellent assortment of English oak timber, of a suitable size for the vessel." A note of prices was added:—"Wages, per day, 3*s.* 4*d.*; common English oak timber, per foot, 5*s.*" In a subsequent letter from the owners, announcing the dispatch of the ship, this postscript is added:—"As it is understood that nothing is to be put into the ship but English oak timber and Dantzic oak plank, to which you must bind yourselves by letter," &c. To this S and G answer thus:—"With respect to the materials, we have a good stock of English timber and Dantzic plank, and little or no Hamburgh; so that Captain Young will have it in his power to take what he likes best." In a subsequent letter, the agent of the owners says:—"I hope you will put on her the best of materials, and also the best of workmanship."

The repairs were superintended by the captain, the carpenter, the master, and a part-owner of the ship, and were completed in 1807. While the repairs were going on, the wages of carpenters were increased, by order of Justices, 6*d.* a day.

Immediately after the completion of the repairs the ship sprang a leak of an alarming description, on her return to port, when she was repaired by the owners, upon a notice given to the builders, who sent their foreman to inspect. After these repairs the vessel was proceeding on a voyage to Davis Straits, but was obliged to put back on account of her leaky condition, and was detained twenty-two days on repairs, when, the season being too late for the fishery in Davis Straits, she sailed on a fishing voyage to Greenland, and brought home a short cargo. These transactions took place in 1806 and 1807. In 1813, after various legal proceedings, upon inspection of the ship, it appeared that American oak had been used in the repairs of the ship; that two of the bolts had been driven and clenched imperfectly; that there was one hole without a treenail; and that the vessel, after the lengthening and repair, had increased in the midships five feet in width.

Held, under these pleadings and proofs, that the shipwrights had no right to charge in their account the additional 6*d.* per day for wages, nor for the price of superior oak timber; that they were answerable in damages for having used American instead of English oak for the repairs done by the respondents, and for the supposed loss in the fishing voyage consequent upon the detention for repairs.

Held also, that the costs were properly given against the appellants, although they had a judgment for a balance after allowance of all the deductions for damages. *Strachan* v. *Paton*, 3 Bligh, N.S. 360.

### (E) When enforced or relieved against in Equity.

[See Specific Performance—*Montgomery* v. *Reilly*, 1 Dow. & C. 62, Dig. Law J. 152.]

The Court will not, generally speaking, enforce an agreement wholly voluntary, and without consideration. *Groves* v. *Groves*, 3 Y. & J. 163.

An old gentleman, who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day to the testator for his approbation, and he was to be desired to cancel both wills. In the course of the night the testator died. The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate; which deed the party, whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars:—Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity:—Held, that the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the defendant having secluded the testator from the other members of the family. *Beastall* v. *Swain*, 1 Tam. 288.

Though, in cases of non-payment of money, the Court will relieve against penalty or forfeiture; yet, when it is not a question of penalty or forfeiture, but a privilege is conferred upon payment of money at a stated period, the privilege is lost, if the money be not paid accordingly. *Davis* v. *Thomas*, 1 Russ. & M. 506, s. c. 1 Tam. 416.

A agreed to lend B a loan of 500*l.* Navy five per cent. stock. He sold the stock for 522*l.*, which he paid to B. A bond is drawn by an unprofessional man, to repay "the sum of 522*l.*, (being the produce of 500*l.* stock, five per cent. Navy, or such other sum as would replace the stock,) with lawful interest." A sum equal to the dividends was paid half-yearly; but B, on discharging the bond, refused to transfer the stock, and would only pay the money received by her; to this A objected, but at length received it, and gave up the bond, remonstrating on the injustice of the proceedings, but being told, at the same time, that the money would only be paid

in discharge of the bond:—Held, that A had no relief in equity; he should not have received the money, unless the party paying it had agreed that the remedy should remain open; but the costs were refused. *Barnham* v. *Munn*, 1 Tam. 84.

The defendant contracted to sell an inn to the plaintiff, and, in the treaty, represented to him that the agreement under which the tenant in possession held it was a void agreement, and that he would give the plaintiff possession at Michaelmas following. He had, in fact, given the tenant notice to quit at that time; the tenant did not quit. These representations were proved by witnesses:—Held, that the plaintiff was entitled to be released from the agreement, or that he might at his election perform it, and have compensation. He elected to have performance, and it was decreed to him, with compensation and costs. *Besant* v. *Richards*, 1 Tam. 509.

A bill having been filed by the devisees under a will, to revive and have the benefit of a suit instituted by the testator, to set aside a conveyance and mortgage of lands, on appeal against the decree, and order on further directions in this suit, it appeared that there was a subsequent will, and that R G, one of the appellants, the devisee under that will, was not a party to the suit and the appeal, that the proceedings should be carried on for the benefit of the party who should appear to be entitled. Upon the hearing of the appeal, it was adjourned, with liberty to make R G a party to the revived suit; whereupon R G filed a bill against all the parties, including an assignee under his insolvency, setting up the second will, and claiming, as executor and devisee, the benefit of the former proceedings. By the decree upon the hearing of this suit, the benefit of the former decree and proceedings was given to R G, as executor, but *quâ* devisee his bill was dismissed, and it was also dismissed against the assignee under his insolvency.

Under these circumstances the case again came on by appeal, but was again adjourned, with liberty to supply the defect of parties under the decree, there being neither devisee nor assignee before the Court.

Some years after this adjournment, a bill was filed by R G and his assignees, stating, that the defendants in the revived suit were cognizant of the second will and its contents, and the agreement between the original plaintiffs in the suit and R G, and that, with this knowledge, they acquiesced in those proceedings, and on that ground praying the benefit of the original decree and the former proceedings. The fact of knowledge and acquiescence was denied by the answers, and not proved in the cause. The bill was dismissed, on the ground of this defect of proof, and the decree affirmed on appeal.

Whether (if the allegations had been sustained by proof,) an agreement not stated in the pleadings, but kept out of the view of the Court, could under these circumstances have been carried into effect by the decree of the Court, and whether there was between the plaintiffs in the original and supplemental suits, such privity as to entitle the latter to the relief obtained by the former—*quære*. *Franklin* v. *Latourche*, 4 Bligh, N.S. 50, s. c. 1 Dow. & C. A.C. 485.

(F) ACTION ON.

(*a*) *In general.*

[See *ante*, (D), and COMPANY.]

Two parties entered into a contract, by which one was to supply the other with certain machinery; after the machinery had been partly worked, the manufacturer of it by deed assigned it, in its then state, to a third person. The deed was shewn to the party for whom the machinery was intended, who told the assignee to go on with the work, and he would see him paid. The work was accordingly finished by the assignee:—Held, that he might maintain an action in his own name for the whole amount of the contract. *Oldfield* v. *Lowe*, 7 Law J. K.B. 142, s. c. 9 B. & C. 73.

The plaintiff had a demand on the defendant for 8*l.* 10*s.*, and the defendant, as executor of a deceased person, had a demand on the plaintiff for 21*l.* They agreed that the smaller should be set off against the larger debt, and the balance paid. To recover the balance, the defendant sued the plaintiff in a court of requests, which had no jurisdiction beyond 5*l.*, and recovered 5*l.*—Held, that this was no violation of the agreement to set off one against the other; and therefore, that the plaintiff could not sue for his debt of 8*l.* 10*s.*; treating the recovery in the court of requests, as a total satisfaction of the debt for 21*l.* *Penney* v. *Squier*, 9 Law J. K.B. 199, s. c. 2 B. & Ad. 142.

Where an act of parliament has been passed to prevent the committing of frauds in a particular trade, the omitting to comply with those regulations will prevent the party who omits from recovering in an action founded upon the transaction in which the omission has been made, although it be not proved that any fraud has been committed; and although the party against whom the action is brought, has had the full benefit of his contract. *Little* v. *Poole*, 7 Law J. K.B. 158, s. c. 9 B. & C. 192.

An author engaged to write a work for a periodical publication, which is discontinued before his work is completed or published, may recover a reasonable sum, for the part he has prepared, on a *quantum meruit* in a common count for work done. *Planché* v. *Colburn*, 5 C. & P. 58. [Tindal]

Upon an agreement for the purchase of goods, the buyer stipulated that a part of the purchase-money should be applied in payment of a debt due to himself, other part in payment of a debt due from the seller to a third person, and the remainder, if any, should be paid to the seller; and that, for this purpose, the money should remain in the hands of a stakeholder:—Held, that this part of the agreement for the payment of the debt to the third person was founded upon consideration, and was not a mere revocable authority; and that the seller could not recover that part of the money in an action against the stakeholder. *Brignell* v. *Ellis*, 8 Law J. K.B. 155, s. c. 5 M. & R. 165.

If a builder do work at an intended hospital on the order of a physician and surgeon, they being announced to deliver lectures there, and being members of the provisional committee, such builder is not bound to look solely to the funds of the hospital for payment, but may sue the persons who gave the orders, unless he was distinctly informed that the

dealing was to be on the terms of looking for payment to the funds of the hospital only. *Pink* v. *Sendamore*, 5 C. & P. 71. [Tindal]

(*b*) *Pleading and Evidence.*

[See LANDLORD AND TENANT.]

Where the plaintiff declares upon a contract for the sale to the defendant of goods; and charges a breach in not accepting and paying for them, it is not necessary for the plaintiff to aver, as special damage, a loss upon the re-sale of the goods. Such damage is considered as a necessary consequence of the breach by the defendant. *Boorman* v. *Nash*, 7 Law J. K.B. 150, s. c. 9 B. & C. 145.

An action on the case may be maintained for the breach of a mere implied contract, and without proving special damage. *Marzetti* v. *Williams*, 9 Law J. K.B. 42, s. c. 1 B. & Ad. 415.

Where a man is employed to do work under a written contract, and a separate order for other work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced by the plaintiff in an action for the second work. *Reid* v. *Batte*, 1 M. & M. 413.

A written parol instrument is not conclusive evidence of the terms of a contract previously made. *Fairmanner* v. *Budd*, 9 Law J. C.P. 180, s. c. 7 Bing. 374, s. c. 5 M. & P. 534.

In an action for work and labour, after the plaintiff's case was closed, the defendant offered in evidence a written contract, which, it was alleged, contained the terms of the dealing between the parties, and differed from the case proved by parol testimony for the plaintiff; but, it being unstamped, he was not allowed to produce it. On a motion for a nonsuit, on the ground that the written instrument containing the terms of the contract, was part of the plaintiff's case, and ought to have been produced by him, being the best evidence of the contract; or for a new trial—the Court refused to nonsuit the plaintiff, but directed a new trial, on payment of costs, in order to give the defendant an opportunity of setting up the contract, duly stamped. *Fielder* v. *Ray*, 8 Law J. C.P. 65, s. c. 6 Bing. 332, s. c. 3 M. & P. 659, s. c. 4 C. & P. 61.

On a written agreement for the hire of a vessel to be made ready to take on board "forthwith," evidence is inadmissible to shew that the parties agreed that the vessel should be ready in two days. But evidence of the known circumstances of the vessel is admissible to shew how soon she might reasonably be expected to be ready. *Simpson* v. *Henderson*, 1 M. & M. 300. [Tenterden]

A, by agreement, promised to surrender into the hands of the lord, &c. "all those brick-works, copyhold of inheritance, then in the possession of A, with full liberty," &c. to the use of B and C: no surrender was made, but B and C entered upon the premises. B afterwards surrendered his interest to C, and an action of trespass having been brought against C and D, they pleaded leave and licence from A to B and C; C justifying in his own right, and D as the servant of B and C, and by their command; to which A replied *de injuriâ*, &c. The question being whether the *locus in quo* was comprised in the agreement, B was called by the defendants to prove, by parol declarations of the plaintiff, that the *locus in quo* was so comprised. B's evidence was objected to —first, because he was bound to indemnify D, his servant, for an act done by his command in the assertion of a supposed right; and secondly, because it was not competent to the defendants to extend by parol evidence the terms of the agreement to premises not in the possession of A at the time:—Held, first, that B was a competent witness; and secondly, that the terms of the agreement being ambiguous, might be explained by parol testimony. *Paddock* v. *Fradley*, 1 C. & J. 90.

Where an agreement expressly refers to a plan as an existing document, forming a term in the contract, parol evidence is admissible for the purpose of identifying the plan. *Hodges* v. *Horsfall*, 1 Russ. & M. 116.

If, upon notice given to the attorney of a party to produce an agreement in his possession, he neglect so to do, he cannot be called as a witness to prove the contents. *Bothomley* v. *Usborne*, Pea. A.C. 101. [Kenyon]

Where it appeared on the record, that an agreement sued on was made by the plaintiff, on behalf of himself and the other proprietors of a theatre, evidence of the declarations of one of such other proprietors was held admissible on the part of the defendant. *Kemble* v. *Farren*, 3 C. & P. 623. [Tindal]

The plaintiff declared for work and labour generally, and proved the value of the work done, and rested her claim on the general *quantum meruit* count. The defendant proved that the plaintiff agreed to do the work on certain specified terms. The plaintiff then proposed to shew, that the work was done under another contract consistent with the original demand: —Held, that she could not do so, as she should have relied upon such contract in the first instance. *Soulby* v. *Pickford*, 7 Law J. C.P. 94, s. c. 2 M. & P. 545.

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## CONVICTION.

[See GAME, MISDEMEANOR, and SESSIONS.]

A local act, establishing a court of requests, gave power to the commissioners, in a certain mode, and under certain circumstances, to impose a fine upon any person who should insult them in court while executing their office. In an action of trespass against them by a person on whom they had exercised this authority, the following objections were taken to their proceedings; which objections were disposed of as follows:—

The commissioners pleaded as a distinct fact, that the plaintiff insulted them; and that they thereupon proceeded to impose the fine upon him. Objected, for the plaintiff, that the insulting as thus pleaded was a traversable fact; and that the conviction, not being pleaded as a conviction, could not conclude that fact. Answered, that, the conviction being set out in the plea, the allegation of the fact which led to the conviction was immaterial.

Commissioners pleaded that the plaintiff had insulted them, by accusing them of injustice, hatred, malice, and corruption. The conviction, when produced, appeared to be for insulting them by so accusing them, "and *by* calling Mr. G S, who was then attending in the court, an infamous liar and a scoundrel." Objected, that if the commissioners had properly considered by the conviction, that the so calling G S in their presence was an insult to them-

selves, there was a variance between the conviction and the plea: and that, if it could not be so considered, the conviction was bad; inasmuch as a part of the cause for which they had imposed the fine was not justifiable; and that the Court had no means of ascertaining how much of the fine was imposed for the justifiable, and how much for the unjustifiable cause. Answered, that the conviction might be held applicable to the justifiable cause, and that the unjustifiable might be rejected as insensible.

The commissioners pleaded, in the terms of the clause which gave them power, that the plaintiff was apprehended in court "*by their order*." The conviction omitted the latter words; but the statement throughout shewed that the plaintiff was in court at the time, as well as the commissioners. Objected, that the conviction did not prove the plea. Answered, that the order of the commissioners might fairly be inferred.

The local act directed the Court to be holden on Tuesdays. The warrant of distress was headed on the Tuesday on which the conviction took place, but at the foot purported to be signed and sealed on the following day. Objected, that the warrant should have been made at the court:—Held, that the heading was sufficient; that the signature might be out of court.

The act directed the Court to sit within certain specified hours only, on the day prescribed. The conviction and the plea were silent as to the hours. Objected, that, as this was a limited authority, it must appear to have been strictly pursued, and that it did not so appear, unless it was stated that the Court was sitting within the prescribed hours. Answered, that as it appeared they were sitting on the prescribed day, it would not be inferred that they were sitting out of the prescribed hours. *Aldridge* v. *Haines*, 9 Law J. K.B. 202, s. c. 2 B. & Ad. 395.

## COPYHOLD.

(A) Nature of the Tenure.
(B) Surrender and Admittance.
(C) Fine.
(D) Forfeiture.

### (A) Nature of the Tenure.

Where conveyance by bargain and sale, as well as surrender and admittance, is necessary to pass the interest in customary tenements, the freehold is in the tenant, and not in the lord.

Where the lord, being tenant for life of the manor, takes a conveyance of such customary tenements to himself in fee, the customary estates are only suspended, and not extinguished; and on his death, the customary tenements, so acquired by him, descend to his heir, and do not go to the remainder-man, who is entitled to the manor. *Bingham* v. *Wood*—*Huddlestone* v. *Corbett*, 8 Law J. Chanc. 46, s. c. 1 Tam. 183, s. c. 1 Russ. & M. 750.

The conventionary tenants within the assessionable manors of the duchy of Cornwall, have a perpetual indefeasible right to them and their customary heirs and surrenderees, to renew their estate from seven years to seven years. *Rowe* v. *Brenton*, 3 M. & R. 361.

A copyholder, who has no interest in the minerals, has yet a sufficient possession of them by reason of his possession of the soil, that he may maintain trespass against a person, who, by means of an entry made in the adjoining land, takes away the minerals. *Lewis* v. *Branthwaite*, 9 Law J. K.B. 263, s. c. 2 B. & Ad. 437.

### (B) Surrender and Admittance.

[Infants, femes covert, and lunatics, may be admitted to copyholds by their guardian, committee, or attorney, 1 Will. 4. c. 65, 8 Law J. Statutes, 134.]

A copyhold estate will not pass by the will of a devisor who dies before admittance. *King* v. *Turner*, 2 Sim. 545.

Where a grant is made by the lord to A to hold to B and others for lives, it is not necessary for B to be admitted, in order to recover in ejectment. *Doe* d. *Besley* v. *Maisey*, 7 Law J. K.B. 85.

Where a surrender is made referring to a deed, and that deed states on the face of it, that the surrender was made as a security for money, and provides, that, after twelve months more, the surrenderee may sell, and pay himself:—The Court holds such deed and surrender to be a mortgage, and will compel the lord of the manor, upon the death of the surrenderor, to admit his heirs on payment of the fines, according to the custom of the manor. *Weaver* v. *Kinglake*, 9 Law J. Chanc. 20.

Where a copyholder devised his estate:—Held, that the heir had nevertheless a right to come in and be admitted, subject to the right of the devisee afterwards to come in; as the estate descended to the heir-at-law, and could not vest in the devisee until admittance.

The Court will order a mandamus to admit the heir: although it may appear that there has been collusion between the heir and the devisee to defeat the lord of his fines. The lord must seek his remedy for the fines, and cannot refuse to admit the heir, if the devisor do not choose to come in and be admitted. *The King* v. *Sir T. M. Wilson*, 8 Law J. K.B. 101, s. c. 10 B. & C. 80, s. c. 5 M. & R. 140.

Where, by the peculiar tenure within a manor, the customary estates of inheritance might be conveyed by lease and release, by the licence of the lord, and passed by descent on the heir appearing and paying a fee to the steward for having his name enrolled:—Held, that there was no duty payable upon this last act, (whether it was an admittance, or a mere recognition) according to the 55 Geo. 3. c. 184, schedule, part 1. *Doe* d. *Carlisle* v. *Towne*, 9 Law J. K.B. 278, s. c. 2 B. & Ad. 585.

A copy of a surrender and admittance, purporting to be signed by the steward, and coming out of the hands of the customary tenant, is admissible in evidence, without producing the court roll. *Rowe* v. *Brenton*, 3 M. & R. 298.

### (C) Fine.

The fine for admission to a copyhold cannot, in general, be allowed to exceed double two years value; whatever may be the number of lives named in the copy.

The proper mode of assessing such a fine, in a particular case, was held to be, for the first life, two years value; for the second life, one-half the sum taken for the first; for the third life, one half the

sum taken for the second, and so on; so that in the result the sum taken should never be quite double the sum taken for the first. *Wilson* v. *Hoare*, 9 Law J. K.B. 253, s. c. 2 B. & Ad. 350.

In ascertaining the amount of a fine, payable by a copyholder, dependent on the annual value of the premises, the amount of rent reserved by a lease granted by such copyholder, is not conclusive of the annual value of the copyhold: he may shew that it is of less annual value. *Lord Verulam* v. *Howard*, 9 Law J. C.P. 69, s. c. 7 Bing. 327, s. c. 5 M. & P. 148.

(D) Forfeiture.

The succeeding lord of a manor may avail himself of a right to seize copyhold land *quousque*, which right accrued to the preceding lord, on default of the heir of the copyholder coming in to be admitted.

The devisee of the lord is entitled to avail himself of such right, the same as the heir of a lord who died intestate.

But, to warrant such seizure, there must be three proclamations made, for the heir of the copyholder to come in and be admitted.

And, according to Lord Tenterden, Mr. Justice Bayley, and Mr. Justice Littledale, those three proclamations must be made at consecutive courts: According to Mr. Justice Parke, three proclamations, though not at consecutive courts, would be sufficient. *Doe* d. *Bover* v. *Trueman*, 9 Law J. K.B. 119, s.c. 1 B. & Ad. 736.

## COPYRIGHT.

[See Injunction.]

The Court will not protect a foreigner's copyright. *Delouche* v. *Shaw*, 2 Sim. 237.

A book is published in a foreign country, copies of which are bought and then published in this country—persons who purchase a part of such work and publish it here, have no copyright therein. *Guichard* v. *Mori*, 9 Law J. Chanc. 227.

The fraudulently taking copies of an *original* engraving, to the injury of the proprietor, is not a piracy within the meaning of the acts 8 Geo. 2. c. 13, 7 Geo. 3. c. 38, and 17 Geo. 3. c. 57.

But, being a fraud at common law, it may be the subject of an action on the case at the suit of the party aggrieved. *Murray* v. *Heath*, 9 Law J. K.B. 111, s.c. 1 B. & Ad. 804.

In a case of alleged piracy of part of a work, the Court, if it refuses the injunction, will not interfere to give any other relief. *Baily* v. *Taylor*, 8 Law J. Chanc. 49, s.c. 1 Russ. & M. 73, s. c. 1 Tam. 295.

Equitable jurisdiction upon the 34 Geo. 3. c. 23. is not excluded from the special remedy thereby provided. Independent of that remedy, the statute vests in the inventor a right of property which, though only of three months' duration, equity will protect by injunction, if the title be satisfactorily established.

In this case the evidence as to title not being conclusive, the injunction was dissolved, and an issue directed, the defendants keeping an account.

The Court will, itself, compare and decide upon alleged *piracies* by inspection, where that can be easily and safely done. *Sheriff* v. *Coates*, 1 Russ. & M. 159.

## CORN AVERAGES.

The sales of corn, which, according to the 9 Geo. 4. c. 60, are to be returned weekly, are not of necessity sales, the contracts for which would be binding according to the Statute of Frauds. Whether so binding or not, they must be returned; and the party not making the return is liable to the penalty, although the contract for the sale was not enforceable, by reason of the Statute of Frauds.

Nor is the time of delivery, or the fact of delivery or non-delivery, material. The sale must be returned within the prescribed time, although there may have been no delivery. *Rex* v. *Townrow*, 9 Law J. M.C. 40, s. c. 1 B. & Ad. 465.

## CORONER AND CORONER'S INQUEST.

[Laws relating to coroners in Ireland amended by 10 Geo. 4. c. 37, 7 Law J. Statutes, 74.]

A freeholder of the county, having a place in the county where he has a right to reside, is capable of being elected coroner.

Such a person, being elected coroner, will not be removed from the office, because he has also a residence in a town comprised within the ambit of the county, but not being part of the county, which has been his more usual place of abode.

*Quære*—whether a coroner will be removed on account of his more usual place of abode being in a town situate within the ambit of the county, but not part of the county, when no inconvenience has arisen from the circumstance. *In the matter of the election of a Coroner for the county of Nottingham*, 7 Law J. Chanc. 61.

*Semble*—that the Court of Quarter Sessions have no power to compel the personal attendance of the coroner with his inquisitions.

But, at all events, they are not justified in refusing to give him an order for his fees, because he had disobeyed a rule of the Sessions, directing such personal attendance. *The King* v. *the Justices of Cumberland*, 9 Law J. M.C. 102.

If the names of the jurors be not set out in the caption of a coroner's inquisition, and the inquisition be not signed by the jurors, with their names at length, the inquisition is bad. If some of the jurors sign with their marks, such marks ought to be verified by an attestation. *Rex* v. *Bowen*, 3 C. & P. 602. [Park]

It is the duty of a coroner, in a case of death occurring in a pugilistic encounter, to examine a surgeon as to the cause of the death. *Rex* v. *Quinch*, 4 C. & P. 571. [Alderson]

## CORPORATION.

(A) Of the Charter.
(a) *Acceptance.*
(b) *Construction.*

(B) Rights, Liabilities, and Disabilities.
(C) Bye-laws.
(D) Officers and Members.
(a) *Qualifications.*
(b) *Election.*
(c) *Rights, Duties, and Liabilities.*
(d) *Amotion.*
(E) Remedies by and against.

## (A) Of the Charter.

### (a) *Acceptance.*

A charter granted by the Crown cannot be partially accepted, unless it should appear to be the intention of the Crown that the grantee should have the option to accept in part and reject in part. *Rex* v. *Westwood*, 2 Dow. & C. 21, s. c. 4 Bligh, N.S. 213, s. c. 7 Bing. 1.

### (b) *Construction.*

A charter creating a corporation provided for electing a mayor on the Monday before Michaelmas-day, and for the swearing him in on the Friday after Michaelmas-day, in every year. A subsequent clause declared that no person who had served the office of mayor should be capable to be re-elected until the space of three years next ensuing the end and determination of his office of mayor. A person who held the office of mayor was, three years afterwards, re-elected; but, if the computation of the calendar was to be taken, three years had not intervened; for he had gone out of office on the 6th of October 1826—was re-elected on the 28th of September 1829, and on the 2nd of October in that year was sworn in. If the computation was to be taken according to years of office, then, according to the charter, three years had intervened:—Held, that the latter was the proper mode of computation; and that he was well elected. *Rex* v. *Sawyer*, 8 Law J. K.B. 221, s.c. 10 B. & C. 486.

In several charters granted to an immemorial city corporate, it was directed that sheriffs should be chosen by the citizens and commonalty "from themselves." A subsequent charter, which confirmed former privileges, and which gave direction as to time and mode of electing sheriffs, did not contain the words "from themselves;" but the usage before and after that charter had been to elect sheriffs from among the freemen:—Held, that the mere omission of those words in the last charter did not dispense with the previous limitation; and that a person not a freeman at the time of his election was not well elected. *Rex* v. *Grant*, 8 Law J. K.B. 382.

A charter of incorporation directed the election of common councilmen to be made out of the burgesses and inhabitants:—Held, that a person who was a burgess, but not also an inhabitant, was not well elected.

Held also, that the meaning of the charter was too clear to admit of evidence of usage, to give it a contrary interpretation.

A charter of restoration, reciting previous charters and a surrender, granted and restored to an immemorial corporation, all elections, nominations, and appointments, which they had before the surrender, by reason or pretence of any charters, or by any other lawful manner, right, or title:—Held, that this did not sanction a practice to elect out of burgesses not inhabitants; the charter, to which the pretence was referred, directing an election out of burgesses and inhabitants. *Rex* v. *Salway*, 7 Law J. K.B. 277, s. c. 9 B. & C. 424, s. c. 4 M. & R. 314.

## (B) Rights, Liabilities, and Disabilities.

If the mayor of a town order weights and measures, and, when supplied, they be examined at a full meeting of the corporation,—this is such a recognition of the contract as will make the corporation liable to pay for them, although the order for them was not under the common seal of the corporation; and the fact, that the mayor was afterwards ousted from his office by a judgment of the Court of King's Bench, makes no difference. *De Grave* v. *the Mayor and Corporation of Monmouth*, 4 C. & P. 111. [Tenterden]

A member of a corporation is not a competent witness to sustain the claim of the corporation, even though he release his interest in the subject-matter of the suit. *Doe* v. *Tooth*, 3 Y. & J. 19.

## (C) Bye-laws.

A bye-law enlarging the class of persons from whom a corporate officer is to be selected, beyond the number or class described by the charter, is bad. *Rex* v. *Barnstead*, 9 Law J. K.B. 321, s.c. 2 B. & Ad. 699.

A charter vests the right to elect burgesses in the general body of an ancient corporation, and gives a power to make bye-laws to a select body. The general body makes a bye-law delegating the power to elect burgesses to the select body:—Held, that this is a good bye-law; for the power given by the charter to the select body to make bye-laws does not divest the general body of the right to make such laws, which is incident to it at common law. *Rex* v. *Westwood*, 2 Dow. & C. 21, s. c. 7 Bing. 1, s. c. 4 Bligh, N.S. 21.

The common council of the city of London have, by custom, a right to make ordinances for regulating carts worked within the city for hire, restraining their number, licensing them, and regulating the manner in which they shall be licensed. A bye-law was made in common council, that 420 of such carts, and no more, should by the president and governors of Christ's Hospital be allowed or licensed to work for hire within the city:—Held, that such bye-law was supported by the custom; and that the discretionary power of licensing was rightly and *ex necessitate* delegated by the common council to a smaller body. And (on motion for a *procedendo*, after return to a *habeas corpus*, obtained by a party sued on the bye-law) the Court refused to inquire whether or not the number of 420 was reasonable. *Shaw* v. *Pope*, 2 B. & Ad. 465.

The masters of a company, under a bye-law, issued to the wardens their warrant to distrain for a penalty. This warrant was put in as evidence by the plaintiff (the party distrained upon) in an action for the seizure, to establish his case against the masters as co-defendants with the wardens. The warrant recited a demand of the penalty previous to the seizure:—Held, that such demand was not established by the putting in of the warrant by the

plaintiff, but that the defendants ought to have proved it.

This objection, on behalf of the plaintiff, *in banco*, on resisting the defendant's application for a new trial, was held valid, though not noticed at the trial.

Although a bye-law, inflicting a penalty, do not in its terms require that it shall be demanded previously to distress being made, yet such demand is necessarily to be implied, and must be proved. The practice on such bye-laws has accordingly been, to aver a demand and refusal in the pleadings.

Unless such be a necessary implication, the bye-law would be unreasonable in inflicting a penalty against a stranger without such demand and refusal, and therefore bad.—*Semble* also, that, without such implication, it would be unreasonable and bad, in not requiring, in terms, notice of the bye-law to be given to a stranger previous to infliction of the penalty.

In support of a bye-law, in favour of a company in a corporate town, to exclude strangers from free trade, a corporator is not a competent witness where the corporation participates in the penalty for infraction of the bye-law.

But *semble*, that the declarations of a deceased corporator, as to reputation of the custom so to exclude strangers, would be admissible.

In order to introduce, in evidence, an entry in the company's book, of an acknowledgment by a stranger, that he had infringed the bye-law, evidence *aliunde* must be previously given, to establish who the party was who made the entry, and in what situation he stood; those circumstances are not to be gathered from the entry itself.

Such an entry being ancient, lapse of time dispenses with the necessity of proving the handwriting of the person who made it. *Davies* v. *Morgan*, 9 Law J. Exch. 153, s. c. 1 C. & J. 587, s. c. 1 Tyrw. 457.

### (D) Officers and Members.

#### (a) *Qualifications.*

[See *ante*, (A, *b*); *post*, (*c*).]

Where the custom of a corporation was, that "*every freeman's son* born in the town after his father was a freeman, should be admitted a freeman on attaining his age of twenty-one years;" and no instance appeared, since the time of Queen Elizabeth, of more than one son of a freeman having been admitted in right of his father:—Held, that the expression, "every freeman's son," when construed by the usage, did not mean "*every son* of a freeman;" and that the custom was satisfied by one son of a freeman being admitted. *Rex* v. *the Mayor and Jurats of Rye*, 7 Law J. K.B. 107.

Where a charter, creating a corporation of mayor, jurats, bailiffs, and burgesses, provided that the vacancies in the office of jurat should be filled up from the burgesses "or inhabitants" of the town; and nothing appeared to shew that it was intended that a jurat should first be a burgess:—Held, that an inhabitant who had not been previously a burgess was well elected to the office of jurat. *Rex* v. *Grest*, 7 Law J. K.B. 98, s. c. 8 B. & C. 363, s. c. 2 M. & R. 391.

A person who had been bound to serve a notary, for the purpose of being admitted to act as one, but who, during the time of his apprenticeship, filled the situation of a banker's clerk from nine in the morning until five in the afternoon, going after five to the notary's office, was refused admission as a member of the Scriveners' Company (preparatory to his application for admission as a notary), on the ground, that the service with the notary was merely colourable:—The Court held the refusal to be warranted; and would not grant a mandamus to the company to admit the applicant. *Rex* v. *the Scriveners' Company*, 8 Law J. K.B. 199, s. c. 10 B. & C. 511.

#### (*b*) *Election.*

The general body of a corporation may lawfully delegate the power to elect burgesses to a select body of the corporation. *Rex* v. *Westwood*, 2 Dow. & C. 21, s. c. 4 Bligh, N.S. 213, s. c. 7 Bing. 1.

#### (*c*) *Rights, Duties, and Liabilities.*

The offices of town clerk and common councilman in the same person, held not to be incompatible; no fact appearing from which it must be inferred, that the person who held them would have to perform any conflicting duties. *Rex* v. *William Jones*, 9 Law J. K.B. 103, s. c. 1 B. & Ad. 677.

Whether the offices of town clerk and alderman are of themselves incompatible, so that they can, under no circumstances, be held by the same person—*quære*.

But where the duties of the office of town clerk required that he should attend the corporate meetings, and take minutes of their proceedings, and by the charter he was removable at the pleasure of the corporation,—Held, that this office was incompatible with that of alderman, inasmuch as the town clerk might, in his character of alderman, have to vote upon a question affecting his own conduct, or touching the retaining of his own situation as town clerk.

The fact, that the town clerk had a yearly salary, which might be increased, diminished, or taken away by the corporation, was held, for the same reason, to render the office of town clerk incompatible with that of alderman.

The circumstance that, by the charter, the number of aldermen was indefinite, held not to answer the above objections. *Rex* v. *Tizzard*, 7 Law J. K.B. 275, s. c. 9 B. & C. 418, s. c. 4 M. & R. 400.

#### (*d*) *Amotion.*

[See *ante*, (D, *a*).]

Where it is sought to deprive a corporator of one office, on the ground that he has vacated it by the subsequent acceptance of an office incompatible with the former one, it must be shewn, not only that he has acted in the subsequent office, but that his appointment to it was legal. Until such appointment, the holding of the former office is legal. *Rex* v. *Day*, 7 Law J. K.B. 308, s. c. 9 B. & C. 702, s. c. 4 M. & R. 541.

A town clerk of a borough held his office for life, with power to appoint a deputy. He appointed one. A bill of indictment for forgery being found against the town clerk, he fled the country and did not return. The duties of the office were continued to be discharged by the deputy, until he (the deputy) died.

Whereupon, the corporation met on a charter-day, and adjourned to a future day (as was customary); and they issued a summons, calling for the attendance of the town clerk. On the day appointed, he not attending, by himself or by sufficient deputy, they removed him from the office and appointed another.

To these proceedings it was thus objected, and was thus answered by the Court:—

1. *Objection*—No sufficient summons to the party.
   *Answer*—He was not within reach of a summons.
2. *Objection*—No conviction for the offence charged by the indictment.
   *Answer*—He was removed for not attending the duties of his office. His flying from the indictment raises a presumption that he did not intend to return. He had abandoned the office.
3. *Objection*—The meeting at which he was removed, was not held on a charter-day. No notice of the purpose given for the adjournment day.
   *Answer*—Every member is presumed to attend on the charter-day; and the adjournment according to the usage, was a continuance of the day: notice, therefore, not necessary.

*Rex* v. *Harris*, 9 Law J. K.B. 165, s. c. 1 B. & Ad. 936.

### (E) Remedies by and against.

[*Attorney General* v. *Mayor of Exeter*, 3 Russ. 395, Dig. Law J. 163.]

It is not necessary, in order to create a corporation, that any express form of words be used, either in the charter or the act of parliament which incorporates. Accordingly, where, from different parts of acts of parliament, it clearly appeared that certain persons were to act for a public purpose—that of making a river navigable; and among other provisions, that they were to have a public corporate name, to make orders for the guidance of other persons than those of their own body, and to take land by succession, and not by inheritance:—Held, that they were entitled to sue in their corporate name for an injury done to their real property, (although they had not been created or described in express words as a corporation,) and were also entitled in their corporate character to take the tolls, although the produce of the tolls were to go to the personal representatives of the persons interested. *The Conservators of the River Tone* v. *Ash*, 8 Law J. K.B. 226, s. c. 10 B. & C. 349.

A trading corporation having by its bye-laws fixed a rate of allowance to be made to the widows of deceased members, subject only to variation upon a defect of funds, cannot exercise a discretionary power as to the rate of allowance, but may be compelled by process in the ordinary courts of justice (no defect of funds being alleged) to make the allowance fixed in a bye-law in favour of the widow of a freeman, who had entered after the date of the bye-law in question, and paid upon his entry a sum of money to the funds of the corporation, and made a small annual payment to the time of his death. *Flashers of Glasgow* v. *Scotland*, 3 Bligh, N.S. 384.

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## COSTS.

(A) In general.
(B) Plaintiff's Right to.
(C) Defendant's Right to.
(D) Extra Costs.
(E) Double Costs.
(F) Security for.
(G) Taxation of.
  (a) *In general.*
  (b) *Attornies and Solicitors' bills.*
(H) Payment of, how enforced.
(I) In the Ecclesiastical Court.
(K) In Criminal Cases—[See Certiorari, *Rex* v. *Richards*, 2 M. & R. 405, Dig. Law J. 171.]

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### (A) In general.

[See Trespass and New Trial.]

A Judge at chambers has no power to give costs to parties, in respect of a summons, attended before him at chambers. *Read* v. *Lee*, 9 Law J. K.B. 238, s. c. 2 B. & Ad. 415.

A man cannot be made liable for the costs of another by a parol undertaking. *Howell* v. *Edmunds*, 7 Law J. Chanc. 147.

J S mortgaged to the lessors of the plaintiff certain premises, by way of security for the payment of a sum due on a cognovit, and the costs of the judgment, *and all other costs and charges whatsoever attending the same.* The mortgagees having levied the amount of the judgment, the assignees of J S, against whom a commission had issued, sued them for the money received, and obtained a verdict; but, on a second trial, the verdict was for the defendants, J S proving not to be a bankrupt:—Held, that the mortgagees were not entitled to claim the costs of this action as costs attending the judgment under the cognovit.

On the levy, J S gave notice to the sheriff that the goods belonged to him jointly with another person, whereupon the sheriff impanelled a jury to ascertain the fact, who found that they were the sole property of J S—*Quære*, whether the sheriff was entitled to call upon the parties for the costs of the inquisition—*Semble*, not. *Doe* d. *Holt* v. *Rex*, 8 Law J. C.P. 147, s. c. 6 Bing. 447, s. c. 4 M. & P. 177.

The costs incurred by an investigation of a disputed fact, not allowed to a party who had the judgment upon the general question of right, the fact being found against that party. *Flashers of Glasgow* v. *Scotland*, 3 Bligh, N.S. 384.

Where a case determined by the House of Lords on an appeal is sent back to this Court, to do what should be just, a part of the decree having been reversed, the question of costs is in the discretion of this Court.

Costs of the appeal in the particular case ordered in favour of the party succeeding on the appeal, although only in part. *Noel* v. *Henley*, 12 Price, 700.

Where copies of deeds or other papers are furnished by either party to the Judge of the Court, the party is not entitled to the costs of such copies as against the other side; but they are merely personal costs, to be sustained by the party furnishing

them, unless there be a fund in court, this being in accordance with the practice in the Court of Chancery. *Bozon* v. *Williams*, 3 Y. & J. 378.

(B) PLAINTIFF'S RIGHT TO.

Where a statute imposes a certain penalty, to be recovered by action, and vests the right of action in a particular person, or collection of persons, the withholding of the penalty is an injury which gives a right to costs of suit, as well as to the penalty. *Aliter*, where the penalty, or the persons who are to sue for it, be uncertain. *The College of Physicians* v. *Harrison*, 7 Law J. K.B. 249, s.c. 9 B. & C. 524, s. c. 4 M. & R. 404.

Where the jury return a verdict for the plaintiff upon a particular part of his count, the Master is justified in not allowing the costs relating to the remainder of the count; although the verdict be taken and the judgment be entered generally; without noticing the special finding of the jury. *Cocks* v. *Peachy*, 7 Law J. K.B. 241, s. c. 2 M. & R. 420.

Where the plaintiff obtained a verdict, and the Court of Exchequer arrested the judgment, which judgment was reversed by the Court of Exchequer Chamber:—Held, that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the Court of Exchequer. *Adams* v. *Meredew*, 3 Y. & J. 419.

A Judge, under the 43 Eliz. c. 6, is authorized to grant a certificate to deprive the plaintiff of costs, where the verdict is for less than 40*s*. (and the action is not within the exception mentioned in the act,) although the plaintiff could not have proceeded in the county court. Such a circumstance may influence the Judge in his discretion, whether he will grant the certificate; but it is no bar to his granting it, where he is of opinion that the action ought not to be brought at all. *Wright* v. *Nuttall*, 8 Law J. K.B. 188, s. c. 10 B. & C. 492.

Where a defendant dismisses a bill for want of prosecution, without having made a motion of which he had given notice, the plaintiff cannot afterwards obtain an order for the payment of the costs of that motion, as being a motion abandoned. *Farquharson* v. *Pitcher*, 4 Russ. 510.

(C) DEFENDANT'S RIGHT TO.

[See MALICIOUS AND VEXATIOUS ARREST.]

Where a plaintiff would be entitled to costs, had he succeeded, he is liable to costs where he fails. *The College of Physicians* v. *Harrison*, 7 Law J. K.B. 249, s. c. 9 B. & C. 524, s. c. 4 M. & R. 404.

A defendant is not entitled to costs upon a judgment of *non pros.* for not entering the issue, where the issue grows out of a plea in abatement. *Michlam* v. *Bate*, 7 Law J. K.B. 121, s. c. 1 B. & C. 642, s. c. 3 M. & R. 91.

In debt on a bail-bond against three defendants, one of them pleaded his bankruptcy and certificate, whereupon the plaintiff entered a *nol. pros.* as to him. The plaintiff had notice of the bankruptcy before plea pleaded:—Held, notwithstanding, that the defendant was not entitled to costs under the 8 Eliz. c. 2. s. 2. *Booth* v. *Middleroat*, 8 Law J. C.P. 149, s. c. 6 Bing. 445, s. c. 4 M. & P. 182.

Where the plaintiff obtains a verdict with damages upon the general issue, and the defendant obtains a verdict upon pleas of justification, or other pleas which answer the action, the defendant is entitled to judgment upon the whole record, and to the general costs of the cause.

*Semble*—that it is proper, in all such cases, for the plaintiff to have damages assessed at Nisi Prius, under the general issue; in order that he may be entitled to judgment in case the defendant's pleas should afterwards be held not to amount to a legal defence. *Alexander* v. *Lawson*, 7 Law J. K.B. 155.

The statute 8 & 9 Will. 3. c. 11. s. 1, which gives costs to one of several defendants obtaining a verdict in actions of trespass, assault, *false imprisonment*, and *ejectione firmæ*, does not apply in an action *on the case* for a malicious prosecution, wherein a *false imprisonment* is alleged consequentially, or by way of special damage. *Murray* v. *Nicholls*, 8 Law J. C.P. 217, s. c. 6 Bing. 530, s. c. 4 M. & P. 280.

(D) EXTRA COSTS.

[*Dew* v. *Clarke*, 4 Russ. 511, Dig. Law J. 166.]

Extra costs occasioned by a mistake of the Master allowed to a creditor proving his debt against a lunatic's estate. *In re Buckle*, 1 Russ. & M. 360.

(E) DOUBLE COSTS.

Where the plaintiff is nonsuited, the Judge before whom the cause was tried, may, after an interval of four years, upon an affidavit that the defendant was within the provisions of the statute 7 Jac. 1. c. 5, grant a certificate to entitle him to double costs. *Norman* v. *Danger*, 3 Y. & J. 203.

(F) SECURITY FOR.

Where an infant sued by a *prochein amy*, who was stated to be insolvent, and fraud was suggested, the Court ordered him to give security for costs. *Mann* v. *Bertram*, 8 Law J. C.P. 155, s. c. 4 M. & P. 215.

Security for costs to the satisfaction of the Master, ordered to be given by a person residing abroad who sought to defend in an action of ejectment as landlord, upon the usual landlord's rule. *Doe* d. *Hudson* v. *Jameson*, 4 M. & R. 570.

Security for costs not required from a bankrupt plaintiff resident abroad. *Roper* v. *Phillips*, 3 M. & R. 84.

A plaintiff will not be required to give security for costs, or disclose his place of residence, where there is no doubt whether he sues in his own right, and it does not appear that he is out of the kingdom. *Lloyd* v. *Davis*, 1 Tyrw. 533.

(G) TAXATION OF.

(*a*) *In general.*

Where two of three defendants defend together, and the third alone, the costs of all (in the event of a verdict for them) should be taxed together. *Smith* v. *Campbell*, 8 Law J. C.P. 277, s. c. 6 Bing. 637, s. c. 4 M. & P. 467.

(*b*) *Attornies and Solicitors' bills.*

It is not requisite that a bill for business in bankruptcy should be taxed under the statute 6 Geo. 4. c. 16. s. 14, before the commencement of an action. *Crowder* v. *Davies*, 3 Y. & J. 433.

A bill of costs was delivered by the solicitor in

1809, and shortly afterwards paid by the client; between that time and March 1817, four other bills of costs were delivered, and various payments were made on account. In November 1817, a sixth bill was delivered, when the client paid the general balance due on the bills of costs, at the same time stating, that he would insist on having the bills taxed; an application for taxation to a Judge at law in 1818, and an application to the Court of King's Bench in 1819, failed, from circumstances not involving the merits of the question. Some attempts at a compromise were made from time to time, and the client was obliged on three or four occasions to leave England, in order to attend to urgent business in foreign countries; but at length, in 1824, a motion was made to have the bills referred for taxation, supported by evidence that some of the items of charge were improper. The Court ordered that the bill last delivered should be taxed generally; and that the five antecedent bills should be referred to the Master, with a direction that the client should deliver to the solicitor a schedule of the items complained of, and that the Master should exercise as large a discretion as he might think fit, with respect to the evidence on which he should proceed in forming his judgment concerning these items. *Scougall* v. *Campbell*, 3 Russ. 545.

It appearing, upon a reference to tax an agent's bill of costs in a Chancery suit, that he never had been a solicitor of the court, the Master was directed to disallow all the items, except those for disbursements made to his clerk in court. *Sumner* v. *Ridgeway*, 1 Russ. & M. 748.

After the plaintiffs' costs had been taxed and paid, it was discovered that their agent in the cause had never been admitted as a solicitor; and an order was thereupon made, that the Master should review his taxation, and disallow all such items as did not consist of fees paid to the clerk in court, with a view to having them refunded. *Coates* v. *Hawkyard*, 1 Russ. & M. 746.

The Master was ordered to tax the costs of all parties, and the amount was directed to be paid out of the assets of the testator in the cause, by his executors, who were at liberty to pay the costs of certain parties to A B, their solicitor. A B was an attorney of the King's Bench and Common Pleas, but had never been admitted as a solicitor in the Court of Chancery; and the Master, for that reason, disallowed the whole of his charges, except what he had paid to his clerk in court. He had, however, previously received from his clients, to the full amount of his bills. The clients then petitioned for an order on the Master to review his certificate, and tax A B's bills; but their petition was dismissed. *Prebble* v. *Boghurst*, 2 Sim. 246.

If an attorney, after the expiration of the month, commence an action against his client for the amount of his bill, and the client afterwards apply to have it taxed, though on taxation more than a sixth be taken off, the attorney will not be liable to the costs of the taxation.

But if the client obtain an order for taxation, before the commencement of the action by the attorney, the latter will be liable to the costs of taxation, if the bill be reduced by a sixth. *Jay* v. *Coaks*, 7 Law J. K.B. 32, s. c. 8 B. & C. 635, s. c. 3 M. & R. 25; s. p. *Quarman* v. *Veale*, 7 Law J. K.B. 42, s. p. *Harbyn* v. *Mills*, 7 Law J. K.B. 336; s. c. 9 B. & C. 755.

Where the plaintiff's attorney, in an arrangement with the defendant, exacted from him the payment of costs as between attorney and client; and the bill was reduced on taxation from 27*l.* to 9*l.*:—Held, that it was not a case within the 2 Geo. 2. c. 23, in which the attorney could be ordered to pay the costs of the taxation.

Nor would the Court introduce a precedent by exercising their jurisdiction, independent of the act, over the attorney, as one of their own officers. *Sutcliffe* v. *Clegg*, 8 Law J. K.B. 280.

An attorney liable to pay the costs of a taxation of his bill, having promised to pay those costs if an account were given him, not liable to the costs of an application to the Court, made without sending such account. *Keeling* v. *Heude*, 9 Law J. C.P. 225.

Injunction granted to restrain an action for the amount of a solicitor's bill, which had been taxed after the commencement of the action, and more than one-sixth had been taken off, but the costs of taxation had not been ascertained. *Walton* v. *Johnson*—*Heselton* v. *Johnson*, 2 Sim. 456.

### (H) Payment of, how enforced.

Under a commission of delegates in the ordinary form, a proceeding after sentence, to enforce payment of the costs, is a proceeding incident to the principal cause, and requires the presence and consent of three delegates. And a writ *de contumace capiendo*, founded upon a *significavit* in the names of two only, was accordingly quashed. *Rex* v. *Blake*, 9 Law J. K.B. 142, s. c. 2 B. & Ad. 139.

The plaintiff's attorney having applied by letter to the defendant for the payment of a debt, the latter four days afterwards paid the amount to the plaintiff, not knowing that a writ had been previously sued out against him. The plaintiff's attorney afterwards caused the defendant to be arrested on a writ sued out before the payment was made to the plaintiff:—The Court directed the proceedings to be stayed without costs. *Reeks* v. *Wasp*, 7 Law J.C.P. 69, s. c. 5 Bing. 190, s. c. 2 M. & P. 304.

### (I) Costs in the Ecclesiastical Court.

Costs are peculiarly in the discretion of the Court. Delay is a ground for refusing them. *Headington* v. *Holloway*, 3 Hag. Ec. 280.

But that discretion is guided by precedent. *Goodall* v. *Gray*, 2 Hag. Ec. 374.

The principle on which costs are given out of the estate, is that the party was led into the suit by the state of the deceased's testamentary papers. *Hilton* v. *Walker*, 1 Hag. Ec. 74.

A suit by the wife against her husband having abated by the wife's death, the Court will not, at the petition of the proctor, direct the costs incurred by the wife to be paid by the husband. *Cheale* v. *Cheale*, 1 Hag. Ec. 374.

Bills of costs between a proctor and his party are of common law cognizance; the Ecclesiastical Court has no jurisdiction over them; the examination of such bills by the deputy registrar is only by consent and *ex gratiâ*, and neither party is thereby bound as to the amount.

The Court will not direct the deputy registrar to allow the solicitor of a party, who has a new proctor,

to be present at the examination by consent of the bill of costs of his former proctor; such an attendance being unusual and unnecessary to the purposes of justice.

The Ecclesiastical Court can enforce the payment of costs, where one party is condemned in costs to the other party; and such costs are then taxed by the Judge in open court, on the report of the deputy registrar, subject to objection from either party. *Peddle* v. *Evans*, 1 Hag. Ec. 684—686.

On appeal in a pew cause from condemning churchwardens in costs,—Held, first, that giving or refusing costs is not a matter absolutely unappealable; though such appeals, especially for trifling sums, are much to be discouraged. Secondly, that an appeal is perempted by doing any subsequent act in furtherance of the sentence—viz. attending taxation of costs. Third, that churchwardens were properly condemned in costs, where the party proceeded against, in substance, succeeded, and the suit was rendered necessary by their undue suppression of information. *Lloyd* v. *Poole*, 3 Hag. Ec. 477.

In general the husband is bound to defray the wife's costs, and also to provide alimony *pendente lite*; but when the wife has separate means, which the Court deems sufficient for her defence and subsistence, she is not entitled to alimony nor costs during suit: she then stands on the common footing of a litigant party, and, on proving her case, has a *primâ facie* right to costs. It is, however, discretionary with courts, on a consideration of all circumstances, to relax the rule. *D'Aguilar* v. *D'Aguilar*, 1 Hag. Ec. 788.

Costs in the courts below not allowed to be taxed in the Court of Appeal, as between husband and wife; or (before sentence) as between party and party.

Costs taxed *de die in diem*, between husband and wife, though she had a separate income. *Westmeath* v. *Westmeath*, 2 Hag. Ec. 133.

When a party is out of the kingdom, the Court will direct him to give security for costs. *Hillam* v. *Walker*, 1 Hag. Ec. 72.

The costs of exceptive allegations tendered on both sides, (the admission whereof was suspended till the final hearing, and then not prayed to be received,) not allowed to be taxed against a party condemned in costs. *Bird* v. *Bird*, 2 Hag. Ec. 553.

Where a bill of particulars for business done in the Court of Delegates had been recently delivered, though a general account had been rendered, settled, and paid, three years before, the Court, on petition, (though such petition contained impertinent matter,) directed the bill to be examined by the registrar, in order, first, that the suitor might decide as to proceeding in other courts, to recover the excess (if any); secondly, to found a complaint against the proctor, if the charges were exorbitant or fraudulent; but the Court cannot notice an asserted undertaking, that disbursements only, and those not exceeding a certain sum, should be charged; nor will it make an order for the production of vouchers, which, if demanded, are produced as of course before the registrar. On the registrar's report, that the bill was just and reasonable, and on the proctor for the complainant declaring he proceeded no further, costs against the petitioner were not given, only because he was almost a pauper.

When a detailed bill of costs has been delivered and long acquiesced in, and payment made after the suit was at an end, and when the party was not *inops concilii*, the party would not be entitled to have it referred to the registrar for examination: *aliter*, where the payment took place without a detailed bill, and application for reference to the registrar was made shortly after the delivery of the bill.

A client is under all circumstances entitled to a detailed bill from his proctor. *Peddle* v. *Toller*, 3 Hag. Ec. 283—97.

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## COVENANTS.

(A) Construction.
(B) Valid or void.
(C) Pleading and Damages.
[In Leases, see Lease.]

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### (A) Construction.

[*Needham* v. *Smith*, 4 Russ. 318, Dig. Law J. 173.]

A, by deed, on his marriage, covenanted to settle by his will, all his real and personal property to his wife for life, with remainder to the issue of the marriage as tenants in common.

By the same deed, an estate of the intended wife was conveyed to the use of A for ninety-nine years, if he should so long live; remainder to the wife for life; remainder to the children of the marriage, as the husband and wife should appoint; in default, over.

Another estate was conveyed, in contemplation of the marriage, to the use of A for life; remainder to the intended wife for life; remainder to the children of the marriage, as A and wife, or the survivor, should appoint; in default, over.

The marriage took effect, and there were issue three children (daughters), B, C, and D.

After the marriage another estate was conveyed to the use of A for life; remainder to his wife for life; remainder to the children of the marriage, as A and his wife, or the survivor, should appoint; in default, over.

A and his wife, by deed, appointed one of the estates to the use of B for ninety-nine years, if she should so long live; with remainder to the use of her children, as she should appoint; and reserved a power of revocation; and he made similar appointments of the other two estates to C and D respectively.

B married, and died in the lifetime of A, leaving her husband and three children.

C died in the lifetime of A, intestate and unmarried.

D remained unmarried.

A, (being possessed of considerable real estates, besides those appointed to B, C, and D, and also much personalty), by his will gave all his real estate to trustees, upon trust for his wife for life; after her death, as to one moiety, in trust (subject to the provision thereout in favour of D,) for the three children of B, their heirs and assigns; and, as to the other moiety, in trust for D and her husband (if any) jointly for life, and then for the survivor for life; after his or her death, in trust for the

children of D, as she and her husband should appoint. The will then gave out of the first moiety to D, in case of her marriage, an annual sum equal to that which the testator had settled upon the marriage of B.

Held, that, by the construction of the covenant, all the children took as tenants in common, and had vested interests from the time of their birth:

That the parties were bound to elect between the provisions made by the settlement and the will; and that the three appointments were bad, except in so far as they gave the estates for ninety-nine years. *Nayler* v. *Wetherell*, 9 Law J. Chanc. 125.

The vendor of a public house covenanted with the purchaser not to carry on the business of a publican within the distance of half a mile. Upon a question, whether this covenant had been broken, it appeared that if the distance were measured along the footpath, with an occasional crossing of the carriage way, so as to arrive at the point by the shortest possible mode, the distance was within half a mile:—Held, that for this purpose, the mode of admeasurement which had been taken was correct, and that the covenant was broken. If the distance were to be measured by drawing a straight line, or, as it is popularly termed, as the crow flies, whether this would be a correct mode of admeasurement for such a purpose—*quære*. *Leigh* v. *Hind*, 7 Law J. K.B. 313, s. c. 9 B. & C. 774, s. c. 4 M. & R. 519.

Where the captain of a post-office packet covenanted with the owners thereof, and their several and respective executors, administrators, and assigns, to pay to such owners, and their and every of their several and respective executors, administrators, and assigns, the sum received from government for the hire of the ship, and a proportion of the freight, to be paid to them at the banking-house of Messrs. B. & Co., or such other bankers as the captain and the said owners should appoint, and in such shares and proportions as were set against their several names; and further covenanted to pay to the said owners, their executors, &c., the appraised value of the tackle and apparel of the ship, &c., in their shares and proportions aforesaid:—Held, that these were several covenants, under which the owners had separate interests, and whereon they could not maintain a joint action. *Serrante* v. *James*, 8 Law J. K.B. 64, s. c. 10 B. & C. 610.

### (B) Valid or void.

A covenant, by a lessee with the lessor, to indemnify the parish in which the demised premises lay "from all costs by reason of his (the lessee's) taking an apprentice or servant who should thereby gain a settlement:"—Held valid. *Walsh* v. *Fussell*, 7 Law J. C.P. 261, s. c. 6 Bing. 163, s. c. 3 M. & P. 457. See 7 Law Journ. C.P. 25.

Covenants in general restraint of trade are void. Particular restraints are good, if not unreasonable, and made with consideration; but where the restraint is larger than is necessary for the protection of the party for whose security it is made, it is void. *Hornor* v. *Graves*, 9 Law J. C.P. 192, s. c. 7 Bing. 735, s. c. 5 M. & P. 768.

### (C) Pleading and Damages.

In an action on a covenant that a married woman should join in levying a fine, and executing a deed to declare the uses thereof, in order to bar her dower,—it was held, that the plaintiff's declaration, which averred merely an application to, and refusal by her to join in a fine, and to execute the deed, was insufficient, in not averring an application to the covenantor, in order that he might have an opportunity of seeking to obtain her consent. *Tooley* v. *Nicholls*, 7 Law J. K.B. 17.

Defendant covenanted, by his marriage settlement, to pay off, within a year, certain incumbrances on his estate, to the amount of 19,000*l*. On his failing so to do, and being sued by the trustees on his covenant, he suffered judgment by default. The estates were of sufficient value, and no special damage was averred. The jury having assessed the damages at 1*s*., the Court ordered a new inquisition;—holding that the plaintiffs were, at law, entitled to damages to the full amount of the incumbrances; and that the defendant must seek relief in equity. *Lethbridge* v. *Mytton*, 9 Law J. K.B. 330, s. c. 2 B. & Ad. 772.

## COUNTY PALATINE.

Service of a mandate obtained upon a non-bailable writ of latitat into a county palatine, or of the latitat itself, will suffice. *Ashbrook* v. *Townley*, 9 Law J. K.B. 207, s. c. 2 B. & Ad. 416.

## COUNTY TREASURER.

A bond given by a county treasurer pursuant to the statute 12 Geo. 2. c. 29, with a condition for the performance of his duties as county treasurer, renders him liable in respect of a breach of duty created by act of Parliament passed subsequent to that under the authority of which the bond is taken, but before the taking of the bond.

The Militia Act, 43 Geo. 3. c. 47, (sect. 9, 16, and 17,) casts certain duties upon a county treasurer: among them, that of transmitting to other county treasurers accounts of money paid by him in pursuance of the act, and which it is the duty of the other county treasurers to reimburse him.

Held, that it is no part of the duty of the county treasurer to demand or recover such money from the other county treasurers.

Nor is it any part of the duty cast upon the county treasurer, after he has duly transmitted such account to the other county treasurers, and payment has not been made, to notify to the Sessions the fact of the transmitting to, and of the non-payment by, the other county treasurers.

Nor, where he has paid to another county treasurer a sum chargeable to a parish in his own county, is it a part of his duty to obtain from the Justices at Sessions an order upon their parish officers to reimburse him. *Farr* v. *Hollis*, 8 Law J. K.B. 11, s. c. 9 B. & C. 315, s. c. 4 M. & R. 230.

## COURT.

The Court refused to award a *procedendo*, where a cause had been removed by *pone* from the county court, after a judgment by default, and notice of the

execution of a writ of inquiry. *Godley* v. *Marsden*, 8 Law J. C.P. 138, s. c. 6 Bing. 433, s. c. 4 M. & P. 138.

Where magistrates are sitting judicially (as in the case of an information for an offence against the game laws), whether an attorney has a right to be present, and, in that character, to take a part in the proceedings on behalf of the accused—*quære*.

But, in general, the court in which magistrates are sitting judicially is an open court, to which the public have a right of access; and, supposing there to be room, that a person conducts himself properly, and there be no reason to justify an order for his removal, every one of the public has a right to be present.

Accordingly, where magistrates sitting judicially ordered an attorney, who attended on behalf of the accused, to be turned out of the room:—Held, that (independent of any question as to his right as an attorney) he was entitled to maintain an action of trespass for being thus turned out, on the ground of right, as one of the public, to be present. *Daubney* v. *Cooper*, 8 Law J. K.B. 21, s. c. 10 B. & C. 237, 830.

An attorney, merely in that character, has no right to insist upon taking part as an advocate upon proceedings before Justices under a penal statute, where it is the practice of the Court in which the proceeding is pending not to allow persons to practise as attornies or advocates. *Collier* v. *Hicks*, 9 Law J. K.B. 300, s. c. 2 B. & Ad. 663.

## COURT MARTIAL.

A purser in the navy, charged with making false entries in the ship's books, for the purpose of fraud, is liable to be tried by a Naval Court Martial, under the 36th of the articles incorporated in the 22 Geo. 2. c. 33. *Man* v. *Owen*, 7 Law J. K.B. 255, s. c. 9 B. & C. 595, s. c. 4 M. & R. 449.

## CRIMINAL INFORMATION.

[See INDICTMENT, and INFORMATION.]

## CRIMINAL LAW.

Consolidation and amendment of statutes in Ireland relating to offences against the person, 10 Geo. 4. c. 34, 7 Law J. Stat. 73.

Amendment of 9 Geo. 4, for facilitating criminal trials in Scotland, 1 Will. 4. c. 37, 8 Law J. Stat. 89.

## CROWN.

Administration of the government provided for, in case the Crown should descend to the Princess Alexandrina Victoria, when under the age of eighteen years, and for the care and guardianship of her person, 1 Will. 4. c. 2, 9 Law J. Stat. 4.

His Majesty enabled to make provision for supporting the royal dignity of the Queen, 1 & 2 Will. 4. c. 11, 9 Law J. Stat. 10.

## CROWN LANDS.

[See 10 Geo. 4. c. 50, 7 Law J. Stat. 93.]

[Grant of leases of lands, &c. in the Duchy of Cornwall, 1 & 2 Will. 4. c. 5, 9 Law J. Stat. 6.]

Although the King holds lands as Duke of Lancaster, he holds them as King also; and all his prerogatives belong to him, with reference to such lands, as they do with regard to lands which belong to him immediately in right of his Crown. *Alcock* v. *Cooke*, 7 Law J. C.P. 126, s. c. 5 Bing. 340, s. c. 2 M. & P. 625.

## CUSTOM.

A custom, that no person, not free of the city of London, should *sell* or put to sale any wares, &c., within the city or liberties, by retail, or keep *any shop for use* of any art, &c., warrants a bye-law forbidding any but freemen *to shew*, sell, or put to sale, &c., or *to use* any art, &c., within the same; the difference between keeping a shop for the use of an art, and the using of an art, and the other slight difference, being considered as merely verbal. *Clark* v. *Denton*, 8 Law J. K.B. 333, s. c. 1 B. & Ad. 92.

## CUSTOMS.

[See REVENUE.]

## CUTTING AND MAIMING.

[See MALICIOUS INJURY.]

## DAMAGES.

If by the negligence of A, in building his house adjoining to that of B, the house of B is thrown down,—A is liable only to such sum in damages as was the value of the old house, and not the whole expense of building a new one. *Lukin* v. *Godsall*, Pea. 15. [Kenyon]

In an action for an injury to the plaintiff's premises, in consequence of the pulling down of the defendant's house adjoining, the plaintiff may recover damages for any injury actually caused by the negligence of the defendant, although he has not himself used those precautions which it was his duty to adopt against such injury. *Walters* v. *Pfeil*, 1 M. & M. 362. [Tenterden]

The plaintiff had accepted a bill for 148*l.*, for the accommodation of T, who gave it to N for a particular purpose. N borrowed 10*l.* of the defendant, and gave him this bill as a security. This sum of 10*l.* was repaid by N, but the bill was not given up; and the defendant indorsed it for value to K, who, when it was dishonoured, caused both the plaintiff and T to be arrested; and the plaintiff paid the amount of the bill, and the costs of both arrests:—Held, that the plaintiff was entitled to recover the amount of the bill from the defendant, but not the costs of the two arrests. *Roach* v. *Thompson*, 4 C. & P. 194, s. c. 1 M. & M. 487. [Tenterden]

A party employing another to present a bill for

acceptance is entitled to recover nominal damages against such agent, if he fails to present it, although no real damage whatever is occasioned by the neglect, the bill and costs having been paid by other persons liable on it. *Van Wart* v. *Woolley*, 1 M. & M. 520. [Tenterden]

Where a general judgment has been given upon several counts, some of which are good, and some bad, and a court of error for this reason reverse the judgment,—whether such Court should, since the 6 Geo. 4. c. 50. s. 60, award a writ of inquiry, and not a *venire de novo*—*quære*. *Fisher* v. *Clement*, 8 Law J. K.B. 176, s. c. 10 B. & C. 472.

A *nolle prosequi* entered up after judgment by default, is a *remittitur* of the damages, and no second action can be brought for such damages. *Boaden* v. *Horne*, 9 Law J. C.P. 229, s. c. 7 Bing. 716, s. c. 5 M. & P. 756.

## DEBTOR AND CREDITOR.

[See ASSIGNMENT.]

(A) DEBTOR.
(B) CREDITOR.
(*a*) *Rights and Liabilities.*
(*b*) *Priority of Payment.*
(C) COMPOSITION.

### (A) DEBTOR.

Where money has been levied under an execution, and paid to the sheriff, the debtor is discharged; and the remedy of the creditor is against the sheriff only. *Morland* v. *Pellatt*, 7 Law J. K.B. 54, s. c. 8 B. & C. 722.

The discharge of a defendant in Scotland, under the law there called the *cessio bonorum*, is not pleadable in bar to an action for debt which arose in this country, unless it appear that the creditor has received a dividend, or otherwise claimed the benefit of that law.

The mere appearance of the English creditor before the Scotch Court, and his opposing the debtor's discharge under the law of *cessio bonorum*, is not such a claiming by him of the benefit of that law, as to deprive him of his right afterwards to sue the debtor in England.

But an English debt, proveable under a Scotch sequestration, is barred by the 54 Geo. 3. c. 137. *Phillips* v. *Allan*, 8 Law J. K.B. 2, s. c. 8 B. & C. 477, s. c. 2 M. & R. 576.

An acceptance of the debtor, taken as payment by the creditor, must be taken as a discharge, if not proved to be destroyed, although it is proved to be lost, and although the creditor offer to indemnify by rule against any claim on the bill. *Woodford* v. *Whitsley*, 1 M. & M. 517. [Parke]

Where a creditor takes a bill from the agent of the debtor for the amount of the debt, and renews it from time to time at the request of the agent, his so doing will not discharge the debtor, unless the latter shew that he dealt with his agent upon the faith of the money being paid; or that, in some other mode, he has been prejudiced by the fact of the creditor so dealing with the agent.

Accordingly, goods were sold upon a certain credit; before the time for credit expired, the creditor applied to the agent of the debtor to give him a bill, deducting the discount in respect of the credit unexpired. The agent accordingly gave his acceptance, deducting the discount. At this time, the agent had money in hand sufficient to pay more than the debt. When the bill became due, it was renewed, and again renewed; and the renewals carried the time beyond the expiration of the credit. There had been no adjustment of accounts between the agent and his principal, the debtor. The agent failed, largely in debt to his principal:—Held, that, inasmuch as it did not appear that the debtor had sustained any prejudice, or been misled by this course of dealing with his agent, the creditor had a right to recover against him for the unsatisfied debt. *Robinson* v. *Read*, 7 Law J. K.B. 237, s. c. 9 B. & C. 449, s. c. 4 M. & R. 349.

### (B) CREDITOR.

#### (*a*) *Rights and Liabilities.*

[*Selby* v. *Selby*, 4 Russ. 336, Law J. Dig. 178.]

[See 1 Will. 4. c. 47, 10 Law J. Stat. 102, consolidating and amending the laws for facilitating the payment of debts out of real estate.]

Where a debtor sends bills to his creditor to be discounted, and applied to a particular purpose, the creditor cannot apply the proceeds of the bills to his own debt, and against the particular purpose for which they were remitted.

If in such a case the debtor become bankrupt, his assignees may maintain either trover for the bills, or money had and received for their produce; and, in the latter case, the creditor will not be entitled to set off his old debt. *Buchannan* v. *Findlay*, 7 Law J. K.B. 314, s. c. 9 B. & C. 738, s. c. 4 M. & R. 593.

Where an estate is settled to the usual uses to bar dower, and then a judgment is entered up against the owner of the estate, and before execution is taken out the owner of the estate appoints it to a purchaser, the judgment creditor's lien is defeated. *Tunstall* v. *Trappes* (*Lawson's case*), 3 Sim. 300.

An assignment of property for the purpose of securing debts due and to be due, with a power of sale upon giving six months' notice, is only a collateral security; and, without a special clause to that effect, does not suspend the remedy by action against the debtor. *Emes* v. *Widdowson*, 4 C. & P. 151. [Tindal]

A receiver appointed in a suit instituted by incumbrancers, was ordered to keep down the incumbrances out of the rents, and to pay the residue to the owner of the estate. A judgment creditor may file a bill against the owner and receiver, without making the other incumbrancers parties, to have his debt satisfied out of the surplus rents. *Lewis* v. *Lord Zouche*, 2 Sim. 388.

A father conveys his estates to trustees for paying off annuities granted by his son, together with the arrears, and also the son's debts, if they thought proper to pay them; remainder to himself for life, remainder to his son in fee. The annuities were mentioned in a schedule, but the annuitants were not parties to the deed. The father and son then execute other deeds, varying the former trusts. Motion by one of the scheduled creditors, to re-

strain the trustees from executing the trusts of the subsequent deeds, until they had performed the trusts of the first, refused. *Walwyn* v. *Coutts*, 3 Sim. 14.

In a suit instituted in 1814, to administer the personal estate of an intestate, who died in 1807, the Master reported that no debts had been proved; and by the decree on further directions, in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained, and carried to his separate account. In 1825, a foreign prince, claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in court; and the plaintiff, coming of age soon after, applied to have that sum paid out:—Held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the Master; but that every defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in court, to that proportion which the plaintiffs' share bore to the whole amount distributed; and therefore, that after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff. *Greig* v. *Somerville*, 1 Russ. & M. 338.

A testator gave lands to A, in strict settlement, and a manor to B, in strict settlement. On his death a creditor's bill was brought for the administration of assets; and it appearing that the testator owed a debt on mortgage, and some specialties, the Master was directed to ascertain what proportion the properties contained in the several devises ought to bear, and to raise the amount by sale or mortgage. The Master sold the manor and lands. The title to the lands was completed, and the purchase money paid; but no good title could be made to the manor. The report was confirmed in 1798. B continued in the possession of the manor, and never paid the contribution; and, in 1824, he and his eldest son, having suffered a recovery, sold it to J. T. F. In 1825, A died; and, in the same year, his eldest son, tenant in tail, filed his bill against B and his eldest son, and the purchaser:—Decreed, that this was a purchase *pendente lite;* and the contribution reported by the Master to be paid from the estate devised to B, with interest and costs, was ordered to be raised by sale and mortgage, and paid to the plaintiff. *Kinsman* v. *Kinsman*, 1 Tam. 399, s. c. 1 Russ. & M. 617.

### (*b*) *Priority of Payment.*

By deed between A and B, it was agreed that a sum in the hands of A, but belonging to B, should be laid out in the funds, in A's name, in trust for B. A died, never having invested the money:—Held, that B was a specialty creditor of A for the amount. *Mavor* v. *Davenport*, 2 Sim. 227.

Husband and wife being lessees of a rectory, assign it to trustees, in trust to sell, and pay certain bonds of the husband, and mortgages on his freehold estates; and, by a deed of even date, the husband, in consideration of his wife having joined in the assignment, conveys his freehold estates in trust for himself and his wife for their lives, and, after their deaths, to be sold for benefit of their children. The produce of the rectory was not sufficient to pay, in full, both the bonds and mortgages:—Held, that the bond creditors had no right, as against the children, to throw the mortgagees upon the produce of the freeholds. *Boasman* v. *Johnston*, 3 Sim. 377.

Where an estate is sold under a decree of the Court for payment of debts, a judgment creditor will be entitled to be paid out of the whole produce of the estate, and not out of a moiety only. *Tunstall* v. *Trappes—Lawson's case*, 3 Sim. 300.

### (C) Composition.

A conveyance by a debtor, to trustees for payment of scheduled creditors, who do not execute the deed, or conform to its terms, cannot be enforced by the creditors. *Garrard* v. *Lord Lauderdale*, 3 Sim. 1.

The plaintiff agreed to accept a composition of 10*s.* in the pound for a debt, on his debtor's brother's agreeing to supply him with coals to the amount of the remaining moiety of the debt. The plaintiff was the last person who signed the agreement for the composition. The coals were delivered, and the plaintiff afterwards sued the surety on the composition note:—Held, that the note was void, the stipulation for the coals being a fraud on the rest of the creditors. *Knight* v. *Hunt*, 7 Law J. C.P. 165, s. c. 5 Bing. 432, s. c. 3 M. & P. 18.

By an agreement entered into between the defendant and his creditors, reciting that the defendant was indebted to his said creditors in the several sums of money set opposite to their respective names in the schedule thereunder written, the creditors, in consideration of a composition of 10*s.* in the pound, upon and in respect of their *said* several debts, agreed to execute a general release. This deed was executed by the plaintiffs. Besides the amount inserted in the schedule as the debt of the plaintiffs, they held a bill, of which the insolvent was the drawer. This bill, having afterwards been dishonoured by the acceptor, was put in suit against the insolvent:—Held, that the release contained in the deed operated in discharge of the insolvent's liability, the concealment of the amount of the debt being in effect a fraud upon the other creditors. *Britten* v. *Hughes*, 7 Law J. C.P. 188, s. c. 5 Bing. 460, s. c. 3 M. & P. 77.

A creditor, in respect of two demands, seized the goods of B, his debtor, under an execution for one of the two debts, and afterwards at a meeting of some of the creditors of B, when a composition was proposed, declared that he would not agree to the composition, unless the debt for which the goods had been seized, were secured to him; C, who was not a creditor, guaranteed the debt, and A withdrew his execution, and signed the composition deed:—Held, that the bargain was a fraud upon the rest of the creditors, and void. *Coleman* v. *Waller*, 3 Y. & J. 212.

An agreement between a debtor and certain of his creditors, by which they agree "to accept payment, by his covenanting to pay to a trustee a third of his income and executing a warrant of attorney, as a collateral security;" so far binds each of the creditors parties to it, that neither can sue upon his original demand, unless the debtor has failed to perform his part of the agreement. *Good* v. *Cheesman*, 9 Law J. K.B. 234, s. c. 2 B. & Ad. 328.

A tradesman, holding a situation in a public office, being indebted to several persons, they met together, and signed an agreement, in which they stated, that he, being unable to make immediate payment, they agreed to accept payment by his covenanting and agreeing to pay to a trustee of their nomination, one-third of his annual income, and executing a power of attorney as a collateral security. The debtor did not sign the agreement, but attended the meeting, and expressed his willingness to comply with its terms. Before anything had been done in execution of the agreement, one of the creditors, who had signed it, brought an action against the defendant for his original debt:—Held, that he could not recover. *Good* v. *Cheesman*, 4 C. & P. 513. [Tenterden]

Trustees under a general assignment for the benefit of creditors, refused to allow one of them to sign the deed, on the ground that they had discovered, after the assignment was agreed on, that his claim was founded on usurious transactions:—Held, that this refusal remitted him to his original rights. *Garrard* v. *Woolner*, 4 C. & P. 471. [Tindal]

The defendants entered into an agreement with their creditors, by which trustees were appointed, to whom all the estate and effects of the defendants were to be conveyed and assigned, until each creditor was paid in full; the deed to contain "all usual and necessary clauses and conditions." The trustees took possession of the personal property, and paid 10*s.* in the pound on the debts. A deed of conveyance of the real property was prepared, which the defendants refused to execute, it not containing a clause of release. The deed had not then been executed by all the creditors, and the meeting at which it was produced was therefore adjourned. The plaintiffs in the meantime sued for the residue of their debt:—Held, that no sufficient breach of the agreement by the defendants had been shewn, to remit the plaintiffs to their original right. *Tatlock* v. *Smith*, 8 Law J. C.P. 54, s. c. 6 Bing. 339, s. c. 3 M. & P. 676.

Trustees under an assignment for the benefit of creditors, are entitled (like assignees under the Bankrupt and Insolvent Debtors Acts) to a reasonable time to ascertain whether property held under a lease by the debtor, can be made available for the benefit of the creditors or not; but if they act in such a way as to render the premises of less value to the lessor, or deal with the property as if the lease were vested in them, they will by that conduct make themselves personally liable for the payment of rent and performance of covenants. *Carter* v. *Warne*, 4 C. & P. 191, s. c. 1 M. & M. 479. [Tenterden]

## DECEIT.

In an action on the case for wilful misrepresentations as to the character of an agent, whereby damage accrued to the plaintiff:—Held, that the defendant was liable on the ground of the falsehood of the representations so made by him, without express proof of malice. *Foster* v. *Charles*, 8 Law J. C.P. 118, s. c. 6 Bing. 296, s. c. 4 M. & P. 61.

## DEEDS.

(A) Execution and Delivery.
(B) Construction and Operation.
(C) Validity of, and where set aside.
(D) Registration.
(E) Remedies on.

### (A) Execution and Delivery.

Where a defendant in ejectment produces a deed called for by the lessor of the plaintiff, such production does not dispense with the necessity of proof of the execution, unless the defendant claims some interest under the deed. *Doe* d. *Wilkins* v. *Marquis of Cleveland*, 8 Law J. K.B. 74, s. c. 9 B. & C. 864, s. c. 4 M. & R. 666.

Where a party produced a deed which had been for some time in his possession, and offered it in evidence against a party who formerly claimed and received a benefit under it, but afterwards abandoned that benefit, and gave up the deed to the party then producing it in evidence:—Held, that this did not dispense with the evidence of the attesting witness. *Vacher* v. *Cocks*, 8 Law J. K.B. 341, s. c. 1 B. & Ad. 148.

An instrument executed by mark, may be proved from inspection by a person who has seen the party so execute instruments. *George* v. *Surrey*, 1 M. & M. 516.

It is not necessary in the absence of the subscribing witness, to prove the handwriting of the party executing the deed, it is enough to prove the handwriting of the witness. *Kay* v. *Brookman*, 3 C. & P. 555, s. c. 1 M. & M. 286. [Tindal]

Where the subscribing witness to a deed cannot be produced, proof of his handwriting is sufficient evidence of the execution by the parties, whose signature purports to be affixed to it, without any further evidence of their identity. *Kay* v. *Brookman*, 2 M. & M. 286, s. c. 3 C. & P. 555. [Best]

Upon a question of settlement by apprenticeship, the indenture was produced, apparently executed by all parties: and the name of "George Jones" affixed to the attestation, as the attesting witness; but without any description. It was proved, that diligent search had been made in the place where the indenture was executed, but no person of that name could be there found; and that inquiry had also been made of the parties to the indenture, but no information as to the witness could be obtained from them:—but that between two and three miles from the place, there was a George Jones, who had been applied to, and who said he knew nothing at all about the matter. He was not produced.

Upon this evidence, the Sessions refused to receive the parties themselves to prove the execution of the indenture; being of opinion that enough had not been done to prove the handwriting of the attesting witness. The Court of King's Bench held the Sessions to have decided rightly. *Rex* v. *the Inhabitants of Muscleston*, 7 Law J. M.C. 96.

### (B) Construction and Operation.

General words, sufficient to pass a reversion, will pass it, unless the party using them indicate a clear intention to the contrary.

Accordingly, a settlor had a life-estate in a tene-

ment in Wootton, of which he was also entitled to the reversion after other life-estates. He subsequently executed a deed, by which he professed to advance his sons. He granted a particular property in Wotton, which he described, to certain uses. Then followed general words, not describing the first-mentioned property in terms, but sufficient to include it. He also expressly passed his household goods. One of the trusts was, the paying to himself an annuity for life: another was, to pay *thereout* 10*l.* a year to one of his sons; but this 10*l.* a year could not properly have been thus charged upon the first-mentioned property:—Held, that these circumstances did not shew a clear intention to limit the effect of the general words: and consequently, that the life-interest of the settlor and the reversion passed by the general words. *Doe* d. *Pell* v. *Jayes*, 9 Law J. K.B. 82, s. c. 1 B. & Ad. 593.

The defendant drew certain bills of exchange as surety for C H, the acceptor. By a deed to which C H, the defendant, the plaintiff, and one B, were parties, C H conveyed his lease, fixtures, and effects to B, upon trust to sell the same and pay to the plaintiffs a debt due to them from C H and also the bills in question. The deed also contained a proviso that the premises should be sold, and the proceeds applied to the purposes specified in the deed, before any proceedings should be had on the bills against the defendant. The trustee, with the knowledge of the defendant, omitted to take possession under this deed; and in the meantime a commission of bankruptcy issued against C H, under which his effects were sold by the assignees:—Held, that the proviso in the deed did not under these circumstances operate as a bar to the plaintiffs' right to sue the defendant upon the bills. *Lancaster* v. *Harrison*, 8 Law J. C.P. 288, s. c. 6 Bing. 728, s. c. 4 M. & P. 561.

A person having a legal estate in certain premises as trustee, and an equitable and beneficial interest in the same estate, executes a deed which might be construed as purporting to pass either both estates, or only the equitable estate which alone he has a right to convey:—Held, that the instrument should be construed as intending to pass only the estate which he had a right to convey; for a party shall be presumed to have intended to do only that which he had a right to do, provided the instrument be fairly and reasonably capable of that construction. *Fausset* v. *Carpenter*, 2 Dow. & C. 232.

(C) Validity of, and where set aside.

[*Pratt* v. *Barker*, 4 Russ. 507, Dig. Law J. 182; *Harvey* v. *Cooke*, 4 Russ. 34, Dig. Law J. 182.]

By a deed, bearing date the 17th of April 1672, conveying a turn of an advowson, the considerations were thus stated—"The sum of 20*s.* paid to the grantor by the grantee, and for true and faithful service done unto the former by the latter; as also for divers other good and valuable causes and considerations him (the grantor) thereunto moving:"—Held, that, in the absence of all proof of fraud and covin, the consideration (regard being had to the date of the conveyance,) must be presumed to be *valuable*. *Gully* v. *Bishop of Exeter*, 7 Law J. C.P. 50, s. c. 5 Bing. 171, s. c. 2 M. & P. 266.

A deed was made in 1672, by which the person entitled to present in the fourth turn, (the church being then full upon the first presentation only,) in consideration of 20*s.*—of true and faithful services done—and for divers other good and valuable causes and considerations, conveyed the right to present upon the fourth turn. In 1828, such deed being pleaded in support of the title to the fourth turn, the party against whom it was set up, pleaded, that the deed was made fraudulently, in order to deceive such person as should purchase afterwards. Issue was joined upon this; and the jury found a verdict negativing fraud:—Held, that after this verdict, the Court could not hold that, in point of law, the deed was fraudulent. *Gully* v. *Bishop of Exeter*, 8 Law J. K.B. 281, s. c. 10 B. & C. 584.

A having purchased a freehold estate, and paid part of the purchase-money, died intestate, leaving two daughters his co-heiresses and next-of-kin. After his decease, on payment of the remainder of the purchase-money by the two daughters and their husbands, the estate was conveyed to the two daughters as tenants in common. By an arrangement between the two daughters and their husbands, the freehold estate and certain personal property were agreed to be taken by B, the husband of one of the daughters, (by whom the remainder of the purchase-money for the estate was recited to have been paid,) as his share of the property, and a fine was covenanted to be levied to the use of B in fee. The fine was neglected to be levied, but B remained in possession till his death, acting as absolute owner of the estate: shortly before his death, and seventeen years after the covenant to levy the fine, a deed was executed and a fine levied, by which the estate was settled to the use of B and his wife for their lives successively, with remainder to their children. A bill by the creditors of B, to set aside this settlement as voluntary and fraudulent within the statute 13 Eliz. c. 5, was dismissed. *Houghton* v. *Tate*, 3 Y. & J. 486.

The grantor of a heritable bond is taken bound "to infeft and seise A B and his foresaids, on our own expenses, in the lands and others above disponed, to be holden from me of and under my immediate lawful superiors thereof, in the same manner as I hold the same myself, and for payment of the feu-duties as I pay or am bound to pay therefor." No confirmation is procured from the superior:—Held, by the House of Lords, affirming a judgment of the Court of Session, that this was a public holding, and invalid for want of confirmation. *Stevenson* v. *Rowand*, 2 Dow. & C. 104.

John Ewen, by his marriage contract, covenants that his whole property at the time of his death shall belong to the issue of the marriage. His wife dies in his lifetime, leaving a daughter, an only child, who, when about twenty-one years of age, marries a young man about the same age, and in a year after a son is born of the marriage. The husband then proposes to go abroad to improve his fortune, and Ewen, who was then a prosperous trader, persuades him and his wife to execute a deed, in the nature of a post-nuptial contract, by which, in consideration of a sum of 315*l.* they discharge him from all claims whatever on his property. They were at this time ignorant of the daughter's claims under her father and mother's marriage contract, and Ewen, attended by his man of business, brought them the deed to sign on the night of the husband's departure, and it was then executed. It was stated

in the deed that Ewen had paid a moiety of the 315*l.* at the time of the execution of the contract, and that the other moiety was to be paid after his death. But in point of fact he paid down nothing at the time of the execution, but only renounced a debt of 61*l.* due to him from the husband for goods, and gave a promissory note for the other 96*l.* Ewen lived for a considerable time after; and two days after his death, by a trust deed of settlement, conveyed the bulk of his property, amounting to 14,000*l.* to trustees to build an hospital.

The daughter's post-nuptial contract reduced on the ground of fraud and circumvention. *Ewen* v. *Bannerman*, 2 Dow. & C. 74.

Maccabe, an Irish barrister, becomes casually acquainted with Mrs. Hussey, a widow lady, possessed of some property of her own, and having large expectations from an aunt. Maccabe acquires her confidence, and engages in the management of her affairs, and persuades her to give him a deed of gift of a third of the aunt's property. When that property comes into possession, he persuades her to transfer to him one-half of it for himself, and also the other half to be managed by him on her account. He makes misrepresentations to her about her son, and as to other matters, and prevails upon her to execute a release to him. Mrs. Hussey at length calls for an account, which he refuses to render. She offers him a full discharge, if he would pay her the two-thirds of her property, calculated by her at 21,000*l.* He refuses. She files her bill in equity, and the deed of gift and release are set aside, as having been obtained by fraud and undue influence and misrepresentation; and Maccabe agreed to refund 36,500*l.* to Mrs. Hussey. This decree affirmed on appeal. *Maccabe* v. *Hussey*, 2 Dow. & C. 440.

J M, a man eighty-three years old, being entitled under the provisions of a trust disposition and settlement, to the annual produce of a fund during his life, estimated at the value of 6,000*l.*, but subject to reduction in the proportion of one third, upon the event of a suit, executed a deed, by which he renounced all his interest in the fund, and assigned it to his daughter and her husband, to whom the reversion belonged, in consideration of an annuity of 40*l.* a year, to be paid to him for life out of the fund, and his funeral expenses. In a suit instituted to reduce this deed, it was admitted that he was weak and infirm, and addicted to intoxication; and it appeared that the deed was drawn up by the agents of the daughter and her husband, and that no agent or other person was employed on the part of the father. Under these circumstances the deed was held void and reduced, and the judgment affirmed on appeal. *M'Diarmid* v. *M'Diarmid*, 3 Bligh, N.S. 374.

By a deed in 1762, lands were conveyed to the use of the grantor for life, and after his death in trust for D S his daughter, the wife of R S; and after her death, to the first and other sons successively of D S by R S, with remainders over, and subject to a power of revocation. In 1763 the grantor, by a will made in execution of the power, directed and desired that if there should be no issue male of the existing marriage, the lands should stand limited (subject to the dispositions of the deed of 1762) to the first and other sons of his daughter by any other husband.

R S died in 1778, leaving D S, his widow, and four sons surviving. Soon after his death D S married R B, by whom she had a son A B.

J S, the eldest son of the first marriage, having been from infancy a person of weak capacity, in the year 1785, as soon as he came of age, joined with his mother and father-in-law, as party to a deed, by which, reciting his title as tenant in tail in remainder, subject to his mother's life-interest in the lands, and an agreement which had been made for providing thereout, a present maintenance for him; and that the younger children of his mother had been left without provision by the deed of 1762, and further reciting certain expenditure made on the premises by R B, the husband of his mother, for the benefit of the inheritance, the lands were assigned to trustees for a term of 500 years, in trust to secure to J S an annuity of —*l.*, and subject thereto to the use of the mother for life; remainder to R B for his life, remainder to trustees for a term, to raise portions for the younger children of D M his mother, and subject thereto to the use of J S and the heirs male of his body; and in default of male issue, to such other of the children of D M, as she should appoint, and in default of appointment, to R S, E S, and A B, three of her children; remainder to her right heirs.

A fine and recovery were levied to give effect to this deed, which was registered in 1789.

J S died in 1794. In 1800 L S, the second son of the first marriage, filed a bill in Chancery against R B and D his wife, to establish the deed of 1762, and to set aside the deed of 1785 on the ground of fraud. This bill was dismissed by the plaintiff, 1805.

By deed in 1803, D, the mother, appointed the lands to A B her youngest son, subject to the payment of annuities. In 1809 the lands were, by deed executed on the marriage of A B, settled on the husband and wife, and the issue of the marriage, notwithstanding notice given to the parties by L S of his claims.

R B died in 1813; A B died in 1814, leaving a son. D, the mother, died in 1818. Upon this event L S brought an ejectment against the parties in possession, under the deed of 1785. This ejectment was not prosecuted, but in 1821, L S being dead, an ejectment was brought against the same parties by his son. Upon the trial, it was agreed between the parties that the sole question should be, whether the deed of 1785 was void at law as the deed of J S. It was sworn upon the trial, by some witnesses, that J S was not competent at the time of executing the deed, and they spoke to acts and conduct evidencing mental incapacity. On the other hand, it was by others sworn that he was competent to execute. It was admitted that the incapacity did not arise from lunacy, no evidence having been given of lunacy.

The Judge, in his charge to the jury, told them that the question for them to try was, whether J S was a person of sound mind or not, and that to constitute such unsoundness of mind as should avoid a deed at law, the person executing such a deed must be incapable of understanding and acting in the ordinary affairs of life, that it was not necessary that he should be without any glimmering of reason, and that as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him. To this direction a bill of exceptions was taken,

upon the ground that the Judge refused to tell the jury that in order to avoid the deed at law, the unsoundness of mind must amount to that which constitutes idiotcy according to the strict legal definition of an idiot.

Held, that this direction was right, and that the case could not be argued or decided upon an objection that the direction was too general and vague, because such objection was not taken at the trial, and did not form part of the bill of exceptions. *Ball* v. *Mannin*, 3 Bligh, N.S. 1, s. c. 1 Dow. & C. 380.

Releases set aside as fraudulent; and that, too, though there was no express prayer that they might be set aside. *Williams* v. *Smith*, 7 Law J. Chanc. 129.

A, an army agent in Dublin, having effected a policy of insurance on his own life for 3,000*l.*, in 1819, by an informal instrument, attested by two witnesses, assigned the policy to C, who had been for many years his confidential clerk. From the time of the assignment A paid two-thirds, and C one-third of the premium. In 1821, by a more formal instrument, drawn up by a professional person, he executed a further assignment of the policy. In the first instrument, the consideration expressed for the assignment is, "regard and affection," in the second, "friendship and affection." The last assignment was drawn up by the attorney of C, and both the instruments were drawn up and executed, without the knowledge of A's family.

By a codicil to his will, A gave to C a legacy of 100*l.*, as a further mark of his regard and affection. Upon the death of A, a letter addressed to his son was found inclosed in his will, stating that the assignment had been extorted from him by C, by threats and undue influence.

Upon a bill filed by H, as executor of A, to set aside the assignment on the ground of fraud and undue influence, C, by his answer, claimed the interest under the assignment, as a compensation given to him by A, in the place of an increase of salary. Upon the depositions it appeared, in evidence, that C had given different accounts of the object of the policy—viz. that it was effected as a provision for the wife of A, and that it had been given to him, for making up the accounts of A, in a way to deceive government.

It appeared also in proof of the charge of influence, that C had declared when the codicil was in contemplation, that none should be executed unless he chose; and when the letter was found in the will, that he said he could ruin the credit of the house and the character of the testator. Upon this, and other evidence, an issue was directed at the instance of the defendant, to try whether the assignments as to two-thirds of the sum insured, were the free and voluntary acts of the testator, or extorted from him by threats or undue influence, or obtained by fraud; the defendant, upon trial of this issue, was to produce the deeds of assignment, and the attesting witnesses.

Upon the trial of the issue, the letter found inclosed in the will, was tendered in evidence by the plaintiff; but rejected. The deeds of assignment and the attesting witnesses were produced by the defendant, but the plaintiff declined proving them, and the witnesses were not examined, and the deeds not proved by either party, but other evidence was given nearly similar to that which appears upon the depositions in equity on the part of the plaintiff. The defendant produced no witnesses, whereupon the jury found that, in the event of any assignment having been made, as to two-thirds thereof, it was obtained by undue influence.

A motion to set aside this verdict, and grant a new trial, was refused; and upon a re-hearing, a decree was made in favour of the plaintiff.

This decree was affirmed on appeal. *Collins* v. *Hare*, 2 Bligh, N.S. 106, s. c. 1 Dow. & C. 139.

### (D) Registration.

A term for 399 years in certain lands in Ireland, being vested in B for life, with the residue in his daughter, a settlement is made on the inter-marriage of the daughter and W, by which the whole term is conveyed to trustees, on trust to pay the rents and profits to B, the father, for life, then to W, the husband, for life, then to the daughter for life, if she survived him, and afterwards to convey the term to the first son. This settlement is not registered. On the death of B, the father, W, the husband, demises the whole term for valuable consideration to K, and the indenture is duly registered; and K afterwards assigns for like consideration his lease of the term to I:—Held, by the House of Lords, in conformity with the unanimous opinions of the attending common law Judges, that the registered indenture shall prevail over the unregistered settlement, and that the title of the assignee of the lease is to be preferred to that of the widow of W, and of the trustees under the settlement; and that this is so, whether the assignment from K to I was registered or not, for the unregistered assignment would pass the interest as between the lessee and assignee, and there is no conflicting claimant under a registered deed. And this construction of the Registry Act, 6 Ann. c. 2, holds good, whether the party executing the prior secret conveyance, and the subsequent registered deed, be the same party or not. *Warburton* v. *Loveland, ex dem. G. & H. Ivie*, 2 Dow. & C. 480.

### (E) Remedies on.

*Quære*—Whether an illegality appearing on the face of the deed, can be taken advantage of, at the trial, on a plea of *non est factum*. *Horner* v. *Graves*, 9 Law J. C.P. 192, s. c. 7 Bing. 735, s. c. 5 M. & P. 768.

Where a deed purported to be made "in consideration of esteem for A T, and for divers other good considerations," evidence is admissible that it was made in consideration of an intended marriage with A T.

And it is admissible evidence of this fact, that the settlor (the future husband) instructed his solicitor to prepare the deed as a marriage settlement. And that after the deed was executed, and before the marriage, he spoke of it as such. *Tull* v. *Parlett*, 1 M. & M. 472. [Tindal]

To a bill by one who claimed estates, either as heir *ex parte maternâ* of G, the person last seised or as a remainder-man under the limitations of some prior settlement, charging that G had only a life-interest in the property, as would appear if the contents of a certain deed executed in 1730, and within the power of the defendant, were set forth, and praying besides discovery in aid of an ejectment, the removal of outstanding terms, and other relief

connected with the action at law; a plea, that in 1766, G being then tenant in tail in possession, duly suffered a recovery of the estates in question to the use of himself in fee, and subsequently devised them to the defendant, but taking no notice of the deed of 1730, and not stating any part of its contents, was overruled. *Hungate* v. *Gascoigne*, 1 Russ. & M. 698.

## DEMURRER.

(A) Where allowed.
(B) Form.
(C) Practice.

### (A) Where allowed.

[*Grant* v. *Grant*, 3 Russ. 598, Dig. Law J. 187.]

A general demurrer for want of equity allowed, where it appeared on the face of the bill, that, of two co-plaintiffs, one had not any interest in the matters of the suit. *Cuff* v. *Platell*, 4 Russ. 242.

Where a bill charges a defendant with acts which would subject him to a criminal prosecution under a statute, the defendant need not plead the statute, but may demur to the bill. *Fleming* v. *St. John*, 2 Sim. 181.

After a cause was at issue, the plaintiff filed a supplemental bill, setting forth facts which occurred before the filing of the original bill, and alleging the contrary of a fact which was stated in the original bill. The defendants put in a general demurrer to the supplemental bill; which, on argument, was allowed by the Court. *Coleclough* v. *Evans*, 9 Law J. Chanc. 72.

### (B) Form.

A defendant who demurs generally, does not thereby admit the truth of the bill. *Thompson* v. *Barclay*, 9 Law J. Chanc. 215.

If a foreign government has not been recognized by the King of Great Britain, the Court will, upon demurrer, consider such government as not recognized, notwithstanding an allegation in the bill, that the government has been recognized by us. *Taylor* v. *Barclay*, 7 Law J. Chanc. 65, s. c. 2 Sim. 213.

### (C) Practice.

A demurrer to the whole of an amended bill may be filed, though the original bill has been answered.

*Semble*—Where a demurrer is allowed to an amended bill, the suit is entirely out of court; and the defendant is entitled to the costs of the whole suit. *Jones* v. *Reid*, 7 Law J. Chanc. 160.

Leave given to file a general demurrer after the second order for time had been taken out, the subpœna having been made returnable immediately, and there having been no wilful delay on the part of the defendants. *Attorney General* v. *the Mayor and Corporation of Carlisle*, 2 Sim. 427.

On a demurrer by a defendant, obviously for delay, the Court allowed a *concilium*, moved for on the last day but two of the term, to be drawn up for the last day of the term, although no rule had been given to bring in the paper-books, nor had the books been delivered, there not being a sufficient number of days to enable the plaintiff to conform to the usual practice in cases of demurrer. *Cooper* v. *Hawkins*, 9 Law J. Exch. 53, s. c. 1 C. & J. 219.

Before the plaintiff can move for judgment upon demurrer, the demurrer-books must be delivered to all the Barons; and if the defendant do not deliver his books, the plaintiff must deliver them on his behalf. *Commelin* v. *Thompson*, 1 C. & J. 461, s. c. 1 Tyrw. 346.

Demurrer not allowed to be withdrawn after judgment—nor, *semble*, after argument, without affidavit of merits. *Farebrother* v. *Worsley*, 9 Law J. Exch. 166, s. c. 1 C. & J. 549, s. c. 1 Tyrw. 424.

## DEPARTURE.

[See Detinue.]

## DEPOSITIONS.

[See Evidence.]

Magistrates should not allow depositions to be framed so as to meet the enacting words of a statute. *Mills* v. *Collett*, 7 Law J. M.C. 97, s. c. 6 Bing. 85, s. c. 3 M. & P. 242.

## DETINUE.

The gist of detinue is detainer: therefore, where A declared against B, in detinue, as upon a general bailment; and B pleaded that the subject-matter was delivered, not upon a general bailment, but as a deposit for a loan of money still due; A replied a tender; and B demurred, alleging that the replication was a departure from the declaration:—Judgment was given for the plaintiff. *Gladstone* v. *Hewitt*, 9 Law J. Exch. 145, s. c. 1 C. & J. 565, s. c. 1 Tyrw. 445.

## DEVISE.

[See Legacy and Will.]

(A) Construction of, in general.
(B) Of the Devisee.
(C) What Property passes.
(D) What Interest vests.
(E) Devises in Trust.
(F) Estates in Fee.
(G) Estates in Tail.
(H) Estates for Life.
(I) Estates by the Curtesy.
(K) Copyhold Estates and Customary Lands.
(L) Estates in Mortgage.
(M) Joint Tenancy, and Tenancy in common.
(N) Conditional and Contingent Devises and Limitations over.
(O) Executory Devises.
(P) Devises by Implication.
(Q) Devises for Payment of Debts.

### (A) Construction of, in general.

[*Farmer* v. *Bradford*, 3 Russ. 354, Dig. Law J. 191; *Harvey* v. *Cooke*, 4 Russ. 34, Dig. Law J. 190.]

A testator bequeathed Blackacre to A and B, with permission to dispose of it if they thought proper; but if it was not sold, he gave it, after the decease of either, to the survivor, and directed that, after the death of both, it should be sold, and the purchase money equally shared between the children of A and B, who were infants:—Held, that A and B took only a life estate, with a power of sale; that they could make a good title, and give discharges for the purchase-money; that, after the death of A and B, the purchase-money belonged to the remainder-men. *Breedon* v. *Breedon*, 8 Law J. Chanc. 104, s. c. 1 Russ. & M. 413.

T H, by his will, devised certain freehold and leasehold property to a trustee, upon trust to permit his son, T E H, to receive the rents during his life, subject to the payment of rents and performance of the covenants reserved and contained by and in the present or future leases, whereby the leasehold premises were or should be held; and also all taxes, fines, and expenses attending the same; remainder upon trust for the sons of T E H in fee, as tenants in common. The tenant for life became bankrupt, and afterwards died. His assignees received a sum of 2,000*l.*, subsequent to the bankruptcy, for rents:—Held, that these rents were liable to the fines for renewal. *Hulkes* v. *Barrow*, 1 Tam. 264.

A testator, in the early part of his will, gave all his property among his four illegitimate children, a boy and three girls, subject to such regulations and legacies as he should thereafter mention. He then says, "As the whole of this estate is to be equally divided amongst the before-mentioned four children, or the survivor of them, a regular division must be made of the estate when each comes of age, or is married; and the share of such person is not to be considered any longer as belonging to the general stock, but to the particular person so coming of age, if a boy. When the girls, or any one of them, come of age or get married, I hereby direct that their shares may be so settled on themselves during their lives, and on their children, in equal proportions, after their deaths, that it will not be in the power of the husband, if so inclined, to injure either his wife or children." The testator then proceeds:—"Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors; but in case of issue, these children are to inherit the share of their parents amongst them equally; and in case they die without issue, it is to return for the benefit of the survivors of those four children, or their families. Upon the reversion of any sum to the public stock, the issue of a deceased child is to have the share which its parent would have had:—Held, that the boy, on attaining twenty-one, took an absolute interest in his share. Held, that the daughters took for life, with remainder to their issue. Held, that on either daughter dying without issue, her share would go to the survivors of the four children, in the like manner as their original shares. *Jackson* v. *Forbes*, 1 Tam. 88.

Devise to executors and trustees of a freehold inheritance for a term of ten years, in trust to pay debts and legacies, and after testator's decease, to his wife for life; then to his grandson, "Thomas Chorlton, son of the late Richard Chorlton, all that my estate where I now live, and all that other estate and premises thereto belonging, situate in Pendleton aforesaid, called or known by the name of Weaste estate, now in the tenure or holding of Thomas Walker, his assigns or under-tenants, for his own use during his natural life, with remainder to the first son of the body of the said Thomas Chorlton, lawfully begotten, severally and successively in tail male, of the name of Chorlton. And for want of such lawful issue of that name, either by my said grandson Thomas Chorlton or my son John Chorlton, then I give and devise the said estate where I now live, and the Weaste estate, amongst my daughters and their children, share and share alike, to hold unto them, his, her, or their heirs for ever, as tenants in common, and not as joint tenants." Thomas Chorlton suffered a recovery. He had no child.

Held, on an exception to title, taken by a purchaser under a sale by order of the Court, that the devisee could make a good title in fee to the vendee. *Quære*—whether, as tenant in tail or tenant for life, with remainder in tail, or tenant for life, &c., with contingent remainder over, barred by the recovery.

*Quære*—whether John or his issue took any estate by implication. *Rushton* v. *Craven*, 12 Price, 599.

Charges imposed by will, creating a term upon real estate, to be paid out of the rents and profits, are *primâ facie* to be paid out of the annual rents and profits. Such is the *primâ facie* meaning of the words.

The same words may mean, that the charges shall be satisfied by sale or mortgage of, or of part of, the estate, as where it would be necessary to give effect to the charge on the property, according to the intention of the testator, and where the tenant for life is also remainder-man in fee. *Heneage* v. *Lord Andover*, 10 Price, 316.

### (B) Of the Devisee.

[*Mortimer* v. *West*, 3 Russ. 370, Dig. Law J. 196; *Crozier* v. *Fisher*, 4 Russ. 398, Dig. Law J. 191; *Pycroft* v. *Gregory*, 4 Russ. 526, Dig. Law J. 192.]

Under a devise by a man married at the time of making his will, and having a wife then living, but never having had any legitimate children, (the will being republished by him after her death,) giving part of his freehold estates of inheritance, except, &c., (after devising his mansion-house to his wife for life, and giving to her an annuity for life in lieu of dower, and giving the said mansion-house, after her decease, to Ann Lewis for life, provided she so long continued unmarried,) to trustees for the term of thirty-one years, and after the expiration thereof, "to the children which I may have by the aforesaid Ann Lewis, and living at my decease, or born within six months after," and all the other his estates, lands, &c. in certain counties in England and Wales, "to the use and behoof the child or children which I may have by the said Ann Lewis, as above mentioned,"—real property may be passed

to such natural children so described, born before the date of the will, such a description of natural children as the objects of a devise, where they have acquired a reputation of being the children of the testator, as will distinctly and certainly point them out, being a sufficient *designatio personarum*.

The capacity of illegitimate offspring to take real property under a will, when termed children, depends wholly on the due description of the devisees by other means of designation; and whether it appear, from the general tenor of the will, that such offspring were meant by the testator.

Argument, founded on the particular terms of the description of the devisees, as children "which I may leave," that the words of the will should be construed as having reference to future legitimate children of the testator by the same woman, the will being submitted to be made in contemplation of a possible marriage,—rejected, as inconsistent with the general tenor of the devise, which was held to be too plain to be open to such a construction.

If the testator had married Ann Lewis after the death of his wife, and had had other children,—*semble, aliter*. *Wilkinson* v. *Adam*, 12 Price, 470.

A testator devises Black-acre to A, and White-acre (which is of equal value) to B; afterwards, a commission of lunacy having issued against him, White-acre is sold by the order of the Lord Chancellor, for the payment of the lunatic's debts:—A is not entitled to have any compensation out of the lands devised to B, for the loss of the lands devised to him, A. *Holmes* v. *Goodworth*, 7 Law J. Chanc. 128.

J L by his will gave to his niece the rents of houses for her life, and after her death devised the houses to her children by her late husband, in what proportions she should by her will direct. At the testator's death, the niece had nine children, but four died in her lifetime:—Held, that all the five surviving children were entitled, to the exclusion of the representatives of those who died in the lifetime of their mother. Held also, that these children took as tenants in common. *Arrow* v. *Bellamy*, 9 Law J. Chanc. 198.

### (C) What Property passes.

A testator, resident in Jamaica, devised the rents, issues, and profits of his estate, called Islington and Cove's Pens, in that island, to A B:—Held, that the estate, and the slaves, mules, cattle, and machinery thereon, passed under this devise. *Stewart* v. *Garnett*, 3 Sim. 398.

A, being entitled to a Scotch heritable bond, devised it, with other property:—The heritable bond does not pass, but descends to the heir-at-law. It is immaterial that there is also a personal obligation. The debt still retains its real character as the *jus nobilius*. *Jerningham* v. *Herbert*, 1 Tam. 103.

Edward Gore, by his will, made in February 1801, devised all his manor, or reputed manor, of Barrow Minchin, in the county of Somerset, with the mansion-house, called Barrow Court, thereunto belonging, and the park, and also all his freehold messuages, lands, tenements, and hereditaments thereunto belonging, situate in the parish of Barrow Minchin and Barrow Gurney, to trustees, to the use of his eldest son, W. G. Langton, for twenty years from the day of the testator's death; and after the determination of that estate, to the use of the first and other sons of the testator's younger son, Charles Gore, in tail male; remainder to testator's grandson, J. G. Langton, and his sons, in tail male; and he directed that the persons so taking these estates in tail male should assume and use the name of Gore. He then disposed of other parts of his real property, situate in various counties, and, among other legacies, he bequeathed to his executors all arrears of rent due from any tenants of his estates in the parish of Barrow, to be laid out upon the farms, &c. appurtenant thereto; and he charged his said estate at Barrow with certain annuities. He bequeathed the residue of his personal property to his son Charles Gore. It appeared manifestly, from the whole of the will, that his intention was to dispose thereby of all his real estate. The testator died in March 1801.

The estate and manor of Barrow had been in the testator's family for several generations. In October 1800, he purchased a farm and premises, which adjoined to and were in some parts intermixed with the Barrow estate, and which were situate in the parish of Barrow Minchin and Barrow Gurney. That parish contained two hamlets, Barrow Minchin and Barrow Gurney.

The manor of Barrow Minchin was a reputed manor, without courts, quit rents, or freehold tenants. It extended beyond the hamlet of the same name, and comprised lands in the other hamlet. The gamekeeper of the manor of Barrow Minchin had been in the habit of shooting over the lands in question for several years before and after they were purchased by the testator, both in the time of the testator and of the defendant.

The testator, upon the marriage of his eldest son, had settled upon him considerable estates at a distance from Barrow Court. The son acquired also property by his wife, whose name (Langton) he took; and upon his marriage he fixed his residence upon one of the estates so acquired, at a distance from Barrow Court.

On ejectment brought by M G, son of Charles Gore, the second son of the testator, to recover the farm and premises purchased by the testator in October 1800:—Held, (on a special case submitted to the Court,) first, that the date of the purchase, the situation of the lands in question, the fact of William Gore Langton being eldest son of the testator, and having married a lady of fortune, and taking her surname, and that the ancient seat of the Gore family was at Barrow, the eldest son residing at another place, were admissible in evidence to explain the intention of the testator.

Held, secondly, that as the intention of the testator appeared manifest from the whole of the will, (if the words "thereunto belonging" had not been in it,) that the lands in question should pass as part of his Barrow estate, and as a jury might have inferred, from the fact of the gamekeeper of the manor having shot over the lands in question, that they were within the limits and part of the manor; and it was left to the Court to draw such conclusions as a jury might have drawn. The words "thereunto belonging" might be understood to mean, in a popular sense at least, "situate within the manor;" and, consequently, that the land in question passed by the will. *Doe* d. *Gore* v. *Langton*, 2 B. & Ad. 680.

(D) WHAT INTEREST VESTS.

[*Crozier* v. *Fisher*, 4 Russ. 398, Dig. Law J. 193.]

Testator, after devising certain real property to his heir-at-law, devised "to my daughter, E M, all that part of a messuage or tenement, with the appurtenances, which is now in the occupation of H L, situated in Ringstead, adjoining the tenement in the occupation of J M, to hold to her and her assigns, for and during the term of her natural life, if she shall so long continue a widow and unmarried; and, from and after the day of her decease, or day of marriage, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances, and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of J M, and also, all that my close or orchard lying above the said homestead, &c., unto the four children of my late son:—Held, that these four grandchildren of the testator, under this devise, did not take an immediate vested interest in any part of the premises mentioned therein, but a remainder expectant on the decease or second marriage of E M, and consequently, that one of those grandchildren, a pauper, did not obtain a settlement by forty days' residence in the parish where those premises were situate, during the life and before the second marriage of E. M. *Rex* v. *Ringstead*, 7 Law J. K.B. 197, M.C. 103, s. c. 9 B. & C. 218, s. c. 4 M. & R. 67.

(E) DEVISES IN TRUST.

In a devise, the words, "and I earnestly recommend to my said wife the care and protection of my affectionate (friend), most heartily beseeching my said wife, that she will permit and suffer the said (friend) to live and reside with her, and that she will afford to the said (friend) the same kind attention and tenderness which has been always shewn her in my lifetime. And I seriously and warmly entreat my said wife, at her decease, to settle and assure to two trustees such part of my real estate as she shall think proper, for the special purpose of securing to the said (person) during her natural life, (in case she survives my said wife, but not otherwise,) such an income as will enable the said (nominee) to enjoy all those comforts of life which she has hitherto been used and accustomed to, leaving the amount of such income to the entire discretion of my said wife," although sufficient *per se* to raise a trust, do not do so where they are coupled with words of confidence in the discretion of the devisee, as to the exercise of a controlling power conferred upon her by the will, such as these—"And I have devised and bequeathed the whole of my said real and personal estate, hereinbefore particularly set forth, unto my said dear wife, (and which she must acknowledge not to be inconsiderable,) unfettered and unlimited, in full confidence, and with the firmest persuasion, that in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference:"—Held, that by the latter clause no trust was raised for the heirs-at-law of the testator's father, or any of them, the words and objects of the bequest being too vague, undefined, and uncertain—Graham, B. *dissentiente*. *Heneage* v. *Lord Andover*, 10 Price, 230.

A recommendation or desire expressed in a will, that the devisee to whom the will declares the testator "has devised and bequeathed the whole of his real and personal estate, unfettered and unlimited, in full confidence, with the firmest persuasion" that she will adopt it, that is, in the words of the will, "that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference," is not confined strictly to the heirs-at-law of the original testator, but may be applied to any or either of all his direct descendants.

Thus, in such a case, the second testator may devise to a son of a younger daughter of the youngest sister of the first devisor, in preference to the daughter of an elder sister, and to the only son of the same youngest sister of the first testator.

It is not the true construction of the terms of such a devise, accompanied with such a trust, that the estate should be given entire and altogether to any one of the first testator's heirs or descendants.

Notwithstanding, therefore, the terms of the will, expressing confidence that the testator's devisee would devise the whole of his devised estate, together and entire:—Held, that the testatrix was not bound thereby to make such entire disposition of the whole. *Meredith* v. *Heneage*, 10 Price, 306.

Devise to trustees, their heirs and assigns for ever, upon trust to pay the rents to a married woman for her life, notwithstanding her coverture; and after her decease to convey to the use of such persons as she should appoint:—Held, that this passed the whole legal estate in fee to the trustees. *Doe* d. *Booth* v. *Field*, 9 Law J. K.B. 274, s. c. 2 B. & Ad. 564.

Devise to trustees and their heirs, upon certain trusts; then followed similar devises of other lands; at the close were these words: "And I hereby will, order, and direct, that the said trustees, and each of them, shall, may, and do, in every respect, give receipts, pay money, and demise the aforesaid premises or any part thereof, as shall be consistent with their duty and trust, or otherwise:—Held, that the trustees took the whole legal estate in fee. *Doe* d. *Keen* v. *Walbank*, 9 Law J. K.B. 276, s. c. 2 B. & Ad. 554.

A testator devised lands to trustees, upon trust, out of the rents and profits to pay two annuities, and subject thereto to permit A, and after him his wife, to receive the rents and profits during their respective lives; and, after the decease of the survivor, he devised the lands to their children:—Held, that the trustees could grant a valid lease of the lands for a term of ten years. *Naylor* v. *Arnitt*, 1 Russ. & M. 501.

A testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A, and next to apply the rents to the maintenance, education, and bringing up of the three children of A, during A's life. The sole survivor of the three children attained twenty-one in the lifetime of A:—Held, that the interest of such surviving child in the surplus rents and profits did not cease on his attaining twenty-one, but that he con-

tinued entitled to them during the life of his father. *Badham* v. *Mee*, 1 Russ. & M. 631.

A testator, by his will, devised to trustees and their heirs, all his freehold and copyhold land at S, and also his freehold land at H, in case there should be but one son of his daughter A who should attain the age of twenty-one years, upon trust for such son and his heirs; and in case there should be two or more sons of A who should attain the age of twenty-one years, then in trust for the second of such sons and his heirs; and in case there should be no son of A, upon trust for such of the daughters of A, (if any,) as should first attain the age of twenty-one years, &c.; and then after certain bequests of stock in trust to pay the dividends by way of life annuities, the testator devised and bequeathed all the residue of his property, whether freehold, copyhold, or for years, money in the funds, upon mortgage or otherwise, upon security or at interest, debts of whatever other nature or kind, to the same trustees, their heirs, executors, and administrators, upon trust, to sell, get in, &c.; and as to the residue of the monies to arise by such sales, to invest the same in the public funds or real securities; and if there should be only one child of A, upon trust, to transfer or assure the funds, and the dividends, interest, and annual proceeds thereof, to such only child, at or on his attaining the age of twenty-one years, &c.; and if there should be two or three children of A, in trust for such two or three children, equally to be divided between them, the shares of sons to be transferred on their attaining the age of twenty-one years, &c.

The testator afterwards made a codicil to his will, in these words, to the effect following:—"Having some short time back drawn my pen through the first fifteen lines of the sixth sheet of my will, and being apprehensive that such rasure not being witnessed, might lead to litigation, I declare that the sole intention of such rasure is, to revoke that part only of the will, whereby I direct the sale of my freehold property; and I hereby direct and appoint that the son of my daughter A who shall first attain the age of twenty-one years, shall, on attaining that age, change his name to Elwes; and I give and devise to the said son of A on his attaining the age of twenty-one years, and changing his name to Elwes, all my freehold property, lands, tenements, and hereditaments, to hold to my said grandson, his heirs, and assigns, &c.; and I do hereby ratify and confirm the said will, except as before is excepted."

Held, that the will was revoked by the codicil, expressly as to the power of sale; and as to the corpus of the lands at S and H by the effect of inconsistency of devise, but that the will was unrevoked and operative in all other respects; and that under the devise, by the effect of the will and codicil, no estate in the lands at S and H and the other freehold estates was vested, but remained contingent upon the event of sons or daughters of the testator's daughter, according to the limitations of the will, living to attain the age of twenty-one, &c.; and that until such vesting upon such event, (or until such event should become impossible,) the estate in the lands vested in the trustees, and the rents and profits were applicable according to the trusts of the will. *Duffield* v. *Duffield*, 3 Bligh, N.S. 261, s.c. 1 Dow. & C. 268.

### (F) Estates in Fee.

[See *ante*, E.]

A devise of lands to A, "for paying his son 50*l.* when of the age of twenty-one years," gives A the fee beneficially, charged with the payment of 50*l.* *Abrams* v. *Winshup*, 3 Russ. 350.

Devise to trustees and their heirs, during the life of M P, in trust, to lay out in rents, &c. on government securities, to accumulate until she shall attain twenty-one, and from and after she shall attain that age to suffer her to receive and take the rents, issues, and profits during her life, not subject to the control of any husband with whom she may intermarry; her receipt to be a sufficient discharge for the same: and from and after the decease of the said M P for ever:—*Semble*, that the legal estate is vested in the trustees during the life of M P, and, therefore, that there can be no union, under the rule in Shelley's case, of the legal estate in remainder to the heirs of M P, with the preceding estate for the life, so as to give M P the fee. *Playford* v. *Hare*, 3 Y. & J. 175.

Testator gave to his heir 1*s.*, and devised to W B all his lands; and, in the next sentence, gave to him all his goods, chattels, personal and testamentary estate:—Held, that the fee-simple of the lands passed to W B. *Bradford* v. *Belfield*, 2 Sim. 264.

A will began "As touching such worldly property wherewith it has pleased God to bless me in this world." The testator then devised several real estates, bequeathed sundry chattels, and charged a freehold estate called C, with annuities, but did not otherwise mention C. He then proceeded, "All the rest of my worldly goods, bills, bonds, notes, book debts, and ready money, and everything else I die possessed of, I give to my son George, whom I make my whole and sole executor."—*Held*, that the residuary clause, coupled with the preamble, gave George an estate in fee in C, to the exclusion of the heir-at-law. *Wilce, demandant*, *Wilce, tenant*, 9 Law J. C.P. 197, s.c. 7 Bing. 664, s.c. 5 M. & P. 682.

The testator by his will, after giving several pecuniary legacies for the benefit of his children, devised to his widow in one paragraph, "the whole of his remaining property in the Bank of England or otherwise, and also a freehold house in C, also a freehold estate in C, also about sixty-one acres of freehold land, with a house and barns thereon in B, (and two other similar freeholds,) also a copyhold estate in E B, also a leasehold estate in C, with all right and title to the same:"—Held, that the widow was entitled to an estate in fee-simple in the freeholds, and to an estate in fee, according to the custom of the manor, in the copyhold. *Sharp* v. *Sharp*, 8 Law J. C.P. 231, s.c. 6 Bing. 630, s.c. 4 M. & P. 445.

A testator devised property to trustees, in trust for the use of his daughter E E till the age of twenty-one, at which time the trustees were to account to E E, and put her in possession of the lands. In the event of the death of E E before twenty-one, or without issue, the testator gave to T E on his attaining twenty-one, for his life, &c. But if E E should attain twenty-one, or marry, the trustees were to hold, in trust, a portion for her first male issue, other part to the second, and other part to the third male issue, charged with an annuity for E E. And in

case E E should die without issue male, leaving issue female, he gave to such issue female, and the heirs male of their bodies; remainder to the testator's right heirs:—Held, that E E took an absolute estate of inheritance in fee simple in the estate in question. *Permewan* v. *Mitchell*, 9 Law J. C.P. 38, s. c. 7 Bing. 351, s. c. 5 M. & P. 256.

### (G) Estates in Tail.

[*Reece* v. *Steel*, 2 Sim. 233, Dig. Law J. 197.]

Devise of all testator's real and personal estate unto the heir-at-law of Mrs. R, (Mrs. R being then alive, and surviving the testator), and, in case such heir-at-law should die without issue, then to the next heir-at-law of the said Mrs. R, and his or her issue:—Held, that the eldest son of Mrs. R took an estate tail in the real estates devised by the will, as heir at-law. *Carne* v. *Roch*, 9 Law J. C.P. 19, s. c. 7 Bing. 226, s. c. 4 M. & P. 862.

A testator devised lands "to the use of G B, the second son of his nephew J B, to enter upon and possess the same *after the decease of his father, the said J B;*" and by his will directed that J B and G B should, within one year next after his decease, pay 100*l.* to certain trustees named in the will, for them to discharge certain legacies; and that, if J B and G B did not pay the 100*l.* within the time limited, the trustees should let the premises, and receive the rents, until the 100*l.* should be paid, they keeping possession of the title deeds, and not allowing J B and G B to sell or mortgage the estate until the legacies were paid; and that, *if G B should die, and leave no child lawfully begotten of his body*, the trustees should sell the premises, and distribute the produce amongst the brothers and sisters of the testator:—Held that, under this devise, G B took an estate tail in the premises, upon the death of J B, his father. *Raggett* v. *Beaty*, 7 Law J. C.P. 9, s. c. 5 Bing. 243, s. c. 2 M. & P. 512.

A testator devised lands to trustees, upon trust to convey the same to his son J H L, for life, remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the said J H L, severally, successively, and in remainder, one after another, as they, and every of them, should be in seniority of age or priority of birth, &c., with divers remainders over. The will contained various provisions as to portions, &c., which were to take effect only on a general failure of issue male of J H L; and there was a power of charging the lands with portions for the children of J H L, other than an eldest or only son:—Held, on the whole context of the will, that, notwithstanding he was omitted in the enumeration, the *first* son of the testator's son J H L took an estate in tail male *expectant* on the death of his father. *Langston* v. *Pole*, 7 Law J. Chanc. 185, s. c. 1 Tam. 119.

Devise "to my son-in-law John, and Elizabeth, John's wife, for their lives, and that of the survivor; and immediately after the survivor's decease, then to the heirs of the body of Elizabeth by John, to be equally divided among them, share and share alike." Devise of the residue to John:—Held, that the words "heirs of the body," were words of limitation, and were not altered by the subsequent words "to be equally divided," &c.; consequently, that the first devisees took an estate tail. *Doe* d. *Atkinson* v. *Featherstone*, 9 Law J. K.B. 163, s. c. 1 B. & Ad. 944.

Testator devised all his real estate to his wife for life; after her decease, a part to his grandson Alexander, his heirs and assigns, for ever. Of other part he thus disposed:—To his daughter Ellen for life; remainder to her husband John for life. Then followed—"My will likewise is, that, at the decease of my son-in-law John, the same, the whole legacy to him, shall go to my grandson William, and to his children lawfully begotten, for ever; but, in default of such issue, at his decease, to my grandson Alexander, his heirs and assigns for ever":—Held, that the grandson William took an estate tail. *Broadhurst* v. *Morris*, 9 Law J. K.B. 27, s. c. 2 B. & Ad. 1.

### (H) Estates for Life.

Estates held for lives will pass under a general devise of lands.

A testator devises leaseholds for lives to his daughter F, and the heirs of her body, and, in default of such issue, to A and her heirs: the daughter being at the time of his death a married woman, and of unsound mind, her husband took out administration to the testator, with his will annexed, and, as such administrator, renewed the leases and assigned them to a trustee for his own benefit. F survived her husband:—Held, that, upon the death of F, A became entitled to the renewed leases. *Fitzroy* v. *Howard*, 7 Law J. Chanc. 16.

A testator devised, "as to the rest of my estate, the two houses, one in St. John's-lane, and the other in Foggwell-court, in Charterhouse-lane" to his wife for her life, and after her decease, that in St. John's-lane, to his daughter:—Held, that the daughter took only an estate for life under the devise. *Esdaile* v. *Gall*, 8 Law J. Chanc. 133, s. c. 1 Russ. & M. 540.

Devise to trustees to pay rents and profits equally to A, B, C, and D, (females) for their respective separate use; and if they die, leaving daughters, the share or interest of the respective mothers to go to the daughters: provided that, in case any of them, A, B, C, or D, shall die *without issue*, then, devise over:—Held, that A, B, C, and D, respectively took estates for life, and their daughters estates for life. *Bennett* v. *Lowe*, 9 Law J. C.P. 132, s. c. 7 Bing. 535, s. c. 5 M. & P. 485.

A, a married woman, having, by virtue of her marriage settlement, power to appoint her personalty and a freehold to such person as she should direct, with remainder to a trustee to sell and distribute amongst her next of kin, gave, devised, and bequeathed to her husband the freehold by the description of her two fields and house; likewise, the remainder of her personalty, and all she might die possessed of, at the time of her death, after certain previous bequests, and her just debts were discharged, and appointed him and another executors:—Held, that the husband took only an estate for life, and that the next of kin were entitled to the monies to arise by a sale of the reversion. *Monk* v. *Mawdsley*, 1 Tam. 24.

### (I) Estates by the Courtesy.

Devise to A and her heirs; but if she died leaving issue, then to such issue and their heirs. A died, leaving issue:—Held, that her husband was not

entitled to be tenant by the curtesy. *Barker* v. *Barker*, 2 Sim. 249.

(K) Copyhold Estates and Customary Lands.

Since the statute 55 Geo. 3. c. 192, copyholds will pass under a general devise of real estate, without a surrender to the use of the will, notwithstanding there are freeholds to answer the devise; such general devise being in itself sufficient to include both freeholds and copyholds; and an intention to include the copyholds in the legal operation of such general devise not being negatived by the absence of such surrender. *Doe* d. *Clarke* v. *Ludlam*, 9 Law J. C.P. 74, s. c. 7 Bing. 275, s. c. 5 M. & P. 48.

A testator, by his will, devised to trustees all his freehold messuages, stock or shares in any of the public funds, and all money in hand or debts due to him, and all shares or *property* whereof he might be possessed or entitled to, upon certain trusts. By a codicil, he directed his copyholds to be transferred to his wife, until the expiration of certain leases, or till her death, and then to be sold for the benefit of his children and their heirs:—Held, that the copyholds did not pass to the trustees by the will; but that the interest in them passed to the wife, determinable on the expiration of the leases, or at her decease. *Chapman* v. *Prickett*, 8 Law J. C.P. 199, s. c. 6 Bing. 602, s. c. 4 M. & P. 404.

Devise of a copyhold estate upon certain trusts. Proviso thus—"Provided also, and I do desire and direct that the present tenant of the said copyhold estate, or any of his children desiring to be continued tenant or tenants thereof, be suffered to hold and occupy the said premises, upon payment of the present rent, and the taxes and levies which the said present tenant hath been accustomed to pay, and also all future taxes, during the time he or they shall respectively be tenant or tenants of the same, and upon entering into proper agreements not to commit any waste, or do any damage by sowing the same with flax, hemp, or woad, or by any other means whatsoever:"—Held, that this was merely a trust; and gave no legal interest to the tenant, or any of his children. *Doe* d. *Griffin* v. *Grafter*, 9 Law J. K.B. 266.

In two manors in Durham there is no custom for surrendering to the uses of the will, but the tenant divests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeazance, that the surrender is to the uses of the surrenderor's will. In this case, the father and maternal grandfather of the testator R N, both being copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeazance. The legal estate in both descended to the testator. But, with regard to the tenements in the manor of Houghton, they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator R N in fee. The widow being alive at the time, the testator R N made his will and died; it was held, that the copyholds in the manor of Houghton passed by his will. With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees, upon trust for the testator R N; Held, that there being nothing to separate the legal estate and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor.—Held, that his widow was entitled to free bench, and the heir, subject thereto, to the inheritance, but they, taking benefits under the will, were bound to elect. *Nicholson* v. *Nicholson*, 1 Tam. 319.

A testator, being absolute owner of some copyholds, of which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor, to which he had not been admitted, but subject to trusts, under which he was in equity only tenant for life, with remainder to his son in tail, remainder to himself in fee, surrendered to the use of his will all his copyholds, holden of that manor, or which he was seised of, or entitled to, either in possession, reversion, remainder, or expectancy: he was subsequently admitted tenant of all the copyholds which were subject to the trust, except the moiety of one tenement, and afterwards made a will, devising all his hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son for life; with remainders over:—*Held*, that the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the devisor was in equity only tenant for life, and that the son was bound to elect whether he would give effect to this general devise, or would insist upon the benefit of the equitable estate tail, which he took under the whole trusts, to which some of the copyholds were subject. *Abdy* v. *Gordon*, 3 Russ. 278.

A testator possessed of freehold lands, and of copyhold lands of Borough English custom, devised all to A for life; remainder to A's son, remainder to the *eldest* son of that son if he had one, but if he had no son, then to the next *eldest* regular male heir, of his (testator's) family, so long as there should be one of them in being:—Held, that the son of the first devisee took an estate tail; and that the descent, as to the copyholds, must follow the custom; and, therefore, that the youngest son of the tenant in tail was entitled. *Doe* d. *Garrod* v. *Garrod*, 9 Law J. K.B. 149, s. c. 2 B. & Ad. 87.

(L) Estates in Mortgage.

Where a testator was mortgagee in fee, and devised all his freehold estates under certain limitations which could be applicable only to property which was his own:—Held, that the devise did not pass his legal estate as mortgagee.

Where that testator in another part of his will devised all his stock in trade, cotton-mill, machinery, cupola furnace, mineral tools, implements and utensils, ready money, and *securities for money, debts*, personal estate and effects, upon trust that the trustees, their *heirs*, &c. should dispose of the stock, get in the debts, and lay out the produce in the purchase of freehold property, upon certain trusts:—Held, that this devise did not pass the testator's legal estate as mortgagee. *Galliers* v. *Moss*, 7 Law J. K.B. 109, s. c. 9 B. & C. 267, s. c. 4 M. & R. 268.

Devise of lands subject to 1,000*l.* to be raised for the testator's daughters, to an annuity of 37*l.* 10*s.* to his widow, and to all such incumbrances as might happen to be thereon, does not exempt the personal

estate from the payment of a mortgage thereon. *Phillips* v. *Parker*, 1 Tam. 136.

(M) JOINT TENANCY AND TENANCY IN COMMON.

[*Thomas* v. *Phelps*, 4 Russ. 348, Dig. Law J. 200.]

Devise to Margaret and Elizabeth, of the residue, to them and the survivor of them, their heirs and executors for ever:—Held, that they took a joint tenancy in fee. *Doe* d. *Young* v. *Sotheron*, 9 Law J. K.B. 286, s. c. 2 B. & Ad. 628.

Devise to A for life, of messuage and other freehold estate at ——; and after her decease "I give the same estate to all and every the child and children of A, equally to be divided amongst them; and for want of such issue," over:—Held, that the children of A took as tenants in common in fee simple. *Esdaile* v. *Wilshere*, 9 Law J. Chanc. 71.

Where the residue of real and personal estates was devised by a testator to his two sons as joint tenants, and the two sons, after the father's decease, and during the period of twenty years, carried on the business of farmers with such estates, and kept the monies arising therefrom in one common stock, and with part of such monies purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other:—It was held, under the circumstances, that they continued, at the death of one of them, joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estates. *Morris* v. *Barrett*, 3 Y. & J. 384.

(N) CONDITIONAL AND CONTINGENT DEVISES, AND LIMITATIONS OVER.

[*Parr* v. *Swindells*, 4 Russ. 283, Dig. Law J. 202.]

Devise "to R W and his heirs for ever. But if in case the said R W dies without heirs, then to J P and his heirs; *or* if in case the aforesaid R W offers to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to go to the aforesaid J P and his heirs:"—Held, that the condition to restrain the alienation was void, and that R W took an estate in fee. *Ware* v. *Cann*, 8 Law J. 164, s. c. 10 B. & C. 164.

A devise in terms which would give an estate tail, after a life estate. Proviso, that the devisee should, on his surviving the tenant for life, pay A B 5*l.*:—Held, that this proviso did not enlarge the estate tail into an estate in fee. *Doe* d. *Jones* v. *Owens*, 8 Law J. K.B. 404, s. c. 1 B. & Ad. 318.

A testator, having daughters in England, and an only son in the West Indies, thus devised:—"I give and devise to my son R H, now of the island of St. Christopher's, all that &c., to hold the said premises to my said son R H, his heirs and assigns for ever; subject, nevertheless, to the payment of the sum of 600*l.* to my said three daughters. And I do hereby direct, that, until my said son R H, or his heirs, shall come to England, and also pay the said 600*l.*, that he shall not have the possession of the said estate, but that the rents and profits shall be equally divided among my said daughters, until my said son shall return to England and pay the said sum."

Then followed a power to the daughters to let for seven years.

"And in case my said son shall not come to England during his lifetime, to take possession of the said estate, and shall die without leaving any issue, lawfully to be begotten, then I do give and devise the said estate to my said daughters in equal parts as tenants in common, and to the respective heirs of their several bodies for ever."

Held, that the daughters took, not an estate tail, but either an estate in fee on condition, to determine when R H, or his heirs, should return to England and pay the 600*l.*, or a chattel interest, to continue until such return and payment. *Doe* d. *Goldin* v. *Lakeman*, 9 Law J. K.B. 138, s. c. 2 B. & Ad. 30.

A testator devised lands to trustees, in trust for his son J H L, for life, remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the said J H L, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age or priority of birth, &c., with divers remainders over:—Held, that, notwithstanding his being omitted in the enumeration, the *first* son of the testator's son J H L, took under this devise an estate in tail male *expectant* on the death of his father. *Langston* v. *Pole*, 7 Law J. C.P. 1, s. c. 5 Bing. 228, s. c. 2 M. & P. 490.

Devise to husband and wife, and to the survivor for life; then to their daughter and other children; and, in case they leave no children, then to their heirs and assigns for ever. The wife having died in the lifetime of her husband, and afterwards the daughter (their only child) in her father's lifetime, the heir-at-law of the testator was not entitled to take on the decease of the father; the remainder in fee becoming vested in the latter, as the survivor of the husband and wife, leaving no children. *Doe* d. *Nesmyth* v. *Knowls*, 9 Law J. K.B. 78, s. c. 1 B. & Ad. 324.

Devise to A, B, C, &c., share and share alike, for their lives, remainder to their respective children for their lives, and so to be continued from issue to issue for life. But if any of them die, leaving no issue, their shares to go to the survivors, for their lives, and the issue of such of them as shall be dead; and, for default of any issue, then over:—Held, that A, B, C, &c. take estates tail, with cross-remainders. *Mortimer* v. *West*, 2 Sim. 276.

An estate at C was settled on A for life, remainder to his first and other sons in tail male, remainder to A in fee. A devised as follows: "As to the reversion and inheritance of the freehold estate at C, purchased by me in pursuance of my marriage articles, bearing date, &c., in case of failure of issue of my body by my said wife, I give and devise the same," &c. He then limited the estate to his brothers in succession, and to their respective first and other sons in tail male:—The Court was of opinion that the devise was good. *Egerton* v. *Jones*, 3 Sim. 409.

(O) EXECUTORY DEVISES.

A testator gave the residue of his estate to trustees, upon trust to pay, apply, and dispose of it to two women, A and B, when they should attain their respective ages of twenty-one years, directing

that their shares should not be subject to the controul of their husbands: but in case both or either of them died without issue living at the time of their respective deceases, then he gave the share of her or them so dying to his nephews and nieces: —Held, upon the whole context of the will, that the executory devise over of the residue was not confined to the death of A and B, or either of them, under twenty-one, and without leaving issue; but would take effect upon their respective deaths at any time, without leaving issue then living. *Gray* v. *Folds*, 7 Law J. Chanc. 182.

Devise to A and B, and their heirs, to sell and dispose, at their discretion, of all the testator's rights in King's Sedgmoor, belonging to the manor of Moorlinch, and all his rights in Moorlinch, if an act should pass for inclosing the said moor within twenty years, and to pay the proceeds to the several persons therein mentioned. An inclosure act passed within the twenty years, and various allotments were made in respect of the testator's estates:—Held, that the devise was in the nature of an executory devise, to take effect on the passing of the act; and that, under the devise, the devisees took a quarter part of the money produced by the sale of the allotments in King's Sedgmoor in respect of the manor of Moorlinch, and the whole of the proceeds of the sale of allotments in respect of lands in Moorlinch. *Gardner* v. *Lyddon*, 3 Y. & J. 389.

### (P) Devises by Implication.

The Court held, upon the particular language of a will, that an estate tail would not be implied in A and B, though an estate was given to them for life, and the property was, upon failure of their issue male, limited over to their grand-daughters, and there was no express limitation which would include all their issue male. *Houston* v. *Platt*, 7 Law J. Chanc. 20.

A testator devised to his sons T and S, and their heirs males, then to his (testator's) four grandsons, share and share all alike, then to the heirs males of all his said grandsons, and then to go to his grandsons' heirs males that part that belonged to their father, and then to them, and then to the last liver, to their heirs males of his said grandsons; and, for want of issue males of his grandsons, to the testator's nephew, and his heirs males, &c.; and, for want of such issue male, to the testator's own right heirs for ever:—Held, that cross-remainders might be implied. *Doe* d. *Edward Southouse* v. *Jenkins*, 7 Law J. C.P. 182, s. c. 5 Bing. 469, s. c. 3 M. & P. 59.

Where estates tail are devised to more than two persons as tenants in common, and it is manifest that the testator did not intend that any part of the estate should go over, unless there was a failure of issue of all the devisees, there the devisees take cross-remainders.

Where estates tail are given to two persons only as tenants in common, there cross-remainders between them will be implied, although there is no expressed intention that no part of the estate should go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively. *Livesay* v. *Harding*, 1 Russ. & M. 636, s. c. 1 Tam. 460.

### (Q) Devises for Payment of Debts.

[*Hewill* v. *Witaker*, 3 Russ. 343, Dig. Law J. 203.]

A testatrix devised certain estates to trustees for a term of five hundred years; and, subject to the term and the trusts thereof thereinafter declared, she devised the same estates to the use of various persons successively for life; with remainder to the first and other sons of such several persons successively in tail male; with remainder to the daughters of such several persons successively in tail general; with remainders over. The trusts of the five hundred years' term were declared to be, that the trustees of the term should, out of the rents and profits of the hereditaments comprised in the said term, pay the several annuities mentioned in the will; and, subject thereto, should, out of the residue of the rents and profits of the premises comprised in the said term, levy and raise such sums of money, not exceeding 8,000*l.* in the whole, as should be necessary to pay and satisfy such debts or sums of money as might be due and owing by her late husband, or by herself, either by mortgage, bond, or otherwise; and all which she directed the trustees to pay, satisfy, and discharge out of the said rents and profits, in such manner and form as they should think fit, and as soon as conveniently might be after her decease; and, subject and without prejudice to the several trusts declared of the said term, upon trust to pay and apply the residue and overplus of the net rents, issues, and profits of the premises comprised in the said five hundred years' term, unto the person or persons who for the time being should be next entitled to the reversion or remainder of the premises, expectant on the said term, under the limitations thereinbefore contained: —Held, that it was a question of intention, to be collected from the provisions of the will, whether the testatrix meant to charge the debts upon the *corpus* of the estate, or only to direct the payment out of the annual rents and profits; and, upon the several provisions, the Court held, that the testatrix did not intend that the debts should be raised out of the *corpus* of the estate, but only that the same should be discharged out of the annual rents and profits.

Though, in favour of creditors, the Court considers a devise in trust for payment of debts out of rents and profits, to be equivalent to a devise of the estate itself in trust for payment of debts, and will direct the estate to be sold for that purpose, yet it has been in cases where the remainder-man was either tenant in fee or in tail, and therefore liable to pay the debts sooner or later. *Hanage* v. *Lord Audley*, 3 Y. & J. 360.

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## DIEM CLAUSIT EXTREMUM.

Where freehold and leasehold property had been seized under a writ of *diem clausit extremum*, on an old commission and inquisition, and various claims were entered on the part of the persons insisting on a prior right to that of the King, and the executor of the deceased Crown debtor, and his surviving partners in trade, and the purchasers of part of the leasehold estate from his executors and mortgagees, apply by motion to the Court (without prejudice to their right to traverse the debt found due to the

Crown) for an *amicus curiæ* as to the leasehold property, for a reference as to the partnership property, and a further reference as to part of the leasehold estates which had been sold, and the proceeds of which had been applied in paying off or reducing mortgages on the other parts of the property,—the Court refused to entertain any part of the application, on the ground, that where so many claims were made, and points of law were raised, they could not act in a summary way without the consent of the Crown.

*Semble*—That the parties applying ought to admit the debt claimed to be due to the Crown as an indispensable preliminary to being heard by the Court on the merits of the motion. Hullock, B. *dissentiente.*

*Quære*—whether, and to what extent, and from what time, and under what circumstances, leasehold property of a deceased Crown debtor is bound by inquisition and a writ of *diem clausit extremum.*

*Quære*—how far partnership property is affected by such a writ against a deceased partner for a partnership debt.

*Quære*—whether, and how far, freehold and real chattels of a deceased Crown debtor, sold by his executors, are subject to a writ of *diem clausit extremum*, where the proceeds have been applied by them in payment of incumbrances on the other real property of the deceased, and in discharging it from *bonâ fide* legal charges. *Rex* v. *Hodge*, 12 Price, 537.

## DIGNITY.

[See Peer.]

## DILAPIDATIONS.

The liability of an incumbent to repair the parsonage house and the chancel, is a liability at common law, and has not been enlarged by any statute.

The principle upon which that liability is to be ascertained in amount is, that the premises are to be put into such a state of repair as an outgoing lay-tenant ought to leave his buildings, where he is under covenant to leave them in good and sufficient repair.

But he is not bound to supply or maintain anything in the nature of ornament. Painting, whitewashing, and papering, are for this purpose considered as ornament; except where the painting be necessary to preserve exposed timber from decay. *Wise* v. *Metcalfe*, 8 Law J. K.B. 126, s.c, 10 B. & C. 299.

## DISCLAIMER.

In order to get rid of the effect of a disclaimer, a distinct application, supported by affidavits establishing a special case, is necessary. *Sidden* v. *Ledlard*, 1 Russ. & M. 110.

## DISCOVERY.

Where a bill for discovery and relief is demurrable to, for want of equity to the relief, the plaintiff cannot have the discovery prayed. *Mellish* v. *Richardson*, 12 Price, 530.

A plea of matter, which would constitute a defence to an action at law, is not a good plea to a bill in equity for discovery leading to legal relief. *Robertson* v. *Lubbock*, 9 Law J. Chanc. 138.

The Dean and Chapter of C, being rectors of a parish, leased all the tithes belonging to the rectory; the lessees filed a bill for tithe of hops, against the occupiers, to which the vicar was made a party, as claiming that tithe. The occupiers then filed a cross-bill against the Dean and Chapter and their lessees, for a discovery and production of documents. Demurrer by the Dean and Chapter, allowed. *Tooth* v. *the Dean and Chapter of Canterbury*, 3 Sim. 49.

## DISTRESS.

[See Indemnity and Replevin.]

(A) Who may distrain.
(B) What may be taken.
(C) How disposed of.
(D) Distress for Damage feasant.
(E) Action for an Excessive Distress.
(F) Fraudulent Removals.

### (A) Who may distrain.

A tenant from year to year, underletting from year to year, has a reversion, which entitles him to distrain. *Curtis* v. *Wheeler*, 2 M. & M. 493, s. c. 4 C. & P. 196. [Tenterden]

A demise, not under seal, of tithes, and also of a corporeal hereditament, at an entire rent, will not justify a distress for the rent reserved. *Gardiner* v. *Williamson*, 9 Law J. K.B. 233, s. c. 2 B. & Ad. 336.

A tenant held premises under an agreement for a lease. No rent was paid; but the tenant, in an account stated between him and his landlord, assented to an item therein debiting him for a half-year's rent:—Held, that the assent was equivalent to a payment, and established a tenancy from year to year, so as to entitle the landlord to distrain. *Cox* v. *Bent*, 7 Law J. C.P. 68, s.c. 5 Bing. 183, s. c. 2 M. & P. 281.

P and R entered into agreement; the former to grant, and the latter to take, a lease at a certain rent, to commence at a future day; the landlord to make the premises habitable, and allow the tenant 15*l.* towards building an oven. R entered, built the oven, and occupied four years without paying rent; P not having made the premises habitable. On being called on, R said he was ready to pay the rent, but insisted on P performing first his part, and on being allowed sums he had been compelled to lay out:—Held, that distress did not lie for the rent, the circumstances not amounting to an actual existing demise at an ascertained rent. *Regnart* v. *Porter*, 9 Law J. C.P. 168, s.c. 7 Bing. 651, s. c. 5 M. & P. 370.

A, entitled to a lease for lives, renewable for ever, assigns the whole of his estate and interest in the lands of B, reserving a rent, and a power of distress and re-entry, but no reversion. The rent being in arrear, A distrains, and B replevies; A avows under the Irish statute, 25 Geo. 2. c. 13, corresponding to the English statute, 11 Geo. 2. c. 19, giving the landlords remedy by distress, and judgment in the Irish Common Pleas and Exchequer Chamber for A. But, on error by B, in Dom. Proc., the judg-

ment reversed; for the statutes apply only to those leases where there is a reversion, or an interest vested in the lessor at the expiration of the lease; and here there is no reversion. *Pluck* v. *Digges and another*, 2 Dow. & C. A.C. 180.

The plaintiff being desirous of taking apartments of one B, a tenant of the defendant, the latter promised him, that, "as long as he paid B's rent, he (the defendant) would never trouble him or his property." The plaintiff had failed duly to pay the whole of his rent, but had tendered the balance to B, when the defendant distrained the plaintiff's goods for rent due to him from B. The defendant had no notice of this tender:—Held, that the defendant's right of distress was not taken away. *Welsh* v. *Rose*, 8 Law J. C.P. 246, s. c. 6 Bing. 638, s. c. 4 M. & P. 486.

H S demised premises to the plaintiff for a term of years, and died. The property descended to his heir-at-law, who devised it to the defendant for life, and died. The defendant, conceiving she had a claim, as heir-at-law of H S, declined to take as devisee. The real heir-at-law then brought ejectment, obtained judgment by default, and sued out a writ of possession. To defeat his claim, the defendant then brought ejectment against the tenant (the plaintiff), laying the demise on the 2nd March 1814. The plaintiff continued to occupy after the expiration of the demise to her by H S; but she had never paid rent to the defendant:—Held, that, as the defendant, by bringing ejectment, had treated the tenant as a trespasser, she could not afterwards distrain for rent. *Bridges* v. *Smyth*, 7 Law J. C.P. 143, s. c. 5 Bing. 410, s. c. 2 M. & P. 740.

A landlord may, at his peril, make a distress for rent in arrear; although his right is in question in a suit depending between him and his tenant in respect of a previous seizure for rent previously due.

And, *semble*, that he may, upon a second distress for the rent subsequently due, seize the same goods which were seized on the former distress, and which were replevied; and the legality of which former distress is still in question. *Wilton* v. *Wiffen*, 8 Law J. K.B. 303.

### (B) What may be taken.

Implements of trade may be distrained for rent. *Roberts* v. *Jackson*, Pes. A.C. 36.

Stocking-frames, delivered by a hosier to his workman, to work up his materials at the workman's house, are not privileged from distress for rent due from the workman to his landlord. *Wood* v. *Clark*, 9 Law J. Exch. 187, s. c. 1 C. & J. 484, s. c. 1 Tyrw. 314.

It was stated in a special verdict, that, by an indenture, A demised to B all that wharf next the river Thames, described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever, to the said wharf belonging; and that, by the indenture, the exclusive use of the land of the river Thames, opposite to and in front of the wharf, between high and low water-mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf; but that the land itself, between high and low water-mark, was not demised:—Held, that the lessor could not distrain, for rent in arrear, barges, the property of B, lying in the space between high and low water-mark, and attached to the wharf by ropes. *Capel* v. *Buszard*, 6 Bing. 150, s. c. 3 M. & P. 480, s. c. 3 Y. & J. 344.

### (C) How disposed of.

The appraiser of a distress must be sworn before the constable of the parish where it is taken; the constable of the adjoining parish cannot interfere, though the proper constable is not to be found when wanted. *Avenell* v. *Croker*, 2 M. & M. 172. [Tenterden]

The constable who swears the appraisers of a distress, under the statute, 2 W. & M. sess. 1. c. 5. s. 1, must attend with the appraiser at the time of the appraisement, and must swear them before they make it. *Kenny* v. *May*, 2 M. & M. 56. [Tenterden]

A tenant, tendering his rent after distress taken, but before it is impounded or removed, may maintain trespass for a subsequent removal of the distress. *Vertue* v. *Beasley*, 2 M. & M. 21. [Parke]

### (D) Distress for Damage feasant.

The plaintiff having taken the defendant's cattle *damage feasant*, and suffered them to escape, and to remain in the defendant's own field, whilst he went to the defendant to demand satisfaction for the damage done:—Held, that this was an abandonment of his right of freshly following. *Knowles* v. *Blake*, 7 Law J. C.P. 228, s. c. 5 Bing. 499, s. c. 2 M. & P. 214.

### (E) Action for an excessive Distress.

Where a party distrains for more rent than is due, but takes only a single chattel, he is not liable to an action for distraining for more rent than is due, though the thing taken be of greater value than is necessary to cover the rent actually due, unless there were others of less, but sufficient value, to be found. *Avenell* v. *Croker*, 2 M. & M. 172. [Tenterden]

In an action on the case for an excessive distress, it appeared that the defendant had put a broker in possession, but that still the plaintiff had not been deprived of the controul of the property. The jury having returned a verdict for the plaintiff for 15*l.*, —the Court refused to set it aside. *Baylis* v. *Usher*, 9 Law J. C.P. 42, s. c. 7 Bing. 155, s. c. 4 M. & P. 790.

### (F) Fraudulent Removals.

A landlord may maintain an action on the statute 11 Geo. 2. c. 19. s. 3, for double the value of goods fraudulently removed to prevent a distress; although they be worth less than 50*l.*, he is not confined to his remedy by application to two magistrates. *Bromley* v. *Holden*, 2 M. & M. 175. [Tenterden]

Where goods are fraudulently removed, to prevent a distress for arrears of rent, the landlord is not justified in breaking open the locked gate of the close where the goods are, without first calling to his assistance the constable, and complying with all the conditions in 11 Geo. 2. c. 19. s. 7. The retaking, upon a rescous of goods distrained for rent arrear (not upon fresh pursuit), must be a peaceable retaking; and the breaking open the gate of the close where the goods are, is a trespass. *Rich* v. *Woolley*, 7 Bing. 651, s. c. 5 M. & P. 663.

To entitle a landlord to follow and distrain goods,

under the statute 11 Geo. 2. c. 19, there must be some evidence to shew that the removal was fraudulent, with intent to elude a distress, and also that sufficient was not left upon the demised premises to satisfy the landlord's claim. *Parry* v. *Duncan*, 9 Law J. C.P. 83, s. c. 7 Bing. 243, s. c. 5 M. & P. 19, s. c. 1 M. & M. 533.

## DIVORCE.

(A) Grounds for.
- (a) *Adultery.*
- (b) *Cruelty.*

(B) When barred.
- (a) *In general.*
- (b) *Condonation.*
- (c) *Collusion and Connivance.*

(C) Pleading, Evidence, and Practice.

### (A) Grounds for.

#### (a) *Adultery.*

Sentence of separation, by reason of adultery and cruelty, pronounced, on proof of undue familiarities, clandestine communication, with frequent opportunities of guilt, and concealed correspondence by letters denoting great ardour of passion, if not allusions to actual guilt, (but no credible proof of a fact of adultery,) united with great violence of conduct and language, and an attempted blow. *Bramwell* v. *Bramwell*, 3 Hag. Ec. 618.

The Court cannot separate on improper conduct short of actual adultery. *Hamerton* v. *Hamerton*, 2 Hag. Ec. 14.

#### (b) *Cruelty.*

The husband's conduct is legal cruelty, if by cohabitation the wife is exposed to bodily hazard and intolerable hardship. On proof of such conduct, and the husband's adultery with three different women, a sentence of separation *à mensâ et thoro*, pronounced at the wife's prayer, and the husband condemned in her costs.

Words of abuse and reproach are not—but words of menace, intimating a malignant intention of doing bodily harm, and affecting the security of life, are legal cruelty.

The Court must not wait till threats are carried into execution—but must interpose when words raise a reasonable apprehension of violence, and excite such terror as to make life intolerable.

Spitting on a wife is a gross act of cruelty.

The husband taking a separate bed, is not pleadable as cruelty.

Obtaining the wife's separate property by imposition cannot, but compelling her by threats to go anywhere may, be pleaded as cruelty.

If words of menace raise a reasonable apprehension, it matters not whether they be addressed to the wife, or to a third person.

Cruelty may be relative, and depend on the age, habits, &c., of the party.

An intermediate separation so approximates two periods of cohabitation, that acts of cruelty, happening before the separation, are to be looked upon as if they had happened recently. *D'Aguilar* v. *D'Aguilar*, 1 Hag. Ec. 775, 882.

A husband's attempt to debauch his own women-servants is a strong act of cruelty.

One act of cruelty of an inflamed nature, and sufficiently gross to excite terror, entitle the wife to relief. *Durant* v. *Durant*, 1 Hag. Ec. 768.

To entitle a wife to separation by reason of cruelty, there must be ill treatment and personal injury, or the reasonable apprehension of personal injury.

Aggravations of cruelty may arise from the station of the parties; from the condition of the sufferer; from natural, or even acquired feelings.

If a wife, after legal cruelty, consents to a reconciliation, and to matrimonial cohabitation, former injuries would revive by subsequent misconduct of a slighter nature than would constitute original cruelty, though the reconciliation would be a bar, if no further ill treatment took place.

If legal cruelty be established, a subsequent reconciliation, and matrimonial intercourse, form a bar to a separation for such preceding cruelty; and the question then is, whether any subsequent acts take place, furnishing fresh grounds of legal complaint, or, at least, reviving former wrongs, and in connexion with those former wrongs, creating reasonable apprehension of renewal of ill treatment.

In answer to a suit for restitution of conjugal rights, the wife (having pleaded cruelty and adultery,) proved several acts of personal ill treatment, violent behaviour and language, from 1813 to 1817. A separation was then agreed upon; but, on a reconciliation, matrimonial cohabitation and intercourse were renewed. The Court, on appeal, holding that adultery was not proved; that cruelty, up to 1817, was proved; and that, though afterwards there was no personal violence, his conduct, exciting reasonable apprehension of it, revived the former cruelty—decreed a separation, and condemned the husband in the costs in both courts, except those incurred by certain charges of adultery. *Westmeath* v. *Westmeath*, 2 Hag. Ec. Sup. 61, 112.

Cruelty will revive condoned adultery, and less is necessary to revive than to found an original sentence. *Durant* v. *Durant*, 1 Hag. 765: s. p. *Bramwell* v. *Bramwell*, 3 Hag. 635.

### (B) When barred.

#### (a) *In general.*

*Semble*, mere lapse of time is not sufficient to bar the wife's remedy.

All persons (e. g. Jews,) who stand in the relation of husband and wife, in any way that the law allows, have a claim to relief, on the violation of any matrimonial duty.

It is not necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct. It is legal, and meritorious to be patient as long as possible. Forbearance does not weaken her title to relief. *Durant* v. *Durant*, 1 Hag. Ec. 740, 768.

On proof of adultery, sentence may be barred:—first, by *compensatio criminis*; secondly, by condonation; thirdly, by active procurement, or passive toleration; and, possibly, by other conduct.

Passive sufferance of adultery, for a length of time, enures to a waiver of legal remedy, but is difficult of proof. *Crewe* v. *Crewe*, 3 Hag. Ec. 129, 133.

The wife's adultery being proved, and a similar charge against the husband failing, his relief is not barred by a slight want of caution on his part.

The wife having failed in a charge of adultery, and a recriminatory plea, on the husband's part, being proved; cruelty, and the introduction of his wife to a female of loose character, (the wife's guilt not being connected with such introduction,) form no bar to his prayer for divorce. *Harris* v. *Harris*, 2 Hag. 376.

The doctrine received in the ecclesiastical courts of England, from the civil and canon law, that a plea of recrimination, or *compensatio criminum*, is a valid plea in bar, is founded on the principle, that a man cannot complain of the breach of a contract which he has violated. *Beeby* v. *Beeby*, 1 Hag. Ec. 790.

A deed of separation, upon mutual agreement, on account of unhappy differences, though containing a covenant not to bring a suit for restitution of conjugal rights, is no bar to such a suit. *Westmeath* v. *Westmeath*, 2 Hag. Ec. Sup. 115.

Entering into a voluntary deed of separation, and bringing an action on that deed, do not bar a wife from proceeding for a divorce in the spiritual court, nor bear unfavourably on her case. *Durant* v. *Durant*, 1 Hag. Ec. 760.

Slighter acts will bar than will found an original suit.

A single act of adultery is sufficient to bar the husband's remedy. *Astley* v. *Astley*, 1 Hag. Ec. 721-2.

(*b*) *Condonation.*

[See *ante* A, *b*.]

Condonation is conditional forgiveness, on a full knowledge of all antecedent guilt. *Bramwell* v. *Bramwell*, 3 Hag. Ec. 629.

All condonations, by operation of law, are expressly or impliedly conditional; for the effect is taken off by repetition of misconduct.

And circumstances may take off the effect of condonation which would not support an original cause. *D'Aguilar* v. *D'Aguilar*, 1 Hag. Ec. 781, 2.

On breach of the condition, the right to a remedy for the former injuries revives.

A conditional promise, made under force and violence, is no condonation, if the condition is not fulfilled.

The husband's attempts, when affected with venereal disease, to force his wife to his bed, is of a mixed nature; partly cruelty, and partly evidence of adultery, and would remove condonation of either. *Durant* v. *Durant*, 1 Hag. Ec. 761, 767.

To found legal condonation, as a bar to adultery, there must be a complete knowledge of all the adulterous connexion, and a condonation subsequent to such knowledge. *Turton* v. *Turton*, 3 Hag. Ec. 351.

Condonation is forgiveness legally releasing the injury, and may be expressed or implied; as, by the husband cohabiting with a delinquent wife; but the effect of cohabitation is less stringent on the wife, and condonation by implication is not held a strict bar against her; for it is not improper she should, for a time, shew a patient forbearance, and entertain hopes of her husband's reform.

Where the parties have separate beds, there must, in order to found condonation, be something of matrimonial intercourse presumed; it does not rest merely on the wife's not withdrawing herself.

In a suit for separation *à mensâ et thoro*, by reason of the wife's adultery, the having in a plea of recrimination, or *compensatio criminum*, proved a long series of misconduct, (adultery, solicitation of the servant's chastity, and venereal disease communicated to her,) for which she separated from him, long prior to the adultery committed by her, is entitled to her dismissal; nor will a return to live in the same house, after a formal separation on account of the husband's adultery, operate as a condonation, so as to extinguish her right to set up his guilt as a bar to his prayer. *Beeby* v. *Beeby*, 1 Hag. Ec. 789, 794.

The wife's unwilling acquiescence in a return to live in the same house, but without connubial cohabitation, does not amount to a complete forgiveness. *D'Aguilar* v. *D'Aguilar*, 1 Hag. Ec. 782.

On the execution of articles of separation, not followed by matrimonial intercourse, the wife's reluctant assent to the husband having a bed-room in her house, at the earnest entreaty of him and of mutual friends, and on his declaring, "that he should be merely under the roof by sufferance," is no continuation of a former condonation. *Westmeath* v. *Westmeath*, 2 Hag. Ec. Sup. 118.

Conjugal cohabitation after an act of adultery, avowed by the husband to the wife, may be condonation; but, if a wife overlooks one act of human infirmity, it is not a legal consequence, that she pardons all other acts. *D'Aguilar* v. *D'Aguilar*, 1 Hag. Ec. 986.

Condonation is not held so strictly against a wife as against a husband. *D'Aguilar* v. *D'Aguilar*, 1 Hag. Ec. 786; *Durant* v. *Durant*, ib. 456.

The wife having committed adultery on the first of three successive nights, and the husband aware, and having full proof of this, sleeping with her on the second, condones thereby the previous adultery, and cannot take advantage of further adultery on the third night. *Timmings* v. *Timmings*, 3 Hag. Ec. 83.

The force of condonation, as a bar, varies according to circumstances.

The condonation, by a husband, of a wife's adultery—still more, repeated reconciliations after repeated adulteries; create a bar of far greater effect, than does the condonation by a wife of repeated acts of cruelty.

In answer to a suit for restitution of conjugal rights, brought by the husband, legal cruelty being established, but a reconciliation and matrimonial intercourse having afterwards taken place, the Court enjoined the wife to return to cohabitation, holding, that there was no proof of subsequent misconduct by the husband sufficiently removing the bar of condonation, and reviving the previous cruelty, to entitle the wife to a sentence of separation. *Westmeath* v. *Westmeath*, 2 Hag. Ec. Sup. 1, 113.

(*c*) *Collusion and Connivance.*

Collusion is an agreement between the parties, for one to commit, or appear to commit, a fact of adultery, so as to suffer the other to obtain a remedy at law, as for a real injury. The law permits no co-operation for such purpose, and refuses a remedy for adultery committed with such intent; but it is not proof of collusion, that, after the crime is committed, both parties are desirous of a separation.

The long duration of a criminal intercourse, and delay in applying to the Court, and the indirectness and want of stringency in the evidence, are strong presumptions against a preconcerted scheme to obtain a sentence by connivance.

A judgment by default against the paramour, and no defence on the part of the wife, are not proof of collusion. *Crewe* v. *Crewe*, 3 Hag. Ec. 130, 133.

The husband having proved the wife's adulterous connexion with one individual, five years after separation, of which connexion two children were born; the Court held, that the husband's knowledge of, and consent to, gross indelicacies, or even adultery with three other persons, during cohabitation, would not bar him. *Hodges* v. *Hodges*, 3 Hag. Ec. 118.

Condonation and connivance are essentially different in their nature, though they may have the same legal consequence.

In a suit for separation, for the husband's adultery with his wife's sister, proof that the wife, after knowledge of previous adultery, allowed, under peculiar circumstances, this sister to accompany them to India, and to live in the same house with them, will not bar the wife on the ground of connivance: her conduct, though imprudent, not being traced to a disregard of her own honour, nor to any motive necessarily criminal. *Turton* v. *Turton*, 3 Hag. Ec. 338, 340.

Connivance is a bar to a suit for separation by reason of adultery, on the principle, that *volenti non fit injuria*. *Rogers* v. *Rogers*, 3 Hag. Ec. 58.

*Quære*, whether connivance at adultery during cohabitation, is a bar to a suit for long subsequent adultery with a different person. *Rogers* v. *Rogers*, 3 Hag. Ec. 72.

To constitute connivance, active corruption is not necessary; passive acquiescence, with intention, and in the expectation, that guilt will follow, is sufficient; but, on the other hand, there must be consent—not mere negligence, inattention, confidence, or dulness of apprehension. *Rogers* v. *Rogers*, 3 Hag. Ec. 59.

Passive connivance is as much a bar as active conspiracy; but there must be an intention that guilt should ensue.

But it is not sufficient, that the man did not act as a wise, or prudent, or attentive man, nor that he, in fact, contributed to his wife's guilt: he must intentionally contribute thereto; there must be intentional permission, or corrupt facility.

But the Court, from connivance at improper familiarity, will infer corrupt intention as to the result.

The notoriously debauched character of the paramour; his exclusion from all respectable female society; the introduction of him, by the husband, to his wife; the encouragement of their intimacy; the allowing her to accept a supply of money from him; expostulations from her family at such intimacy; the refusal of the husband to attend to them; and improper familiarities and liberties in his presence, and without his remonstrance, are material facts in a plea of connivance. *Moorsom* v. *Moorsom*, 3 Hag. Ec. 87, 105.

Mere imprudence, and error in judgment, are not connivance: honesty of intentions, not wisdom of conduct, is to be considered.

Affectionate conduct to a wife for many years; no appearance, during that time, of a wish to withdraw from her society; and the absence of any reason to suppose that the husband knew or suspected her depravity, till very shortly before she left him, tend most strongly to disprove connivance at the turpitude of, or active co-operation in the prostitution of a wife. *Hoar* v. *Hoar*, 3 Hag. Ec. 137, 139.

A constant intercourse, continued for four years, between a wife and her paramour, not clandestine, but the common subject of conversation among servants and friends, raises a grave suspicion of the husband's knowledge and acquiescence. *Crewe* v. *Crewe*, 3 Hag. Ec. 125.

Where the wife made no defence to a suit for divorce by reason of her adultery, the Court dismissed the suit, on the ground, that the husband having connived at his wife's adultery with A, could not complain of an adultery nearly contemporary, with B. *Lovering* v. *Lovering*, 3 Hag. Ec. 85.

The adultery of the wife being proved, but she having, with her children, but without her husband, resided in a gentleman's house, (of which she was treated as the mistress, and where she was delivered of three children,) without the husband sufficiently accounting for his absence, or providing for her, or interfering with such residence, the Court dismissed her, on the ground, that the husband, by such conduct, had consented to the connexion and adultery. *Michelson* v. *Michelson*, 3 Hag. Ec. 147.

### (C) Pleading, Evidence, and Practice.

When a libel pleaded facts — first, to establish the adultery of the wife; secondly, to shew that the husband had not forfeited his claim for relief by misconduct; the Court directed parts to be reformed, on the several grounds of too great minuteness, hearsay, and pleading the contents of a letter not exhibited, nor accounted for; and admitted the rest. *Croft* v. *Croft*, 3 Hag. Ec. 310.

Though the Court will not, on presumption, and in the absence of matter strongly inculpatory, impute connivance to the husband, it will not debar him from pleading that which makes the history consistent and natural. *Croft* v. *Croft*, 3 Hag. Ec. 312.

The conduct of the wife, during the absence of her husband, being so indecorous as to induce a lady, with whom she resided, to recommend her removal to her mother, is pleadable.

Where parties are living separate, the commencement of the acquaintance with the alleged paramour, and of the suspicions of the person under whose care the wife was, should be set forth circumstantially. *Croft* v. *Croft*, 3 Hag. Ec. 315.

Where the wife, engaged in an improper communication with the paramour, was compelled to retire, the whole transaction may be pleaded.

Where a letter is pleaded to be in the possession of the adverse party, the contents may be set forth at length, leaving the other party, if she pleases, to produce the letter.

A declaration of the paramour, in the wife's absence, that she had committed adultery previous to the adultery charged in the libel, is not admissible; but a declaration in her presence, and confirmed by her, is; and the Court cannot reject it, on the ground of its reflecting on third parties, nor that it

does not establish adultery previous to the charges in the libel. *Croft* v. *Croft*, 3 Hag. Ec. 310, 318.

A libel, pleading specific acts of adultery and cruelty, can only be rejected, *in toto*, on one of two grounds:—first, that the plea, on the face of it, shews a case impossible of proof; secondly, that it evidently appears, from the facts pleaded, that the party complaining has barred herself.

When the husband's adultery is to be proved by pregnancy and acknowledgment of children, it is not necessary to plead particular acts.

*Quære*, whether condonation, unless as far as is admitted by the adverse case, can be set up without being pleaded:—*Semble*, that, in no case has it been held to estop a party, where not pleaded.

Venereal disease, long after marriage, is *primâ facie* evidence of adultery.

The wife's knowledge and forgiveness of adultery, is matter of defence, and to be proved distinctly and clearly.

Evidence, extracted upon cross-examination, (in order to shew condonation, *compensatio criminum*, or to discredit one adverse witness by another,) if relied on as the sole ground of defence, has far slighter effect than when a defensive, recriminatory, or exceptive plea is given in, and examined to.

In examining evidence and proofs, the Court must not take the charges insulated and detached, but the whole together; and must consider what has been the admitted conduct of the party under similar circumstances. *Durant* v. *Durant*, 1 Hag. Ec. 747, 768.

Minute acts should not be pleaded, but properly come out in evidence.

A long adulterous intercourse and cohabitation; the birth, maintenance, and acknowledgment of a child, are pleadable, if there is nothing that necessarily affects the wife with the knowledge thereof.

In a suit for divorce, by reason of the husband's adultery and cruelty, the Court will not inquire into his depriving the wife of her separate property; *aliter* as to her paraphernalia.

Upon the charge of keeping certain specified houses, to which he took divers loose women, specification of place is sufficient, without specification of time.

The mode in which, after a separation, a return to cohabitation was effected, is material to shew whether there was, or was not, condonation.

If the Mosaic law, as at present received, allows concubines, such a privilege could not be noticed without being specially pleaded. *Quære*, whether it could be noticed at all in the courts of this country.

The remoteness of facts deposed to, accounts for witnesses relating them with less precision and distinctness. All that the Court can require, is, to be satisfied that the evidence is substantially true.

To domestic conduct, friends, dependents, and servants, can alone speak: they must have some bias, and the Court must receive their evidence with some drawbacks. *D'Aguilar* v. *D'Aguilar*, 1 Hag. Ec. 776, 784.

In a suit for separation by reason of the wife's adultery, connivance on the part of the husband may be pleaded by the wife, consistently with a denial.

Indifference, ill behaviour, or cruelty, is not pleadable in answer to a charge of adultery, nor relevant to a plea of connivance.

As a plea of connivance must generally be circumstantial, and consist of many facts, trifling when taken separately, but altogether convincing, the Court must allow a latitude in such a defence.

Much delay having occurred in the wife's defence, a plea of minute facts to establish connivance having been admitted, and the cause now standing "to propound all facts," an allegation of the wife, not responsive, but pleading more minutely, but to the same effect as in the former plea, *rejected in toto*, the facts not being *noviter pertenta*.

The whole substantive case of a party should at once be brought before the Court; but where it is clearly shewn, that the facts could not have been sooner pleaded, additional articles may be given in.

Connivance of a passive and permissive kind, is to be proved by a train of conduct and circumstances. *Moorsom* v. *Moorsom*, 3 Hag. Ec. 91, 106.

An allegation, pleading facts to infer connivance, as a bar to the husband's prayer for a sentence of separation, by reason of his wife's adultery, rejected, because, as no single fact pleaded necessarily inferred a knowledge of the wife's guilt, nor a suspicion that an adulterous intercourse had been, or was about to be formed; and as the whole, taken together, did not warrant an imputation on the husband of consenting to, or intending, his wife's adultery, his conduct laid in the allegation, even if proved, would not amount to connivance; to constitute which, there must be intentional concurrence.

A plea of connivance does not necessarily admit adultery.

Connivance is generally proved by circumstantial evidence.

To support a plea of connivance, when no adultery during cohabitation is charged nor admitted, the clearest evidence of intention and consent would be required. *Rogers* v. *Rogers*, 3 Hag. Ec. 57, 72.

A party being before the Court in a suit for divorce by reason of cruelty, acts of adultery subsequent to the citation may be pleaded. *Barrett* v. *Barrett*, 1 Hag. Ec. 22.

Great facility in condonation of adultery with A; taking no notice of adultery with B (of which he could not be ignorant); conduct amounting to an invitation to adultery with C—not merely to giving free scope to the wife's licentiousness, in order to obtain conclusive evidence of guilt; marrimonial cohabitation, after being in possession of full legal proof of such adultery; are criminal connivance and collusion, barring the husband of relief for his wife's adultery: all happening within two years after marriage.

In a suit for separation by reason of the wife's adultery, the husband must prove his case, so that his own evidence shall not create a bar, by reason of *connivance* or *compensatio criminum*; for, of such evidence, the wife is entitled to the full benefit.

A facility of condonation of adultery, on the part of the husband, leads to the inference, that he does not duly estimate the injury, and will induce the Court to look with jealousy at his subsequent conduct.

Conduct amounting to an invitation to adultery, and not merely to giving scope to the wife's licentiousness, in order to obtain conclusive evidence of guilt, is legal prostitution.

*Semble*, that the husband, by pleading that the wife slept at his house on the night after the last act of adultery charged, (of which adultery he was at the time informed,) takes on himself the onus of shewing, that they did not sleep together on that night; though, generally speaking, the party relying on condonation, as a bar, should plead it. *Timmings* v. *Timmings*, 3 Hag. Ec. 76, 84.

In a suit for separation, by reason of cruelty, brought by the wife, an acquittal of her witnesses, (for a conspiracy, in counselling her to institute this suit,) upon an indictment laid by the husband, and his evidence thereon, in which he admitted and repeated certain accusations originally alleged in the libel as acts of cruelty, may be pleaded as a continuation, and admission on oath, of that cruelty. *Bray* v. *Bray*, 1 Hag. Ec. 163.

On a suggestion, that a charge of collusion and connivance, raised in argument on his own evidence, was a surprise on the husband, there being no counter-plea, or interrogatories, the Court refused to rescind the conclusion, in order that letters might be pleaded—holding, that the husband was bound to guard himself, originally, against such suggestions.

On proof of the wife's adultery, continued for four years, under circumstances which raised a strong suspicion that the husband could not have been ignorant, the Court, after much hesitation and difficulty, granted the sentence of separation, as it could not affect the husband with direct knowledge of the adultery, and as three witnesses had positively sworn, they believed the husband was ignorant.

Witnesses should be required to answer to their belief or impression, as to whether adultery had been committed or not, though the Court cannot rely on such opinion.

The 105th canon, requiring that divorce should not go on confession alone, the Court is almost bound to reject an affirmative issue, in a suit for separation for adultery.

Passive connivance, or toleration, arising from the husband's insensibility to his own honour, or unwillingness to seek redress, is a bar to relief, if there be proved a long course of criminal conduct, of which he was, or of which he must be presumed to be cognizant: he may wait for adequate proof, but no longer. *Crewe* v. *Crewe*, 3 Hag. Ec. 123, 131.

In a cause of divorce, articles to account for the husband's delay in instituting the suit are admissible, but need not be examined to, unless the defence renders it necessary, to justify his conduct.

If adultery, continued for many years, attended with pregnancy, and birth of a child, during the husband's absence from Great Britain, be pleaded, it is useless to prove more than a few facts:—such as the birth of a child, identity, and non-access. *Richardson* v. *Richardson*, 1 Hag. Ec. 6.

When no indecent familiarity, proximate act, or personal freedom, (except two kisses,) and no circumstances inferring adultery, are proved, letters from the alleged paramour, found in the wife's possession, but not necessarily implying the commission of adultery, will not support a sentence of separation by reason of her adultery; but if the evidence raises a suspicion, that an adulterous intercourse is carrying on between the parties accused, the Court may, upon affidavits, rescind the conclusion, and allow the husband to give in an allegation.

In a suit of separation, by reason of the wife's adultery, after the arguments of counsel are closed, and after the Court has delivered its opinion, that, though culpable and suspicious conduct had been, adultery had not been proved, it is a fit exercise of discretion to rescind the conclusion, for the purpose of admitting an allegation pleading further matter to establish the wife's guilt.

The law does not require direct evidence of the very act committed at a specific time and place; but the Court must be satisfied that actual adultery has been committed. *Hamerton* v. *Hamerton*, 2 Hag. Ec. 314.

Where the evidence did not amount to judicial proof of the wife's adultery, but her conduct had been so culpable as to raise strong suspicions of criminality, and induce the Court to rescind the conclusion to admit fresh evidence, proof that, during the progress of the suit, the alleged *particeps criminis* had frequently visited her alone, and remained late at night, will, coupled with the former evidence, found a sentence of separation. *Hamerton* v. *Hamerton*, 3 Hag. Ec. 1.

*Semble*, going to a brothel, and remaining alone for a considerable time in a room, with a common prostitute, is sufficient evidence from which to infer adultery.

A married man, going to a brothel, knowing it to be a house of that description, raises a suspicion of adultery necessary to be rebutted by the very best evidence.

In a suit for separation *à mensâ et thoro*, the wife's adultery being fully established, but she having, on a recriminatory allegation, proved facts antecedent to her adultery, from which the Court necessarily presumed the husband's adultery, this amounts to *compensatio criminum*, and the wife is entitled to be dismissed. *Astley* v. *Astley*, 1 Hag. Ec. 714, 720.

Where a criminal connexion is once shewn, its continuance is presumed where the parties live under the same roof.

Condonation may be meritorious: connivance necessarily involves criminality; and, therefore, the evidence to establish it should be the more grave and conclusive.

The Court, or the husband's counsel, may take the objection of the wife's connivance, where it clearly appears on the evidence adduced by her; but *quære*, whether such a defence can be set up on interrogatories alone: at all events, to support such a defence, so set up, the conduct and evidence to prove it must be most unequivocal, and incapable of explanation.

After publication, in a suit for separation for the husband's adultery, the Court will not, in the first instance, delay the hearing, in order that the wife may counterplead her letters annexed to the husband's interrogatories, from which connivance, or a *par delictum* (neither pleaded), is to be inferred; but, *semble*, that it will not ultimately allow her to be barred by reason of such letters, without affording her an opportunity of explaining them.

The Court will not, before the hearing, rescind the conclusion, in order to admit an allegation, counterpleading letters annexed to interrogatories; nor

will it direct such letters to be disannulled; but, *semble*, that, if, at the hearing, the letters appear important, it will then allow the admissibility of the allegation to be debated. *Turton* v. *Turton*, 3 Hag. Ec. 343, 352.

Facts of adultery, newly come to the knowledge of the party, may be pleaded after publication. *Webb* v. *Webb*, 1 Hag. Ec. 349.

Cruelty cannot be pleaded by the wife in bar of a charge of adultery. *Harris* v. *Harris*, 2 Hag. Ec. 376.

Where the wife is charged with adultery, her conduct and declarations, on a confession of guilt by the alleged *particeps criminis* being communicated to her, are admissible evidence on behalf of the husband. *Harris* v. *Harris*, 2 Hag. Ec. 407.

On proof, either directly or presumptively, of the wife's adultery, great inattention on the part of the husband will not bar him. To establish such a defence, he must have been privy to her guilt, or have led her into the crime. *Rix* v. *Rix*, 3 Hag. Ec. 74.

To establish connivance in bar to a suit on account of the wife's adultery, it is not necessary to shew knowledge of, and privity to, the actual commission of adultery; such extreme negligence to the conduct of his wife, and such encouragement of acquaintance and familiar intimacy, as are likely to lead to an adulterous intercourse, are sufficient. *Gilpin* v. *Gilpin*, 3 Hag. Ec. 150.

On a suit for restitution, the defendant must be compelled to return, unless it be proved that the plaintiff's inherent right is forfeited; but, *semble*, less strict proof of cruelty or adultery is necessary, to answer to such a suit, than where the party making these charges is the original complainant. *Bramwell* v. *Bramwell*, 3 Hag. Ec. 619.

Unpleaded condonation can only avail as a bar so far as it is fully established by evidence.

The general presumption is, that a husband and wife living in the same house, live on terms of matrimonial cohabitation; but particular circumstances may repel that presumption.

It does not follow, that because condonation will bar the remedy of a party agent, it will destroy the defence of a party recriminating. *Beeby* v. *Beeby*, 1 Hag. Ec. 795, 7.

## DOCKS.

The port of Kingston-upon-Hull is mentioned in acts of Parliament, charters, and other documents, in two senses: first, according to the popular understanding, as denoting a particular place; and secondly, in a larger acceptation, as comprising under one name a district of many places classed together for the purposes of the revenue, and of which Kingston-upon-Hull is the chief.

The statute 14 Geo. 3. c. 56. s. 42, which gives the Hull Dock Company a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull, and the company's basin or docks within the port of Kingston-upon-Hull, or unlading or lading any of their cargo within the said port, must be construed as using the term "port" in the popular sense; and not, therefore, as extending the burden of dock duties in places which, in point of local description, are without the port of Hull; as Goole, on the river Ouse. *The Dock Company at Kingston-upon-Hull* v. *Browne*, 2 B. & Ad. 43.

A dock company having a swing bridge on a public highway are bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed, and the number of ships passed at a time) to prevent unnecessary delay; and if they do not do all which can be expected of reasonable men, and any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained. *Wiggins* v. *Boddington*, 3 C. & P. 544. [Best]

## DONATIO MORTIS CAUSA.

[*Duffield* v. *Elwes*, 1 Dow. & C. A.C. 1, Dig. Law J. 208.]

*Quære*—whether a *donatio mortis causâ* is avoided by the fact, that a will or codicil is subsequently made. Whether a remainder may be limited on a *donatio mortis causâ*. Whether the *donatio mortis causâ*, being of a mortgage debt, a gift of the same sum, with the same remainder over, in a subsequent codicil, is to be considered a satisfaction. *Hambrooke* v. *Simmons*, 4 Russ. 25.

## DOWER.

Adultery committed by the wife after a separation by mutual consent, is a bar to her right to dower. *Hetherington* v. *Graham*, 7 Law J. C.P. 233, s. c. 6 Bing. 135, s. c. 3 M. & P. 399.

A, previous to his marriage with an infant who had no fortune, by an indenture, to which her father was a party, granted a rent-charge of 100*l.* a year to trustees, for her during her life, after his decease; to be in bar of dower, and issuing out of certain lands: at the time of the execution of the indenture, he had no power of charging any jointure on those lands; but it was, during his life, confirmed by the remainder-man, who, A not having any sons, became entitled in possession to the lands upon A's death:—Held, that the widow was barred of all claim to dower. *Corbett* v. *Corbett*, 7 Law J. Chanc. 9.

## DRIVING.

Though the rule of a road is not to be adhered to, if, by departing from it, an injury can be avoided, yet, in cases where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right had ample means and opportunity to prevent it. *Chaplin* v. *Hawes*, 3 C. & P. 554. [Best]

If the carriage of A strike against the cart of B, and a person who sees it demand the address of the owner of the carriage, the address given by a person in the carriage is admissible in evidence; but a statement, that any damage done will be paid for, is not so. *Beamon* v. *Ellice*, 4 C. & P. 585. [Taunton]

In an action for the negligent driving of the defendant's coach, the plaintiff gave evidence of the goods destroyed being in the possession of his servant. The witness who proved this was cross-examined, with a view of shewing the goods to be the property of P, and the defendant called witnesses to prove them the property of P:—*Semble*, that P

may be called as a witness in reply, to prove that the goods were not his. *Whittingham* v. *Blaxham*, 4 C. & P. 597. [Patteson]

In an action for negligent driving, a plan, which is to be put into the hands of the witnesses, should merely shew the street, pavement, the turnings, corners, &c., and not the supposed position of the carriages; if it do so, the Judge will not allow it to be used. *Beamon* v. *Ellice*, 4 C. & P. 585. [Taunton]

In case for negligent driving against the plaintiff's horse, the plaintiff's servant, in whose charge the horse was, is incompetent for the plaintiff. *Sherman* v. *Barnes*, 2 M. & M. 69. [Tindal]

## ECCLESIASTICAL COURT.

[Regulation of duties, salaries, and emoluments of officers, clerks, and ministers. 10 Geo. 4. c. 53, 7 Law J. Statutes, 120.]

Generally speaking, all ecclesiastical jurisdictions are limited in their authority to property locally situate within their district. *Crosley* v. *the Archdeacon of Sudbury*, 3 Hag. Ec. 199.

The proctor, being the *dominus litis*, is responsible to the Court for the purity of the proceedings. *Mynn* v. *Robinson*, 2 Hag. Ec. 195.

When a party regularly complains of gross extortion by his proctor, the Court may punish the proctor by suspension or otherwise. *Peddle* v. *Evans*, 1 Hag. Ec. 687.

The Court will exert all its powers to restrain proctors from undertaking causes on condition of sharing in the effects, or of any benefit beyond the payment of fair costs.

The Court inclines to discountenance an agreement on the part of a proctor to accept only disbursements from his client, an appellant; as it is the policy of the law to protect both respondents and appellants from useless litigation. *Peddle* v. *Toller*, 3 Hag. Ec. 291, 3.

On complaint against a proctor, of an extortionate charge (88*l.* 4*s.* 4*d.*) for taking out probate in common form, the bill was referred to the Registrars, who reported the proper charge to be 52*l.* 15*s.* 8*d.* The Court suspended the proctor for three months, and condemned him in costs; it being the first time his conduct had been brought before the Court, and a medical certificate of his inability to attend to business when the bill was delivered, being produced. *In the goods of Lady Finch*, 3 Hag. Ec. 255.

On appeal in a criminal suit, an extension of the term probatory being prayed by the promoter, a delay of nine months, without making substantial progress in the cause, or examining a single witness, (after the suit had been already depending in the Court of Appeal two years,) is a sufficient ground to dismiss the defendant, and condemn the promoter in payment of a sum *nomine expensarum*. *Jenkins* v. *Barrett*, 1 Hag. Ec. 12.

## EJECTMENT.

(A) Where maintainable.
(B) Between Landlord and Tenant.
(C) Declaration and Service.
(D) Notice to appear.
(E) Consent Rule and Recognizance.
(F) Pleading and Evidence.
(G) Judgment.
(H) Execution.
(I) Costs.

### (A) Where maintainable.

[See Land Tax.]

Prior possession, however short, is a sufficient *primâ facie* title in ejectment against a mere wrong doer. *Hughes* v. *Dyeball*, 2 M. & M. 346, s. c. 3 C. & P. 610. [Tenterden]

One who is in possession under an agreement to purchase, is a tenant at will; and he cannot be ousted by ejectment, until the tenancy be determined by demand of possession or otherwise.

But any act of waste by the tenant—for instance, the grubbing up a hedge which separated two fields—determines the tenancy; and, the tenancy being determined, ejectment may be maintained without a demand of possession. *Doe* d. *Mellersh* v. *Redman*, 8 Law J. K.B. 154.

Conveyance, by lease, release, and fine, of land in the adverse occupation of another, conveys no estate to the relessee; and an ejectment, on the demise of such relessee, is not maintainable. *Doe* d. *Masterman* v. *Maling*, 9 Law J. C.P. 231.

Where lands were vested in trustees for the benefit of a parish church:—Held, that the parish officers for the time being might recover possession of them in ejectment upon a demise in their names, under the authority of the 59 Geo. 3. c. 22. s. 17. *Doe* d. *Jackson* v. *Hiley*, 8 Law J. M.C. 105, s. c. 10 B. & C. 885.

### (B) Between Landlord and Tenant.

[See Landlord and Tenant.]

In a case of adverse possession, notice to quit is unnecessary. *Doe* d. *Cheese* v. *Creed*, *Doe* d. *Davies* v. *Creed*, 7 Law J. C.P. 138, s. c. 5 Bing. 227, s. c. 2 M. & P. 648.

Where the tenant in possession made one payment of rent to the person who was entitled to the freehold; and that person, about the same time, cut some timber upon the property; and nothing further was done until fifteen years afterwards, when his heir brought an ejectment:—Held, that this was not a mere entry, subject to the provisions of the statute, 4 & 5 Anne, c. 16, s. 16; but a seisin and a possession, by which the relation of landlord and tenant subsisted.

A disclaimer by a tenant of his tenancy with his landlord may have a retrospective effect, so as to entitle the landlord to recover upon a demise laid in point of date before the disclaimer was pronounced. Thus, demand of rent by letter on the 18th of June; answer by letter on the 26th, that the tenancy had ceased for several years; ejectment, laying the day of the demise on the 1st of May:—Held, that the ejectment was well brought without a notice to quit. *Doe* d. *Grubb* v. *Grubb*, 8 Law J. K.B. 321, s. c. 10 B. & C. 816.

A tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession:—Held, that the landlord might recover in ejectment, unless it were shewn, that some other person, and not the widow, was

executor or administrator of the tenant; and that it was not incumbent on the landlord to shew that the widow was either executrix or administratrix. *Rees* d. *Mears* v. *Perrot*, 4 C. & P. 230. [Littledale]

In ejectment, to recover demised premises, for non-payment of rent, under the usual proviso for re-entry on non-payment for twenty-one days, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the 21st day, at one o'clock:—Held, that only one quarter's rent should have been demanded, and that at sunset. *Doe* d. *Wheeldon* v. *Paul*, 3 C. & P. 613. [Tenterden]

In ejectment by a mortgagee against the tenant of the mortgagor, it was proved, that, on a day subsequent to the day of the demise laid in the declaration, an agent of the mortgagee obtained from the occupier a sum that was due from him to the mortgagor for rent; part of which money was appropriated by the agent in discharge of interest due upon the mortgage:—Held, that this was such a recognition of the tenancy of the occupier as precluded the mortgagee from treating him as a trespasser. *Doe* d. *Whitaker* v. *Hales*, 9 Law J. C.P. 110, s. c. 7 Bing. 322, s. c. 5 M. & P. 132.

### (C) Declaration and Service.

[Where the right of entry accrues in Hilary or Trinity Term, a declaration may be served within ten days after the tenancy expires, or the right accrues, with a notice to appear and plead in ten days, 1 W. 4. c. 70. s. 36, 8 Law J. Stat. 162.]

Where the first day in full term falls on a Sunday, the essoign is to be calculated from that day.

Where a declaration in ejectment was served on the essoign day by mistake, the Court directed the rule for judgment to be served on the tenants in possession, and granted the rule for judgment against the casual ejector absolute, unless cause was shewn in five days after such service. *Doe* d. *Brent* v. *Roe*, 1 C. & J. 483.

In services of ejectment, the Court looks more at the notice than at the title of the declaration, and will suffer the latter to be amended if the former is correct. *Doe* v. *Courtney*, 9 Law J. C.P. 225.

Where one of several houses sought to be recovered in an action of ejectment is empty, as to that the plaintiff must proceed as upon a vacant possession. *Anon.* 8 Law J. C.P. 111.

Service of a declaration and notice in ejectment upon a woman who represented herself to be the wife of the tenant in possession:—Held sufficient. *Doe* d. *Walker* v. *Roe*, 8 Law J. C.P. 110, s. c. 4 M. & P. 11.

Service of a declaration and notice in ejectment upon the son of the tenant, to whom the nature of the proceedings was explained:—Held, not sufficient, without shewing ground for presuming that they came to the hands of the father. *Doe* d. *Bottomley* v. *Roe*, 8 Law J. C.P. 110.

Service upon the son of the tenant in possession, and nailing a copy of the declaration and notice upon the premises:—Held, good service, where it was admitted that the party absented himself to avoid service. *Doe* v. *Hart*, 8 Law J. C.P. 269.

Service of a declaration in ejectment on a servant on the premises, is good service, if it appears that it came to the hands of the party. *Doe* d. *Wide* v. *Roe*, 8 Law J. C.P. 1.

A declaration in ejectment was served on the plaintiff's attorney, the tenant in possession having given a cognovit to confess judgment, authorizing the attorney to appear for him:—Held, good service. *Doe* d. *Hart* v. *Roe*, 8 Law J. C.P. 110.

### (D) Notice to appear.

In ejectment, a notice to appear generally, where the declaration is served before the term, is a sufficient notice to appear within the next term. *Doe* v. *Roe*, 8 Law J. Exch. 81, s. c. 1 Tyrw. 280, s. c. 1 C. & J. 550.

### (E) Consent Rule and Recognizance.

The Court will not permit a mortgagee to come in and defend as landlord under the 11 Geo. 2. c. 19, unless he clearly shew that his title may be affected by the result of the suit. *Doe* d. *Pearson* v. *Roe*, 8 Law J. C.P. 228, s. c. 6 Bing. 613, s. c. 4 M. & P. 437.

The recognizance, with two sureties, to pay damages and costs, required by the 1 Geo. 4. c. 87. s. 1, to be entered into by the tenant in possession upon his being admitted to defend, should not be entitled in the cause as it originally stood, but with the substitution of the name of the tenant for that of the nominal defendant. *Roe* d. *Durant* v. *Moore*, 8 Law J. C.P. 280, s. c. 6 Bing. 656; s. c. 4 M. & P. 531.

A defendant in ejectment cannot by a writ of error discharge his undertaking (under the 1 Geo. 4. c. 87, s. 1,) to give the plaintiff judgment of the term preceding the trial, and his recognizance (under s. 3,) not to commit waste, &c., without entering into the further recognizance, with two sureties, as required by the third section of that statute. *Roe* d. *Durant* v. *Moore*, 9 Law J. C.P. 38, s. c. 7 Bing. 124, s. c. 4 M. & P. 761.

### (F) Pleading and Evidence.

The plaintiff in ejectment is bound to produce the rule to confess lease, entry, and ouster, as part of his case. *Lamble* v. *Lamble*, 2 M. & M. 257. [Park]

Where the heir-in-tail had, for ten years, received rent reserved in a lease for ninety-nine years, granted by his ancestor, tenant in tail:—*Held*, a confirmation of the lease. *Doe* d. *Southouse* v. *Jenkins*, 7 Law J. C.P. 182, s. c. 5 Bing. 469, s. c. 5 M. & P. 32.

Where a person has been in possession for more than twenty years without paying rent, or otherwise acknowledging title in any one else, the presumption is, that the possession has been adverse; and it lies upon the claimant, not only to shew his own title, but to shew how the possession commenced, in order to rebut the presumption of its being adverse. *Shield* v. *Sir G. Noel, Bart.*, 8 Law J. K.B. 166.

Evidence, that, within twenty years, a person in possession surrendered up the possession *pro forma*, and took it again, being told at the same time that he was to hold only so long as the person to whom he gave up the possession pleased,—is evidence to go to the jury, that the whole of the possession, though for many more than twenty years, was permissive, and not adverse; although there be no evi-

dence of payment, or demand of rent, or any other recognition of title. *Doe* d. *Thompson* v. *Clark*, 7 Law J. K.B. 122, s.c. 8 B.& C. 717.

Testator devised an estate to several persons, for their lives, successively, with power to grant leases, under certain restrictions. The first tenant for life grants a lease to a person who had no notice of the power, or that the lessor was tenant for life only. A subsequent tenant for life brings an ejectment against the lessee, on the ground that the lease was not made according to the power. The Court will not prevent the lessee from setting up an old outstanding term created by the testator. *Goleborn* v. *Alcock*, 2 Sim. 552.

Upon the trial of an ejectmest, the landlord (defendant,) proposed to call the tenants in possession of different parts of the property, upon whom ejectments had been served, to prove an adverse possession; but they were held to be incompetent; and the Court refused to enter into the question, whether they were competent to prove the possession of each other, because the distinction had not been pointed out at the trial—but intimated an opinion, that they were not competent for any purpose. *Doe* d. *Lewis* v. *Preece*, 1 C. & J. 515, s.c. 1 Tyrw. 410.

In ejectment, the lessor of the plaintiff proved possession in his father and himself for a period of twenty-two years. The defendant also proved a subsequent uninterrupted possession for eleven years: —Held, that in the absence of evidence of title in the defendant, the presumption was in favour of the first possessor. *Doe* d. *Harding* v. *Cooke*, 9 Law J. C.P. 118, s.c. 7 Bing. 346, s.c. 5 M. & P. 181.

In an ejectment, a person who has had possession of the property is not a competent witness for the defendant to prove that he (the witness,) has held it for more than twenty years: if the lessor of the plaintiff recovered, the witness would be liable to an action for *mesne profits*. *Lewis* v. *Preece*, 4 C. & P. 556. [Bosanquet]

An ejectment against a weekly tenant: the notice proved, was, to quit on Wednesday, the 4th of August. The witness, who was called to prove that Wednesday was the expiration of the current week of the tenancy, said that he guessed "the defendant came in about a Tuesday or a Wednesday, but had no recollection which:"—Held, insufficient. *Finlayson* v. *Finlayson*, 5 C. & P. 67. [Tindal]

In ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him, that the mortgagor or his tenant was in lawful possession of the premises till the time when such interest was paid, and consequently is no defence to the ejectment. *Doe* d. *Rogers* v. *Cadwallader*, 2 B. & Ad. 473.

In ejectment, the plaintiff's witness stating that the premises had been held by the ancestor of the defendant, under a written agreement or lease:—Held, that the plaintiff was bound to produce that agreement. *Fenn* d. *Thomas* v. *Griffith*, 8 Law J. C.P. 218, s.c. 6 Bing. 533, s.c. 4 M. & P. 299.

Upon an affidavit that a person had stolen the lease whereon the ejectment was brought, and had either given it to the real defendants, or held it for their benefit, the Court discharged a peremptory undertaking, and gave plaintiff's lessor leave to give in evidence at the trial an examined copy of the enrolment—the defendants not having sworn that they had not seen the deed, or that they did not know where it was. *Doe* d. *Pearson* v. *Ries*, 9 Law J. C.P. 226, s.c. 7 Bing. 724.

In an action of ejectment by the reversioner, (on the expiration of a building lease,) to recover possession of a house, which adjoined one that the lessor of the plaintiff had sold to the defendant, and the description of which, in the surrender, (it being copyhold,) contained the words—"as now occupied by A B, or his under-tenants;" an underlease, (granted pending the existence of the original building-lease,) under which A B claimed the ground upon which both the houses were built, was received as evidence of the mode in which the property had been enjoyed. *Doe* d. *Tims* v. *Jordan*, 4 C. & P. 146. [Tindal]

### (G) Judgment.

[*Doe* d. *Dyeball* v. *Laurie*, 2 M. & R. 184, Dig. Law J. 214.]

### (H) Execution.

[On the trial of ejectments, the Judge may certify, that a writ of possession ought to issue immediately, 1 Will. 4. c. 70. s. 38, 8 Law J. Stat. 163.]

In cases of ejectment, the certificate of the Judge must, under the statute 11 Geo. 4. & 1 Will. 4. c. 70. s. 38, be for immediate possession, or the case must take its ordinary course; but if the Judge should think that some time ought to be allowed to the defendant, he will grant a certificate for immediate possession—the lessor of the plaintiff undertaking not to enforce it for a certain time. *Packer* v. *Hilliard*, 5 C. & P. 132. [Park]

If a lessor of the plaintiff is nonsuited for want of the defendant's confessing lease, entry, and ouster, the Judge will not grant a certificate under the statute 1 W. 4. c. 70. s. 30, to give the lessor of the plaintiff immediate possession, unless an affidavit, stating the circumstances of the case, be laid before him. Under that statute, the Judge has no discretion as to the time at which the lessor of the plaintiff shall have possession, as he must either grant a certificate to enable him to get immediate possession, or let the case take its regular course. *Williamson* v. *Dawson*, 4 C. & P. 589. [Taunton]

### (I) Costs.

Where three ejectments were brought against a landlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions; and that the ejectment against one of the tenants (who was a pauper,) should abide the event of the ejectment against the other; and that action was tried, and the lessor of the plaintiff obtained judgment, and took possession of all the tenements; the Court compelled the landlord to pay the costs of that ejectment. *Thrustout* v. *Shenton*, 10 B. & C. 110.

## ELECTION.

[See PARLIAMENT.]

[*Coleman* v. *Jones*, 3 Russ. 312, Dig. Law J. 215. And see *Nayler* v. *Wetherell*, tit. COVENANT—Construction.]

Where a party has a power of appointment over a fund in favour of his children, and he appoints to a child (a married woman) for life, and afterwards upon trust for that child's issue, and gives his own personal estate in the same manner, the child of the appointor cannot, where the Court declares the appointment bad as to the issue, as against her husband, be put to her election, nor can the husband be forced to elect. *Carver* v. *Bowles*, 9 Law J. Chanc. 19.

A testatrix, having 30,000*l.* of three per cent. stock, transferred 25,000*l.* of it to trustees, upon trust for herself for her life, and after her death for such persons as she should by deed or will appoint: she appointed 25,000*l.* of the stock among her children: shortly afterwards she made a will, by which she gave legacies of stock to the amount of 30,000*l.* to persons, who also took under the appointment, though, in fact, exclusive of the 25,000*l.*, she had only 5,000*l.* stock, and the rest of the property was of inconsiderable value:—Held, that her declarations to her solicitor, at the time of giving instructions to him for her will, that she then had 30,000*l.* stock, were admissible in evidence—

And, those declarations being received,—Held, that the parties were bound to elect between the will and the deed of appointment. *Guillebaud* v. *Meares*, 7 Law J. Chanc. 136.

A testator begins his will by directing that all his just debts be first paid; he then devises Blackacre to A, and Whiteacre to B; and charges Blackacre, and A, his heirs, executors, and administrators, with payment of an annuity, which was secured by the testator's bond; gives various legacies, and bequeaths the residue of his personal estate to A; and, by a codicil, he revokes the gift of the residue, and gives half of it to A, and the other half to B:—Held, that, as between A and B, the personalty was exonerated from the annuity, and A was bound to elect, either to renounce all benefits under the will, or to provide for the annuity. *Welby* v. *Rockliffe*, 8 Law J. Chanc. 142, s. c. 1 Russ. & M. 571.

If a father makes a provision for a child by a settlement on her marriage, and afterwards a provision for the same child by will, it is *primâ facie* to be presumed, that he does not mean to give double portions.

If there be but slight differences in the two provisions, the two instruments afford intrinsic evidence against double provisions; if the differences be material, then the contrary: but, in either case, extrinsic evidence may be admitted; as, a writing by the testator, made in contemplation, or at the time, of making his will; but not a memorandum written by him some time afterwards.

What are slight differences must be decided in each case by each particular Judge.

In cases where the difficulty of discovering intention is created by the testator, and there is any residuary estate, the costs must be paid out of it: in failure of residuary estate, the Court will not give costs to either party.

Executors, who are also the residuary legatees, are not entitled to their costs, it being to their interest to file the bill. *Weall* v. *Rice*, 9 Law J. Chanc. 116.

Construction of a will as to election. *Baily* v. *Lloyd*, 7 Law J. Chanc. 98.

A testator, seised of heritable lands in Scotland, devises all his estates whatsoever and wheresoever upon certain trusts: such a devise does not raise a case of election against the heir taking benefits under the will.

A testator, by a codicil, reciting that he had purchased certain estates since the date of his will, devised them upon the trusts of his will, and directed that if it should happen that any hereditaments purchased by him at any time or times should happen to be conveyed after the date and publishing thereof, then that his heir-at-law, or other real representatives, and every other person in whom the same should be vested, should, forthwith upon his decease, convey and assure the same to his trustees upon the trusts of his will: afterwards, he purchased other estates:—Held, that a case of election was not raised against the heir, as to the subsequently-purchased estates. *Johnson* v. *Telford*, 8 Law J. Chanc. 94, s. c. 1 Russ. & M. 244.

A devise and bequest of "all my estate and effects, both real and personal, which I shall die possessed of," extends to lands purchased by the testator after the date of his will; and therefore the heir, taking benefits under the will, must elect. *Churchman* v. *Ireland*, 1 Russ. & M. 250.

To make out a case in equity of compulsory election, the party to be bound thereby must be shewn to be fully cognizant of the nature and extent of his rights in respect of each subject-matter of the choice so cast upon him, and to have actually elected as testified by his acts. *Morgan* v. *Edwards*, 13 Price, 732.

A, being tenant for life of a leasehold for years, with remainder to B, after devising one estate to B in tail, bequeathed to him the leasehold during his life, with remainders over, and gave him also the residue of his real and personal property. B took possession of the residuary estate; suffered a recovery of the lands devised to him in tail; acted as the absolute owner of the leasehold estate, and outlived the term for which the lease was granted, having previously acquired a new interest in the demised premises:—Held, that B elected to take under the will, and was bound to give effect to the devise of the leasehold in favour of the remainder-man. *Giddings* v. *Giddings*, 3 Russ. 241.

General F. Dundas, domiciled in Scotland, and possessed of a real estate in England, and of heritable and moveable property in Scotland, died, leaving a trust disposition of the whole of his subjects heritable and moveable, in favour of trustees, in which they are directed to turn the whole into money, and divide the proceeds equally among his four children; and the deed is executed in the Scottish form, attested by two witnesses. This not being sufficient to convey the English real estate, although it was clear that it was the intention of the disponer to convey it along with the rest of his pro-

perty to the trustees, the eldest son and heir-at-law insisted, that it was a nullity as to the English estate, and that he was entitled to take that as heir-at-law to his father, and also to take his fourth share of the Scottish property.

Held, by the House of Lords, affirming an unanimous decision of the Judges of the Second Division of the Court of Session, that the heir-at-law was put to his approbate or reprobate (election), and must waive all objections, and allow the trust disposition to have full effect as to the whole property, according to the intent of the disponer, or take nothing under the disposition. *Dundas* v. *Dundas*, 2 Dow. & C. A.C. 349.

## ELEGIT.

A creditor obtained judgment against his debtor. Subsequently, the debtor took freehold property by indentures of lease and release. The conveyance was in the usual form with uses to bar dower, and with a life estate, and a power of appointment to the purchaser. The purchaser afterwards exercised his power of appointment in favour of another person. Subsequently to all this, the judgment creditor sued out an elegit, and obtained possession through the sheriff's inquisition:—Held, that, although the judgment attached in the first instance upon the life estate of the debtor, that life estate became defeated by the subsequent exercise of the power of appointment; and that the judgment creditor could not maintain the possession against the person in whose favour the power of appointment was executed. *Doe* d. *Wigan* v. *Jones*, 8 Law J. K.B. 214, s. c. 10 B. & C. 457.

Where two elegits are issued on two several judgments of the *same term*, though by different plaintiffs, and inquisitions are taken thereon at the same time, the sheriff must deliver under each writ, a moiety of the whole lands, whereof the defendant was seised at the time of the issuing of the elegits. *Doe* d. *Cheese* v. *Creed*, *Doe* d. *Davies* v. *Creed*, 7 Law J. C.P. 138, s. c. 5 Bing. 327, s. c. 2 M. & P. 540.

Where a creditor sets up title under an elegit, he must by his pleading aver seisin in the debtor. The mere setting out the inquisition, in which seisin is averred, will not be sufficient.

But the inquisition must be set out, as well as the averment of seisin. (Per Holroyd.)

Where both parties to a suit claimed under the same person, the plaintiff being in possession under a demise, and the defendant being a creditor by a subsequent judgment, elegit and inquisition; the title of the former was preferred, although there had been a prior demise to another person;—it being held, that the judgment creditor, claiming through the debtor, was estopped by his acts; and that as the plaintiff under the demise had a good title against the debtor, and against all but the prior lessee, he was entitled to maintain trespass against the judgment creditor, for disturbing his possession. *Chatfield* v. *Parker*, 7 Law J. K.B. 13, s. c. 8 B. & C. 543, s. c. 2 M. & R. 540.

D, having an estate for life in lands, situate in England and Ireland, assigned them, together with his furniture, &c., by several indentures, to trustees, for a term of ninety-nine years, if he should so long live, in trust, out of the rents and profits, after satisfaction of a jointure, prior to the life estate, and the interest of a mortgage, and certain annuities created by the appellant, to pay to the appellant an annuity of 5,000*l.*, and to his creditors by bond, judgment, and simple contract, (parties to the deed of assignment,) interest at the rate of 5*l.* per cent. upon their respective debts; and to apply the surplus from time to time in the gradual extinction of the capital of the debts.

The creditors generally executed the deed of trust and assignment, by which they covenanted not to sue the appellant. But P and B, creditors of D, by simple contract, having obtained judgment for their debts, first in England and afterwards in Ireland, sued out a writ of *fieri facias*, directed to the sheriff of the county of R, in Ireland, who seized the goods of D, but refused to sell them, in consequence of a claim made by the trustees to whom they had been assigned by D. Whereupon P and B, in 1820, filed a bill in Chancery in Ireland, on behalf of themselves and other creditors of D, which stated these facts; and, setting forth, in part, the deed of trust and assignment as it appeared in the registry; but, alleging that they were ignorant of the trusts, prayed that the defendants might set forth the deed, and that the creditors might have power to elect to take the benefit of the deed, or otherwise, that it might be declared fraudulent and void as to them; and that, in the meantime, a receiver of the rents might be appointed, and that they might be applied in payment of the debts. After the bill was filed, two of the trustees died, and two new trustees were appointed. D and the surviving trustee put in their answers.

In 1824, P and B filed a supplemental bill against D and the surviving trustees, stating the deed of assignment and trust; that under it D was entitled to a rent-charge, issuing out of the lands held in trust by the surviving trustee; and that they had sued out an elegit against D, for the sum of 1,827*l.*, directed to the sheriff of R, who returned, that D or his trustee was seised of a freehold rent, issuing out of lands in the county of R, one moiety of which he had delivered to P and B, to hold, &c., till they had levied the damages marked on the writ. They claimed by the bill to be entitled either to a moiety of the lands or of the rent-charge, or to have satisfaction of their judgment out of the annuity payable to B under the trusts of the deed. Upon these grounds, they prayed by their bill a receiver either of a moiety of the lands comprised in the sheriff's return to the writ, to the extent of one moiety of the 5,000*l.* per annum, or of the lands comprised in the deeds of assignment and trust; and, after satisfaction of the charges having priority according to the trusts of the deed, that a moiety or a competent part of the 5,000*l.* per annum might be applied in payment of their demand, and that the trustee might be restrained from paying the annuity to D till the demand was satisfied.

After the filing of the bill, two orders were made;—one for the appointment of a receiver—the other restraining the trustee from paying the annuity to D, to the amount of 1,260*l.* The trustee, by his answer, suggested that his co-trustees and

the creditors of D were necessary parties to the suit. D, by his answer, insisted upon the validity of the deed, and the priority of the trusts (including his own annuity,) over the judgment of P and B. As soon as the answers were filed, applications were made to the Master of the Rolls on the part of D, to discharge the receiver and rescind the injunction; and, on the part of P and B, to continue the receiver and injunction till the hearing, which was granted, and the motion of D was refused; and this decision was affirmed on appeal to the Lord Chancellor of Ireland.

Held, affirming the judgments of the Courts below, that, under the circumstances above stated, the orders appointing a receiver, and restraining the surviving trustee from paying the annuity to D, were properly made—that it was not necessary for this purpose, that the prior incumbrancers, nor the creditors, should be parties to the suit:—Held, also, that the defects in the sheriff's return to the elegit were immaterial, as no return is necessary, and the suing out an elegit is sufficient to ground the equity. Held, further, that one elegit is sufficient, although the rent was payable out of the lands in three counties. *Lord Dillon* v. *Plaskett*, 2 Bligh, N.S. 239, s.c. 1 Dow. & C. A.C. 390.

## EMBEZZLEMENT.

A was employed to lead a stallion; and he was to charge 30*s.* a mare, and not take less than 20*s.* He received a sum of 6*s.* for the covering of a mare, which he did not account for:—Held, no embezzlement, as this sum was not received "by virtue of his employment." *Rex* v. *Snowley*, 4 C. & P. 390. [Parke]

## EMBLEMENTS.

[See LANDLORD AND TENANT.]

## EQUITY.

[See PRACTICE.]

Where the plaintiff's case is defective in the substantial object of the suit, he cannot have relief in equity on a point immaterial to the main issue. *Kendall* v. *Beckett*, 9 Law J. Chanc. 24.

A court of equity will not entertain a bill of discovery in aid of an action to recover money, alleged to have been obtained from the plaintiff by the fraud of the defendants, where the transaction in which the fraud was practised was a contract for the purchase of securities purporting to be granted by a foreign government not recognized by our own. *Taylor* v. *Barclay*, 7 Law J. Chanc. 65, s.c. 2 Sim. 213.

A bill for an account was filed in 1718; a decree was made in 1720; the account was pending in the Master's office until 1734, when it was referred to arbitration. The award was made in 1738, by which a sum of 5,369*l.* 16*s.* 1*d.* was awarded to the plaintiff, and the award was made a decree of the Court, which was affirmed upon appeal to Parliament in 1739.

In 1741, the plaintiff, to enforce the payment of the sum awarded and decreed, filed a new bill, in the nature of a bill of amendment and revive, against the representative of the defendant in the former suit, charging that a certain mortgage held by him was part of the assets, and praying that it might be applied in payment of the demand. The defendant to the last suit, by his answer, admitted the mortgage. In 1742, the plaintiff filed an amended bill; in 1747, he filed another amended bill, praying in default of personal estate a foreclosure of the mortgage, and that the principal and interest might be applied in satisfaction of his demand, stating, among other things, that he had obtained a sequestration against the lands of G B, the defendant in the first suit, who had died before it could be executed, having by his will charged his lands with the payment of his debts. The object of this bill was to obtain payment of the sum awarded from the assets of G B; part of which assets, as the bill charged, consisted of a mortgage upon an estate called Tysquin, and that G B and his representative had been in possession under the mortgage, and had received out of the rents and profits sufficient to satisfy the plaintiff's demand.

In the years 1748, 1751, and 1754, upon the death of parties, bills of revivor and amended bills were filed. From this time no proceedings were taken until the year 1771, when a bill was filed by the representative of the original plaintiff against the representative of the original defendant, stating impediments to the prosecution of the suit, and praying an account of the rents received from the lands mortgaged. In 1772, the defendant filed an answer, refusing the discovery; and, in 1773, upon exceptions, he filed a further answer, still refusing the discovery, which was reported insufficient.

From this time no further proceedings were taken in the cause until the year 1785, when the representative of the plaintiff in the last suit, and of the original plaintiff, filed a bill of revivor and an amended bill against the representative of the defendant in the last suit, and against J B, the heir of the alleged mortgagee, stating impediments to the prosecution of the suit from the litigation in which his testatrix had been involved; and that a deed had been made by collusion between the representative of the mortgagee and J B, the heir of the mortgagor, by which the former conveyed the lands to the latter, in consideration of an annuity; charging that the deed was a fraud upon the plaintiff, and a *devastavit* of the assets, and praying an account of the real and personal estate of the first representative of the original mortgagee, who had charged his debts on his real estate, and devised it and bequeathed his personalty to the defendants, his representatives.

In 1787 the defendants, the representatives, by their answer, admitted that the deed as charged by the bill was fraudulent, and contended that the plaintiff should first have recourse against the lands mortgaged. From 1787 to 1795 no step was taken in the cause. Between the years 1795 and 1804, nine bills of revivor and amended bills were filed. By a decree in 1808, accounts were directed to be taken of the personal and real assets of the original

defendant and his first representative. In 1810, the Master reported, that 28,657*l.* was due to the plaintiffs; that the assets of the original defendant consisted partly of a mortgage of the lands of T, which came into the hands of his representative, who had received of the rents and profits sufficient to answer the demand.

Upon exception to this report, the Master, by a decree upon further directions, was ordered to inquire under what title the representative of the original defendant entered into the lands of T. Upon which reference the Master reported, that he entered as mortgagee. Exceptions being taken to this report, upon the ground, (among others,) that, notwithstanding the existence of apparent securities, and various accounts between the parties on the foot of an apparent mortgage, there was evidence before the Master, that the deeds were, in reality, only deeds of trust, to secure the estate against the claims of adverse creditors; and farther, that there were existing judgments, being charges upon the lands prior to the plaintiff's claim; and that the representative of the original defendant entered upon the lands, not by virtue of the mortgage, but under the limitations of a marriage settlement. By a further decree, upon further directions, the exceptions upon these points were allowed, and the account was directed to be taken excluding the alleged mortgage; and the bill against J B was dismissed.

Held, on appeal, that the decree was right.

Whether delays, such as appear to have occurred, and under such circumstances as in the case reported, ought to operate as a bar to a demand in a court of equity—*quære*.

Whether, under the circumstances stated in the case, J B, the heir of the supposed mortgagor, and relessee of the lands in question, was a necessary party to the appeal—*quære*. *Kelly* v. *Bateman*, 2 Bligh, N.S. 327.

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## ERROR.

(A) Where a Writ of Error lies.
(B) Proceedings.
(C) Bail.
(D) Costs.

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### (A) Where a Writ of Error lies.

[*Powell* v. *Lennett*, 1 Dow. & C. A.C. 56, Dig. Law J. 217.]

The statute 17 Car. 2. c. 8, which enacts, that, in all personal actions, the death of either party, between the verdict and the judgment, shall not be alleged for error, does not apply to a case of nonsuit. *Farrance* v. *Nill*, 4 M. & P. 113.

### (B) Proceedings.

[*Taylor* v. *Williams*, 1 Dow. & C. A.C. 19, Dig. Law J. 218; *Dyeball* v. *Doe* d. *Lauria*, 2 M. & R. 184, Dig. Law J. 218.]

In error, on a judgment given by an inferior court on exceptions, the Court of Error is confined to the points raised by the exceptions, and cannot travel *dehors*. *Fausset* v. *Carpenter*, 2 Dow. & C. A.C. 232.

Notwithstanding the statute 1 Will. 4. c. 70, the Court will not stay execution issued after a writ of error on a judgment of nonsuit. *Keeling* v. *Austin*, 7 Bing. 601, s. c. 5 M. & P. 599.

Where, from conversations with the defendant's attorney *before judgment*, it appeared that delay was the object, but nothing had been said about a writ of error; and afterwards a writ of error was brought; the Court thought this was not enough to warrant a rule to shew cause why the plaintiff should not be at liberty to sue out execution, notwithstanding the writ of error. *Hall* v. *Taylor*, 8 Law J. K.B. 180.

### (C) Bail.

In an action against a corporation, the fact of a party being one of the burgesses, is no objection to his qualification as bail in error. *Henley* v. *the Mayor and Burgesses of Lyme Regis*, 7 Law J. C.P. 261, s. c. 6 Bing. 195, s. c. 3 M. & P. 450.

Where, on a writ of error, sham bail are put in, the whole proceeding may be treated as a nullity. *Fuller* v. *Coombe*, 9 Law J. C.P. 42, s. c. 4 M. & P. 792.

In a writ of error, until the transcript of the record is carried over and filed, the names of the parties are not reversed; therefore a notice of justification of bail in error should contain the names of the plaintiff and defendant as in the original writ. *Smith's Bail*, 7 Law J. C.P. 233, s. c. 3 M. & P. 242.

Bail in error having been given by plaintiff below, and the judgment below affirmed on error, and a new writ of error brought to the House of Lords; the Court of Common Pleas ordered the recognizance to be cancelled, though the plaintiff was a foreigner and insolvent, and no security had been given for costs. *Duvergier* v. *Fellows*, 9 Law J. C.P. 160, s. c. 7 Bing. 463, s. c. 5 M. & P. 403.

### (D) Costs.

Where, after demurrer to a replication in *formedon*, the demandant obtained judgment, and upon the trial of several issues in fact, a verdict being found in favour of the defendant, the latter had judgment that he recover his seisin against the tenant; and upon writ of error brought, the common errors being assigned, the judgment was affirmed:—Held, that the demandant was entitled to double costs, under the statute 13 Car. 2. stat. 2. c. 2. s. 10. *Cockerell* v. *Cholmeley*, 10 B. & C. 563.

Where a general judgment is given for a defendant, and costs taxed generally, it is no objection upon error, that some of the defendant's pleas are bad, and that costs appear to have been allowed to him, as well for the bad as for the good pleas.

A defendant in error, who was also defendant in the original action, is entitled, upon judgment affirmed, to costs in error, under the 8 & 9 Will. 3. c. 11; although the judgment in the court below has not been upon demurrer. *Ricketts* v. *Lewis*, 8 Law J. K.B. 324, s. c. 1 B. & Ad. 197.

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## ESCAPE.

The deputy of an inferior court, authorized to issue bailable process, has no power to appoint a deputy who is not previously known or approved of by the principal, to assist in discharging the duties of the office.

And accordingly, an affidavit of debt, sworn before a person so appointed by the deputy, was held not to warrant the arrest; although the principal had given the deputy a general authority to obtain assistance to discharge the duties of the office. The principal must, in such a case, exercise his own discretion in the appointment of a deputy. *Hughes* v. *Jones*, 9 Law J. K.B. 5, s. c. 1 B. & Ad. 388.

Where a writ upon mesne process commands a sheriff to arrest a defendant, *semble*, that it is not incumbent on the sheriff to be satisfied that an affidavit of debt has been duly made and filed, according to the 12 Geo. 1. c. 29.

But, in an action against the sheriff for an escape upon mesne process, *semble*, that it is incumbent on the plaintiff to prove that such an affidavit has been so made and filed.

An averment in the declaration in such an action, that the writ was "duly *indorsed* for bail," is a sufficient averment that all that was necessary to warrant the indorsement had been done.

An averment in such a declaration, that the person named as defendant in the writ, "was indebted to the plaintiff i a large sum of money, to wit, the sum of 50*l*.," held to be a sufficient averment that he was indebted to the plaintiff in a sum exceeding 10*l*., as required by the statute, although the sum was laid under a videlicet. *Nightingale* v. *Wilcox*, 8 Law J. K.B. 23, s. c. 10 B. & C. 202, s. c. 5 M. & R. 169.

In an action for an escape, on final process, the defendant may shew, on the general issue, that the escape was by the fraud and covin of the party really interested in the judgment. Or, if he plead, that it was by fraud and covin of a person unto whom and to whose use and benefit the judgment was assigned, this is sufficiently proved by shewing that the judgment was assigned to the use and benefit of that person, though the assignment was, in form, made to another. *Hiscocks* v. *Jones*, 2 M. & M. 269. [Bayley]

## ESTATE.

[See Parliament, and Power.]

*Semble*, that an estate for life, executed by the Statute of Uses, cannot unite with a legal remainder by the rules of the common law. *Playford* v. *Hoare*. 3 Y. & J. 175.

Where, by virtue of a custom, certain persons called free-miners were at liberty to apply to the graveller of the hundred of St. Briavel's, to allot them a particular spot of land for a coalpit; and when the spot was agreed upon, the graveller cut a turf, and having cut a stick, so many notches were cut in it as there were to be partners in the intended work, and also one for the King, and one for the graveller; and the stick was fastened down with pegs on the spot where the turf had been pared off, and the turf laid down again—after which the spot was considered appropriated; when coal was found, a money-payment was made to the King, in lieu of his share of the coal:—a share in a coalpit so appropriated was held to be freehold. *Doe* d. *Thomson* v. *Pearce*, Pea. A.C. 242. [Wood]

## ESTOPPEL.

[See Landlord and Tenant, and Trover.]

A deed of release, executed by A, reciting that A is seised of certain lands in fee, operates by way of estoppel against him, and all claiming under him.

*Quære*—Whether a person having a title by estoppel, by means of a deed containing a covenant for further assurance is entitled to the assistance of a court of equity, to have a positive title given to him. *Bensley* v. *Burdon*, 8 Law J. Chanc. 85.

A person who had but an equitable interest professed to convey by lease and release, by way of mortgage to A. In the recital it was stated, that he was legally "*or equitably*" entitled; and in the covenant for title he covenanted that he was lawfully "*or equitably*" seised in fee. And his equitable title was to the fee. He afterwards acquired the legal estate; and he then conveyed by way of mortgage for valuable consideration to B, who had no notice of the prior mortgage. B obtained possession; and upon ejectment by A, it was held, that, although A and B claimed under the same person, B was not estopped from setting up the legal estate against the conveyance to A, as the terms of the recital and covenant to A were satisfied by the conveyance to him. *Right* d. *Jeffery* v. *Bucknell*, 8 Law J. K.B. 304, s. c. 2 B. & Ad. 278.

## EVIDENCE.

(A) In general.
(B) Records.
(C) Judicial Proceedings.
(D) Public Instruments.
(E) Private Writings.
(F) Depositions.
(G) Reputation.
(H) Declarations.
(I) Admissions.
(K) Confessions.
(L) Confidential Communications.
(M) Presumption.
(N) Secondary and Parol Evidence.

### (A) In general.

When a prisoner's defence is insanity, a medical man, who has heard the trial, may be asked whether the facts proved shew symptoms of insanity. *Rex* v. *Searle*, 2 M. & M. 75. [Park]

Evidence that an advertisement was inserted in a country newspaper, circulated at the residence of a party, is not admissible as proof of notice to the party of the facts contained in the advertisement.

unless it be shewn that he took the newspaper in. *The Company of Proprietors of the Norwich and Lowestoft Navigation* v. *Theobald*, 2 M. & M. 153. [Tenterden]

In a concerted account of a fraudulent transaction, the most striking contradictions may be expected on the minor details, or collateral facts, rather than on the leading circumstances.

Clandestinity is a strong indication of fraud. *Brydges* v. *King*, 1 Hag. Ec. 301, 310.

Where a defendant agrees to be bound by what a third party says, what such third party said is evidence. *Daniel* v. *Pit*, Pea. A.C. 238. [Ellenborough]

### (B) Records.

The Nisi Prius record of a cause, with a minute of the verdict, indorsed by the officer of the Court on the jury panel, is good evidence that the cause came on for trial, though no regular postea is indorsed. *Rex* v. *Browne*, 2 M. & M. 315, [Tenterden] s. c. 3 C. & P. 572.

A witness may be interrogated as to his examination of old records, and may state that they correspond in substance with a particular record which has been read, without going through the whole in detail, subject to a full cross-examination. *Rowe* v. *Brenton*, 3 M. & R. 212.

### (C) Judicial Proceedings.

In an action to recover back money paid by a banker on a cheque, and afterwards allowed to his customer, on a suggestion that the cheque had been forged—the question in such action being, whether the cheque, in fact, was a genuine instrument or not—the notes of the magistrate's clerk, of statements made by the customer on a charge against the person supposed to have forged the cheque, are receivable in evidence, though his deposition was afterwards regularly signed pursuant to the statute. *Williams* v. *Woodward*, 4 C. & P. 346. [Tindal]

The deposition of a witness, taken in a judicial proceeding against the party there charged, is not admissible in another proceeding against that party, on the ground that he was present, and had the opportunity of cross-examining. *Melen* v. *Andrews*, 1 M. & M. 336.

Examination of defendant before Commissioners of Bankruptcy, (proved to be correct,) evidence, although not signed. *Boddenham* v. *Lewis*, Pea. A.C. 245. [Wood]

### (D) Public Instruments.

A document from the office of the Duchy of Cornwall, purporting to be a caption of seisin on the use of the Duke, by persons assigned by his letters patent to receive seisin, is receivable in evidence as a public instrument. *Rowe* v. *Brenton*, 3 M. & R. 156.

A document from the Exchequer, purporting to be an extent of Crown lands, and pursuing the directions of 4 Edw. 1. stat. 1, may be given in evidence without producing the commission. *Ib.* 164.

Entries in court-rolls of amerciaments imposed, not evidence without proof of payment. *Ib.* 302.

An inrolment in the office of the Duchy of Cornwall, of a lease purporting to be granted by the King, *vacante ducatu*, is primary evidence of such lease. *Ib.* 214.

An inrolment in the Duchy office of a lease, purporting to be granted by the Duke of Cornwall, is primary evidence of such lease. *Ib.* 218.

A book kept among the records of a manor containing entries of all fines *assessed*; the steward keeping another book of the fines actually *paid*:—Held, that the former book was not admissible in evidence to prove the custom as to fines payable to the lord. *Dean and Chapter of Ely* v. *Caldecott*, 9 Law J. C.P. 171, s. c. 7 Bing. 433, s. c. 5 M. & P. 272.

A book kept in the chapter-house of the Dean and Chapter of Sarum, purporting to contain copies of leases granted by the Dean and Chapter, is, as a public book, evidence of those leases for the purpose of reputation, without proof of possession under the leases. *Coombs* v. *Coether and Wheeler*, 1 M. & M. 398. [Tindal]

The question being, whether the appointment of a curate belonged to the vicar of the parish or to a corporation, entries in old books of the corporation were not received as evidence against the vicar, to shew that the corporation had from time to time appointed the curate. *The Attorney General* v. *the Corporation of Warwick*, 4 Russ. 222.

An entry in a book deposited in the registry of a bishop, is evidence of the admission of a curate at the bishop's visitation; and the admission having been stated to have taken place in 1591, *juxta consuetudinem*:—Held, that it should have been left to the jury to say, whether it was an ecclesiastical or common law custom; and, as it was not done, the Court directed a new trial. *Arnold* v. *the Bishop of Bath and Wells*, 7 Law J. C.P. 120, s. c. 5 Bing. 316, s. c. 2 M. & P. 559.

An entry in the books of a corporation, dated 1617, held not evidence for them upon a question as to their right to toll; the entry not being one to which the public had a right of access. *Brett* v. *Beales*, 8 Law J. K.B. 141, s. c. 10 B. & C. 508.

Where an entry of baptism appeared, in the parish register, to be in the handwriting of a person who was not the clergyman at the time to which the entry referred, though he became so afterwards, such entry was held to be inadmissible in evidence to prove the baptism.

Nor were certain memoranda, made by the parish clerk at the time of the baptism, corresponding with the entry made by the subsequent clergyman, held to be admissible in evidence themselves, or to give an explanation sufficient to warrant the admission in evidence of the register. *Doe* d. *Warren* v. *Bray*, 7 Law J. K.B. 161, s. c. 8 B. & C. 813.

Upon the trial of an issue in prohibition, whether the usurpation of office in a *quo warranto* information mentioned, was committed out of the jurisdiction of the county palatine, and within that of the city, of Chester; a document from the remembrancer's office of the Court of Exchequer was produced, purporting to be a decree made (after hearing of a complaint against the citizens of Chester, and their answer,) by the Lord High Treasurer of England, the Chancellor of the Exchequer, the Under Treasurer, and the Chief Baron, with the advice and as-

sent of a Queen's Serjeant, and the Queen's Attorney and Solicitor General, and others of the same Court; —Held, that this document was not admissible in evidence as a decree, because it was not a decree of the Court of Exchequer, nor of any other court known to the law at the time when it purported to have been made; nor as an award, because there appeared no voluntary submission of parties; nor as evidence of reputation, because the parties making the decree had no knowledge of the subject, except that which they derived in the course of the proceeding. *Rogers* v. *Wood*, 2 B. & Ad. 245.

### (E) Private Writings.

A letter received from a third person, and given by the plaintiff to the defendant, is not evidence against the plaintiff. *Cottle* v. *Champion*, Pea. A.C. 45. [Kenyon]

Where the object was to prove a claim of transactions terminating in fraud on the part of the agent, a letter written by him containing a contract, which was a link in the chain, was held admissible evidence; so that the agent's *viva voce* testimony was dispensable. *Irving* v. *Motley*, 9 Law J. C.P. 161, s. c. 7 Bing. 543, s. c. 5 M. & P. 380.

A date of a letter varying from the post-mark, it was objected, that the post-mark could only be proved to be genuine by calling the person from the post-office who impressed the letter; on which the Judge offered to stay the cause till the arrival of such clerk. But the jury found that the post-mark was genuine without his being called. The Court refused to disturb the verdict. *Abbey* v. *Lill*, 7 Law J. C.P. 96, s. c. 5 Bing. 299, s. c. 2 M. & P. 534.

A brought an action against the sheriff for a false return of *nulla bona* to a *fi. fa.* issued against the goods of B. B had filed a bill of discovery against A, on which there had been a decree or order, that A should bring into the Court of Chancery all letters written by B, or any other, to him, respecting the original debt. A, under this decree or order, brought in various letters:—Held, that none of them could be read in evidence on the part of the defendant in the present action, without first putting in the bill and answer. *Hewitt* v. *Piggott*, 5 C. & P. 75. [Tindal]

The entry of a clerk deceased, in the book of a notary public, is evidence. *Sutton* v. *Gregory*, Pea. A.C. 180. [Lawrence]

Where a bond was conditional that a banker's clerk should faithfully account to his employers for all sums received by him on their account, and should faithfully conduct himself in that employment:—Held, that a book containing entries made by him in the course of that employment, of sums received by him from the customers, was admissible in evidence to shew the fact of those sums having been so received; although some of the persons who made the payments to the clerk were living. *Whitmarsh* v. *Gouge*, 7 Law J. K.B. 57, s. c. 8 B. & C. 556, s. c. 3 M. & R. 42.

Entry made in a book by two partners deceased, in the usual course of their business, good evidence. *Rowcroft* v. *Bassett*, Pea. A.C. 200. [Kenyon]

The entries of a person still living against his interest, are not evidence between other parties;—though it be shewn that he is abroad, having absconded from a criminal charge, and altogether out of the power of a party to produce him as a witness. *Stephen* v. *Gwenap*, 2 M. & M. 120. [Alderson]

A clerk in a merchant's counting-house may be called as a witness, to explain the meaning of a particular entry in the books of the office, made by a fellow clerk since deceased. *Hood* v. *Reeve*, 3 C. & P. 531. [Best]

It is no objection to the admissibility of a book, containing an account in which a deceased receiver charges himself with money paid to him, that, on the opposite side of the account, the receiver discharges himself to the same extent; or that the account (being in his handwriting,) is not signed by him; or that the name of the party on whose account the money is received does not appear in the book, it being shewn *aliunde*, that the person making the entry did not receive the money on his account. *Rose* v. *Brenton*, 3 M. & R. 268.

The question being whether rent paid by the plaintiff to one John Brown had been received by him on his own account, or as agent of the defendant, it was proposed by the defendant, to give in evidence certain accounts which had been rendered to him by Brown, in which he charged himself, as the defendant's agent, with the receipt of those rents. Brown was living at the time of the trial. The accounts were held to be inadmissible. *Sparge* v. *Brown*, 8 Law J. K.B. 67, s. c. 9 B. & C. 953, s. c. 4 M. & R. 638.

The establishment of an act of bankruptcy depended materially on the fact that the arrest of H C, on a certain day, took place at Paddington. The sheriff's officer who arrested him was dead, but a return made by him to the under-sheriff at the time, stating that he had arrested H C in South Molton Street, on the occasion in question, was received in evidence to prove that the arrest was not made at Paddington. The Court were of opinion that such document was not, as to the place of arrest, admissible (as an entry or return of a party, since deceased, in the course of his duty, and charging himself); and they granted a new trial to afford an opportunity for the question to be put on the record. *Chambers* v. *Bernasconi*, 9 Law J. Exch. 125, s. c. 1 C. & J. 451, s. c. 1 Tyrw. 335.

Where the question was, whether a deceased person who had celebrated a marriage was a clergyman, authorized to celebrate it: papers appearing to be letters of the archbishop, ordaining him, and dated more than thirty years before, produced from among his papers by his widow—Held, to be admissible in evidence, without proof that the seal they bore was the seal of the archbishop. *Rex* v. *the Inhabitants of Bathwick*, 9 Law J. M.C. 103, s. c. 2 B. & Ad. 639.

Handwriting cannot be proved by a person who has seen letters from time to time franked by the defendant, but never corresponded with him or seen him write.

*Quere*—How far opinion of a handwriting being genuine or forged, is evidence. *Carey* v. *Pitt*, Pea. A.C. 130. [Kenyon]

A witness called to prove handwriting, should form his judgment from the handwriting, not from

extrinsic circumstances. *Mendes da Costa* v. *Pym*, Peo. A.C. 144. [Kenyon]

The rule, that comparison of handwriting is not evidence, does not extend so far as to prevent the Court or jury from instituting a comparison between two documents, of which *primâ facie* evidence had been given. *Griffith* v. *Williams*, 1 C. & J. 47.

If the witness called for the plaintiff, in his cross-examination, admit that a letter was written by him with the authority of the plaintiff, but deny that a second letter is of his handwriting—the defendant's counsel will not be allowed to shew both letters to another witness called for the plaintiff, and ask him whether he does not believe that the second letter was written by the same person who wrote the first. *Clermont* v. *Tullidge*, 4 C. & P. 1. [Tenterden]

Upon a question of settlement by apprenticeship, the indenture was produced, apparently executed by all parties; and the name of "George Jones" affixed to the attestation, as the attesting witness; but without any description. It was proved, that diligent search had been made in the place where the indenture was executed, but no person of that name could be there found; and that inquiry had also been made of the parties to the indenture, but no information as to the witness could be obtained from them:—but that between two and three miles from the place, there was a George Jones, who had been applied to, and who said he knew nothing at all about the matter. He was not produced.

Upon this evidence, the Sessions refused to receive the parties themselves to prove the execution of the indenture; being of opinion that enough had not been done to prove the handwriting of the attesting witness. The Court of King's Bench held the Sessions to have decided rightly. *Rex* v. *the Inhabitants of Mucclestone*, 7 Law J. K.B. 165, s.c. *Ib.* M.C. 96.

### (F) Depositions.

If, in a case of felony, a witness for the prosecution is too ill to attend the Assizes, this is a good ground for postponing the trial, but will not authorize the reading the deposition of the witness taken before the magistrate. *Rex* v. *Savage*, 5 C. & P. 143. [Patteson]

A was charged with forgery, and B was examined on oath before the magistrate as a witness against A; after this B was himself charged with a different forgery:—Held, that the deposition of B was evidence against him on his trial for forgery, notwithstanding that it was taken on oath. *Rex* v. *William Haworth*, 4 C. & P. 254. [Parke]

### (G) Reputation.

Reputation of lands being part of a manor, and copyhold, good evidence. *Doe* d. *Jones* v. *Richards*, Peo. A.C. 180. [Lawrence]

Upon a question whether a piece of land was in parish A or parish B, old leases describing it to be in parish A, were held to be admissible as evidence of reputation, although it was the interest of the parties to the leases so to describe the land, by reason of there being a subsisting modus in parish A, and not in parish B.

Upon the same question, old rates, by which the occupiers of the land were assessed for rates in the parish of A, held to be admissible, even if the fact of payment of the rates had not been proved. But, supposing it were necessary—

Crosses made in the rate-book kept by the deceased overseer, indicating that the particular assessments, which were crossed, had been paid, held to be admissible in evidence to shew that the payments had been made. *Plaxton* v. *Dare*, 8 Law J. K.B. 98, s.c. 10 B. & C. 17, s.c. 5 M. & R. 1.

### (H) Declarations.

[See Contract.]

Evidence of the declaration of a deceased parent as to the place of birth, or place of baptism, of the child, is inadmissible. *Rider* v. *Malbon*, 8 Law J. M.C. 127.

In case for negligence, the declarations of one defendant who has suffered judgment by default, are not admissible in evidence against the others, to shew the circumstances of the injury, although they are independently shewn to be concerned in it. *Daniels* v. *Potter*, 2 M. & M. 501, s.c. 4 C. & P. 262. [Tindal]

A prisoner, when before the committing magistrate, was sworn by mistake, he being supposed to be a witness; as soon as the mistake was discovered, the deposition, which was begun, was destroyed, and the prisoner cautioned; after this, he made a statement:—Held, that such statement was receivable in evidence. *Rex* v. *Webb*, 4 C. & P. 564. [Garrow]

If a prosecutor gives in evidence a declaration made by a prisoner, it becomes evidence for the prisoner, as well as against him; but, like all other evidence, the jury may give credit to one part of it, and not to another. *Rex* v. *Higgins*, 3 C. & P. 603. [Parke]

If a prosecutor give in evidence a declaration made by a prisoner, exculpatory of himself, the jury are not bound to take this to be true, merely because the prosecutor gives it in evidence; but they ought to consider how far it is consistent with the rest of the evidence, and whether they believe it to be really true. *Rex* v. *Steptoe*, 4 C. & P. 397. [Park and Garrow]

A declaration *in articulo mortis*, made by a child only four years old, is not admissible in evidence on the trial of an indictment for the murder of such child; because a child of such tender years could not have had that idea of a future state which is necessary to make such a declaration admissible. 3 C. & P. 598. [Park]

On an indictment for robbery, the declaration *in articulo mortis* of the party robbed, is not admissible in evidence. *Rex* v. *Robert Lloyd*, 4 C. & P. 233. [Bolland]

To render a declaration of a deceased person admissible, on the trial of an indictment for manslaughter, it must have been made by him under an impression of almost immediate dissolution; and it is not enough that the deceased should have thought that he should ultimately never recover.

Before a declaration of a deceased person is re-

[illegible] to a declaration in extremis mortis, the Judge will [illegible] all that the deceased said respecting the danger in which he conceived himself to be; and it would, some time, be for his Lordship to decide whether the prisoner must have had that impression on his mind when he made the declaration admissible. *Rex* v. *Van Butchell*, 3 C. & P. 629. [Bullock]

A woman who was told by the surgeon, that she would never recover, said, that she "hoped he would do what he could for her, for the sake of her family." He again told her, that there was no chance of her recovery.—Held, that this showed such a degree of hope in her mind, as to render a statement she then made inadmissible as a declaration in extremis mortis. *Rex* v. *Crockett*, 4 C. & P. [illegible] [Bosanquet]

(I) Admissions.

The statements in a special plea, on which judgment has been given for the plaintiff on demurrer, cannot be used at the trial of the cause as an admission for the plaintiff by the defendant; but the case must be tried in the general issue, without any reference to the special plea at all. *Fleming* v. *Crosby*, [illegible] [Lyndhurst]

(K) Confessions.

[illegible] making a promise, that it will be better for him to do so, will exclude a confession made by the person, although that person was not a [illegible] or witness, or the [illegible] [Bosanquet]

A girl was charged with administering poison, with intent to murder. The surgeon said to her, "[illegible] and some medicine of this, and you had better tell all you know." After this, she made a confession to the surgeon.—Held, that the statement was not admissible in evidence. *Rex* v. *Kingham*, [illegible] [Parke]

The prisoner at a vessel said to one of his sailors, suspected of having stolen a watch, "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle: you are a common thief, and the gaolers is painted in your face." Held, that a confession made by the sailor after this threat was not receivable in evidence on the trial for stealing. *Rex* v. *Parratt*, 4 C. & P. 570. [Alderson]

A prisoner was in the custody of A, a constable; B, another constable, coming into the room, A left it, and the prisoner immediately made a confession to B. Held, that if the prisoner was in custody as an accused party, that A must be called to prove that he had held out no inducement to the prisoner to confess, before the confession made to B is receivable in evidence; but if it appear that the prisoner was not then in custody on any charge, but merely detained as an unwilling witness, it will not be necessary to call A.

If a prisoner makes a confession to a constable, who takes down what he says, and the prisoner signs it, this paper will be read by the officer of the Court. *Rex* v. *Smithies*, 4 C. & P. 548. [Patteson]

A person charged with murder made a confession before the coroner. It appeared, that before he made this confession, B, who was both a clergyman and a magistrate, had had an interview with him:—Held, that the prosecutors were not bound to call B before they put in the confession, but that it would be fair for them to do so; and that, if the prosecutors did not call B, the prisoner might call him before the confession was read, to prove that some inducement was held out.

A, a prisoner charged with murder, was visited by B, who was both a magistrate and a clergyman. B told him, that if he was not the person who struck the fatal blow, and he would tell all he knew, he (B) would use his endeavours and influence to prevent anything happening to him; and that if he (A) did not make a disclosure, some one else would probably do so. After this, B wrote to the Secretary of State, who returned an answer, that mercy could not be extended to A; which answer was communicated by B to A. After this, A sent for the coroner, and wished to make a statement. The coroner told him, that if he did so, it would be used as evidence against him. The prisoner made a confession:—Held, that this confession was admissible.

If a prisoner, charged with murder, say in his confession, which is read in evidence against him, that he was present at the murder, but took no part in the commission of it, this is evidence for him, as well as against him; but the Judge will not direct an acquittal, as the jury may believe one part of the confession, and disbelieve another; however, if it is meant to be charged that the prisoner did more than is stated in the confession, there ought to be some evidence to shew that. *Rex* v. *Clewes*, 4 C. & P. 221. [Littledale]

On the trial of a prisoner who has made, before a magistrate, a voluntary confession of his guilt, previous to the conclusion of the evidence against him, which confession is taken down in writing, and signed by the prisoner, and attested by the magistrate's clerk; the proper course is, for the clerk to give evidence of the prisoner's statements, refreshing his memory by the written paper. *Rex* v. *Bell*, 5 C. & P. 162. [Gaselee]

(L) Confidential Communications.

A communication made to an attorney or counsel is not privileged, unless made with a view to a judicial proceeding, either commenced or apprehended. *Broad* v. *Pitt*, 2 M. & M. 233. [Bosanquet]

The answer to an interrogatory, confined to the point on which the party's solicitor was produced, is admissible, though he gained his information as solicitor. *The King's Proctor* v. *Deines*, 3 Hag. Ec. 235.

A letter, written by an opposing creditor, to the Chief Commissioner of the Insolvent Debtors Court, previous to the hearing of an insolvent's case, is not a privileged communication. *Gould* v. *Hulme*, 3 C. & P. 625. [Tindal]

(M) Presumption.

A possession short of twenty years is insufficient to warrant a presumption of livery of seisin under a feoffment; although the possession may have been in accordance with the fact of there having been livery of seisin. *Doe* d. *Wilkins* v. *Marquis*

*f Cleveland*, 8 Law J. K.B. 74, s. c. 9 B. & C. 864, .c. 4 M. & R. 666.

In 1711 a mortgage, for a term of years, was nade to A. In 1712 a mortgage in fee of the estate ras made to S, in trust for A. In 1714 the term ras assigned to C, in trust for A, to attend, &c.; nd then the equity of redemption, in fee, was conveyed to A. In 1717 A, reciting that he was seised a fee, subject to a lease for ninety-nine years, made y a prior owner, grants and confirms that lease. ubsequent owners, in their wills and deeds, used erms adapted to pass the legal estate, granted leases or long terms, and exercised other acts of ownerhip:—A reconveyance of the legal fee was presumed. *Noel* v. *Bewley*, 3 Sim. 103.

Where a decree was directed by an act of Parliament in the reign of Hen. 8. to be enrolled in Chancery, and parties interested under it had ever ince treated it as a binding decree, and the Courts ad so recognized it in repeated instances, it must e presumed to have been duly enrolled according o the act, though no enrolment of it could be ound. *Macdougall* v. *Purrier*, 2 Dow. & C. 135.

Twenty years affords a presumption of payment on judgment. *Curties* v. *Fitzpatrick*, Pen. A.C. 92.

To a bond of upwards of twenty years' standing, ras pleaded, *inter alia*, payment, and a release. To ebut the presumption of payment, an affidavit made y defendant, before a Master in Chancery, was roduced, in which he (being the son-in-law of the bligee) swore, that having applied to the obligee urther to assist him, the latter refused, saying that e had already had his share of the estate; that he aight do as he pleased with what he had, as he ever should call on him for it. Although the presumption of payment was thereby rebutted, it was nevertheless evidence also of the bond having been ancelled or otherwise legally discharged. *Washington* v. *Brymer*, Pen. A.C. 200.

(N) Secondary and Parol Evidence.

[See Forgery and Contract.]

Where notice to produce a letter has been served, he attorney for the opposite party may be asked whether he has that letter, in order to let in secondary evidence of it, if not produced. *Bevan* v. *Waters*, 1 M. & M. 235. [Best]

Notice to produce a written demand of a thing for which an action of trover is brought, unnecessary. *Hammond* v. *Plank*, Pen. A.C. 90.

Where a search for a document was made among he papers in the custody of an executrix of a person who had acted as executor of another person:—Held, that this was sufficient for the purpose of considering the person who had so acted, to have been, in law, the executor, although the probate was not produced. *Rex* v. *the Inhabitants of Witherly*, 8 Law J. K.B. 46, s.c. *Ib.* M.C. 43, s.c. 4 M. & R. 724.

The Court will not take judicial notice of an entry n the sheriff's book. *Russell* v. *Dickson*, 8 Law J. C.P. 146, s. c. 6 Bing. 442, s. c. 4 M. & P. 196.

A copy, examined by the witness, of a court roll s admissible in evidence, without the production of he original. *Rowe* v. *Brenton*, 3 M. & R. 297.

Where a Court prints and circulates copies of its rules, for the guidance of its officers, the production of one of these printed copies is good evidence of he rules which the officers are to act on, though the original rules are kept under the seal of the Court, and the copy is not shewn to have been examined with the original. *Dance* v. *Robson*, 1 M. & M. 294.

In the absence of proof that the registers of Episcopal Chapels at Edinburgh are by the law of Scotland documents of an authentic and public nature, copies thereof rejected as inadmissible by the law of England. *Conway* v. *Beazley*, 3 Hag. Ec. 651.

A book containing the copy of a letter had, by consent of the parties to a Chancery suit, been inspected at the office of the attorney of the party who had the possession of it, instead of being deposited with the Master; and on that occasion a copy of the entry in the book was taken by the party who inspected. On a trial at law between parties in the same interest,—Held, that upon notice to produce this book, evidence of the copy so taken was admissible; without reading the answer in the suit in which it was produced, and which answer referred to it, and was the cause of its inspection. *Long* v. *Champion*, 9 Law J. K.B. 248, s. c. 2 B. & Ad. 284.

A claim under a lost deed allowed, on the production of an authenticated copy of it, coupled with its being recited and recognized in other deeds and instruments, and its being memorialized in the register for the West Riding of Yorkshire, where the lands alleged to be comprised in the lost deed were situate, and the long acquiescence of parties interested in disputing the claim. *Tunstall* v. *Trappes*, (*Margaret Tunstall's case*,) 3 Sim. 388.

The facts of occupation and payment of rent, will be sufficient to raise a presumption, that the person who so occupied and paid was the tenant; and, for the purpose of raising merely this presumption, those facts may be ascertained by parol, although the tenancy was under a written agreement, which is not produced.

But if it be sought to carry this presumption any further, or to alter it, by shewing either the terms of such a tenancy, or that the person who so appeared to be tenant, was tenant with others, the written agreement must be produced. *Rex* v. *the Inhabitants of Rawden*, 7 Law J. K.B. 84, s. c. 8 B. & C. 708.

Upon a question of settlement since the 59 Geo. 3. c. 50, the term of the tenancy, as well as the fact of tenancy, become material; and therefore, where the tenancy is the subject of a written agreement between the parties, and the agreement is in existence, parol evidence of the tenancy is inadmissible. *Rex* v. *the Inhabitants of Merthyr Tidvil*, 8 Law J. M.C. 114, s. c. 1 B. & Ad. 29.

By written agreement between a man and a woman, the latter was engaged as servant to the former, at wages. Before the making of the agreement she and her master had carried on an improper intercourse. That intercourse was continued during the service, but she acted in other respects as, and performed the work of, a servant. Upon a question as to the settlement of the woman,—Held, that evidence was admissible, notwithstanding the written contract of service, to shew that such contract was merely colourable, and that the real contract was for the improper intercourse. *Rex* v. *the Inhabitants of North Wingfield*, 9 Law J. M.C. 57, s.c. 1 B. & Ad. 712.

The respondents, on appeal, proved that a deceased rated inhabitant had stated several times to

the pauper, that the appellant parish had taken a bond from A B, touching the support of a child of the pauper's wife; and that he (the rated inhabitant) had the bond in his possession. This person did not appear to have ever been a parish officer. Notice had been given to the appellants to produce the bond; but it did not appear that any search had been made among the papers of the deceased, nor were his representatives examined:—Held, that parol evidence of the contents of the bond was not admissible. *Rex* v. *the Inhabitants of Hinckley*, 9 Law J. M.C. 75.

A witness who produces a document for the purpose of shewing a particular clause, may be asked whether he has not inspected documents of the same nature, in which the clause is not found, although such documents are not produced. *Rowe* v. *Brenton*, 3 M. & R. 303.

It is to be presumed, that what is stated on oath, before a magistrate, is taken down in writing; and, therefore, parol evidence of such a statement is not receivable, unless it be first shewn that it was not so taken down. *Phillips* v. *Wimburn*, 4 C. & P. 273. [Tindal]

If the examination of a prisoner, taken in writing, is inadmissible by reason of irregularity, parol evidence of what he said at the time of the examination may be received. *Rex* v. *Reed*, 1 M. & M. 403. [Tindal]

A prisoner being under an examination before a magistrate, on a charge of felony, a statement was made in his presence, by the solicitor for the prosecution, which the witness called to prove it, said he believed had been taken down in writing:—Held, that under these circumstances parol evidence of the statement was not admissible on the trial of such prisoner. *Rex* v. *Hollingshead*, 4 C. & P. 242. [Vaughan]

## EXCISE.

[See Revenue.]

[One or more of the Commissioners of Excise enabled to act for the dispatch of business. 10 Geo. 4. c. 32, 7 Law J. Stat. 73.

Certain oaths and affirmations made in the Excise department, abolished by 1 & 2 Will. 4. c. 4, 9 Law J. Stat. 5.]

In an action against excise officers for a seizure, the notice of action must be proved in the first instance, before any other evidence is given. The plaintiffs slept at different houses, away from their places of business; but a servant slept on the premises of the latter. *Semble*, that the place of business may properly be described in the declaration as a dwelling-house of the plaintiffs. *Quære*, whether the notice of action properly describes the plaintiffs as of the place of business, the statute requiring it to state their abode. *Johnson* v. *Lord*, 1 M. & M. 444. [Tenterden]

## EXECUTION.

[See 1 Will. 4. c. 7, 9 Law J. Stat. 10.]

Practice as to certificates under the statute 1 Will. 4. c. 7. s. 2. *Barford* v. *Nelson*, 5 C. & P. 8. [Patteson]

The Court will not certify, under stat. 1 Will. 4. c. 7. s. 8, that execution ought to issue immediately in an action of debt on simple contract. *Fisher* v. *Davies*, 2 M. & M. 93. [Tenterden]

If a man employing an officer attends with the officer, who seizes in his presence the goods of a third person, under an execution which he has sued out, he makes himself responsible for the officer's acts; and, *semble*, that in such a case, where he is present, and interferes, he ought to point out to the officer which goods are to be taken, and which not. Also, if in such a case an unjustifiable assault be committed by the officer, the party authorising the seizure will not be answerable for it, unless it be shewn in some way to have been committed by his direction. *Meredith* v. *Flarman*, 5 C. & P. 98. [Lyndhurst]

Where a writ of *fieri facias* has been executed by seizure, the plaintiff cannot take any further step until that writ is returnable.

Accordingly, where, in the long vacation, a *fi. fa.* was executed by seizure of a small quantity of goods, which the sheriff sold; and thereupon, but before the return day, made a return to the writ; and the plaintiff then issued a *ca. sa.* for the residue, reciting the *fi. fa.* and return:—this issuing of the *ca. sa.* before the return day of the *fi. fa.* held to be irregular. *Lewes* v. *Codrington*, 9 Law J. K.B. 72.

By a turnpike act, the trustees were directed to sue and be sued in the name of the clerk:—Held, that this did not authorize a personal execution against the clerk. *Wormwell* v. *Hailstone*, 8 Law J. C.P. 264, s. c. 6 Bing. 668, s. c. 4 M. & P. 512.

An action by A against B pending,—B gave a cognovit, confessing nominally 3,000*l.*, and agreeing that, in default of payment of 259*l.* on the 7th of May, judgment might be entered for 3,000*l.*, and execution taken out for 259*l.*, which would leave 1,650*l.* due. Default having been made, A entered up judgment, issued *ca. sa.* for the whole sum due, and took B. in execution thereon. On application to a Judge, order made to presently discharge B on terms, one of which was, that no action for the excessive imprisonment should be brought: that order not acted upon; B remained in prison till act of bankruptcy complete, and commission issued; which was disposed of by his making a general assignment. B sued A for excessive execution.

*Semble*—that (save as to the effect of the Judge's order) such action was maintainable; (*sed quære*)—and (Mr. Justice Parke *contrà*) that in this case, notwithstanding the Judge's order, it was maintainable.

## EXECUTOR AND ADMINISTRATOR.

(A) Appointment.
(B) Rights and Interests.
(C) Powers and Duties.
(D) Liabilities.
(E) Assets.
(F) Executor de son Tort.
(G) Actions and Suits by and against.
  (a) *Where maintainable.*
  (b) *Pleadings and Evidence.*
  (c) *Costs.*

### (A) Appointment.

Directing certain persons to pay debts, funeral expenses, and expenses of probate, is an appointment

of such persons executors. *In the goods of Henry Sampson Fry*, 1 Hag. Ec. 80.

A person appointed limited executor in a will, may be appointed general executor in a codicil by implication, and without express words. *In the goods of Deliciæ Aird*, 1 Hag. Ec. 336.

(B) Rights and Interests.

[*Livesey* v. *Livesey*, 3 Russ. 287; Dig. Law J. 233.]

An executor who has renounced, may, at any time before administration has passed the seal, retract. *M'Donnell* v. *Prendergast*, 3 Hag. Ec. 212.

An administrator having claimed his debt before the Master, that is sufficient to entitle him to retain it. *Winter* v. *Hicks*, 1 Tam. 475.

If the maker of a promissory note be appointed one of the executors of the person to whom it is payable, the right of action upon the note is discharged. *Freakly* v. *Fox*, 7 Law J. K.B. 148, s.c. 9 B. & C. 130, s.c. 4 M. & R. 18.

On a marriage, the father of the wife purchased 1,000*l.* consols, and the same was vested in trustees to pay the dividends to the wife for her life; and then trusts were declared for the children of the marriage, under which the Court had decreed, in a former suit, that the only child of the marriage, a daughter, took a vested interest. This daughter married J M, and died in the lifetime of the mother, leaving J M her surviving. J M did not take out administration to the effects of his deceased wife, and afterwards died:—Held, that his executors were entitled to the 1,000*l.* consols, and that the representatives of the wife were not entitled. One of J M's executors, who was a defendant, having colluded with the other defendant, the Court gave costs against both of them. *Platt* v. *M'Dougall*, 1 Tam. 390.

An agent, named executor, is not entitled to charge commission on business done subsequently to the testator's death. *Sheriff* v. *Axe*, 4 Russ. 33.

W, a solicitor, having been appointed, and acting as an executor in the administration of the affairs of the estate, brought and defended many suits, in which he employed himself as the attorney. Upon a bill filed by the residuary legatees against the executor, it was referred to the Master, to inquire whether any money due to the estate had been lost by the negligence of W; and whether the suits had been properly commenced, prosecuted, and defended; and that he should tax the costs for business done by W, as an attorney in those suits, without prejudice to the question whether W, being an executor, was, as an attorney, to be allowed such costs, except so far as he had disbursed money. Upon this decree the Master reported, that some of the suits had been properly commenced, but negligently conducted; so that the recovery of the property in question in those suits had been probably endangered; and he made no allowance of costs to the executor; but submitted to the Court, whether the claim for costs should not be suspended until the debts should be recovered, &c. Exceptions taken to this part of the report were, by the decree, on further directions, overruled; and, on appeal, this part of the decree was affirmed.

By the decree, upon further directions, it was also ordered, that interest should be charged upon all balances in the hands of the executor, at the end of every year; and that interest should be charged against the residuary legatees upon all advances made to them by the executor, from the time of the advances. Upon appeal, this order was varied, by declaring that the Master should be directed, in taking the accounts, to make a rest, and state the balance, at the end of each year, and to charge the executor with interest on such balance; and to apply such interest, as might be so found due from him in each year, in the first place towards his future payments, before any application should be made of the balance of principal money in his hands. *Carmichael* v. *Willson*, 4 Bligh, N.S. 145.

(C) Powers and Duties.

An inventory and account may be demanded of an executor by a residuary legatee, who has given a release. *Kenny* v. *Jackson*, 1 Hag. Ec. 105.

The Court will not, at the instance of the assignee of an insolvent, and on a suggestion that the insolvent had not received his distributive share, call upon the widow and administratrix of the father of the insolvent for an inventory and account, after a long acquiescence of the insolvent and his assignee; and when it is shewn that a valuation and inventory of the deceased's effects were made shortly after his death, and facts are proved, from which it may be fairly presumed that the insolvent had received considerably more than his full share.

This Court can only require, that all the deceased died possessed of should be included in the inventory; it cannot call for an account of the subsequent profits of his business. *Pitt* v. *Woodman*, 1 Hag. Ec. 247—250.

*Semble*, that executors are justified in completing such contracts begun to be performed by the testator, as have not a mere relation to and dependence upon his personal talent or exertion, but can be performed by others: and that they would be liable in damages out of the assets, if they did not so complete. *Marshall* v. *Safford*, 9 Law J. Exch. 105, s.c. 1 C. & J. 403, s.c. 1 Tyrw. 348.

(D) Liabilities.

An executor who has assets sufficient for that purpose, is liable, upon an implied promise, to pay for a funeral, suitable to the degree of his testator, furnished by the directions of a third person. *Rogers* v. *Price*, 3 Y. & J. 28.

Where an estate proved to be insolvent, no more than 20*l.* was allowed to the executor, as against a creditor, for the funeral of the deceased, whose station in life was that of a captain in the army, although the executor, under a belief that the estate was fully solvent, had expended 79*l.* *Hancock* v. *Podmore*, 8 Law J. K.B. 403, s.c. 1 B. & Ad. 260.

If an executor, acting *bonâ fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at 4*l.* per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate: and the Court will direct an account to be taken of the value of the property so possessed

by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors. *Spode* v. *Smith*, 3 Russ. 511.

Executors depositing monies belonging to the estate, with the same persons as the testator intrusted with his monies in his lifetime, although they are not bankers, are not liable for a loss sustained by their bankruptcy. *Lord Dorchester* v. *the Earl of Effingham*, 1 Tam. 279.

An executor, who is employed by his co-executor, as his agent, to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain it, although by the will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate. *Davis* v. *Spurling*, 1 Russ. & M. 64, s.c. 1 Tam. 199.

A testator directed his executors to invest money, within six months after his decease. This was not done for many years. In the meantime, part of the money was lost, by the bankruptcy of a banker, in whose hands it was lodged. The surviving executor directed the money to be properly laid out, but it was not done; and, the banker having failed, the Court ordered him to pay interest upon the balances from time to time in the hands of himself and his co-executors, and to repay the money lost by the bankruptcy. *Newton* v. *Reid*, 9 Law J. Chanc. 273.

Executor charged with interest on dividends of stock received by him, and kept at his banker's with his own money, for a number of years, instead of being invested, to accumulate. *Goodchild* v. *Fenton*, 3 Y. & J. 481.

B having died indebted to G, for work and labour done, his executors signed the following memorandum on the back of G's account: "Mr. G having consented to wait for the payment of the within account, we, as the executors of B, engage to pay Mr. G interest for the same, at 5*l.* per cent., until the same is settled:"—Held, that the executors were personally liable to pay the debt and interest. *Bradley* v. *Heath*, 3 Sim. 543.

If letters of administration be granted to an infant, under which he receives and disposes of assets of the intestate, an account cannot be directed in respect of his receipts during his infancy. *Hindmarsh* v. *Southgate*, 3 Russ. 324.

### (E) Assets.

A suit cannot be instituted for an account of assets of a testator, possessed by an executor in Honduras, unless the will is proved here, or a sufficient reason assigned why it is not proved here. *Lewis* v. *Gentle*, 7 Law J. Chanc. 43.

In a suit instituted for the administration of the assets of a testator, who in his will described himself as "of Halifax in Nova Scotia," certain lapsed shares of the residue were, at the hearing, on further directions, ordered to be distributed according to the Statute of Distributions, there being no suggestion in the record, that the administration ought not to be according to the law of England. Afterwards, a petition of rehearing was presented, stating that the testator died domiciled in Nova Scotia, and praying that the distribution might be according to the law of that country: but the petition was dismissed. *Nevinson* v. *Stables*, 4 Russ. 210.

A testator dies in England, domiciled here, and dies seised of lands in a foreign country, which, by the law of that country, and also by the will, are charged with his debts:—the assets being insufficient for the payment of his simple contract debts, the produce of those lands must be applied among the simple contract creditors, according to the priorities recognized by the law of the country where the lands are situate. *Hanson* v. *Walker*, 7 Law J. Chanc. 135.

A creditor of a person who died intestate in India, took out letters of administration to the deceased, in that country. He then came to England, and obtained letters of administration from the Prerogative Court. Afterwards, one of the intestate's next of kin procured that administration to be revoked, and administration to be granted to himself:—Held, that the Indian administrator was compellable to account to him for assets possessed in India, as well as in this country, in a suit instituted by him as personal representative only of the intestate, and to which the other next of kin, who were resident in India, were not parties. *Sandilands* v. *Innes*, 3 Sim. 263.

The plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking an assignment of the bond:—he is only a simple contract creditor of the testator. *Jones* v. *Davids*, 4 Russ. 277.

A, by his will, bequeathed to S, his partner in trade, certain leasehold premises where the trade was carried on, for the residue of the term and interest of the testator therein. These premises, together with other premises at H, were subject to mortgages for monies which had been raised and charged upon them by the testator, who had also given his bond for the debt.

Upon a bill filed by pecuniary legatees, against the executors, to carry the trusts of the will into execution, and a decree for taking the accounts of the estate, it appears that S, who was one of the executors, had paid off the sums due upon the mortgage of the premises at T and H, out of the personal estate, which was insufficient to satisfy all the debts and pecuniary legacies. This payment was allowed by the Master, in his report. The report, in this respect, was confirmed by order, upon further directions; and upon appeal the decision was affirmed. *Davies* v. *Bush*, 4 Bligh, N.S. 305.

A person who had taken the benefit of the act for the relief of insolvent debtors, first in 1814, and a second time in 1820, died in 1826, leaving assets more than sufficient for the payment of all the debts which he had contracted subsequently to his second insolvency:—Held, that the assets ought to be applied in payment, first, of those subsequent debts; and, secondly, of the debts scheduled under the second insolvency; and, thirdly, of the debts scheduled under the first insolvency: that a court of equity has jurisdiction so to administer the fund: and that the right of the creditor to such relief was not affected by the Statute of Limitations. *Barton* v. *Tattersall*, 1 Russ. & M. 237, s.c. 1 Tam. 378.

A testatrix, who died in 1782, gave an annuity to A B, and devised her real estates to M and his sons, in strict settlement, and bequeathed her personal estate to M absolutely. Down to 1821, the

annuity was paid by the persons in possession of the real estates, and no fund for payment thereof was ever set apart out of the testatrix's personal estate, although that estate was administered in a suit instituted by her legatees, to which A B was a party, and in which the annuity was erroneously considered as not primarily charged upon the testatrix's personal estate. M bequeathed his personal estate to L, and died. L afterwards died, and one of the defendants was her executrix:—Held, that A B had no claim upon L's estate, in respect of his annuity. *Brown* v. *Claxton*, 3 Sim. 225.

A monition against an administrator *pendente lite*, will be granted at the end of a suit, to compel him to transfer, to the person entitled, everything in his possession acquired in that character. *In the goods of Dame Susanna Graves*, 1 Hag. Ec. 313.

(F) EXECUTOR DE SON TORT.

Although an executor *de son tort* can do no act, which may work to his own benefit, he may administer the assets in a lawful course. Thus, if sued upon a simple contract debt of the deceased, he may, between declaration and plea, pay a bond-debt, and plead that payment, in answer to the action for the simple contract debt. *Oxenham* v. *Clapp*, 9 Law J. K.B. 229, s. c. 2 B. & Ad. 309.

(G) ACTIONS AND SUITS BY AND AGAINST.

(*a*) *Where maintainable.*

[*Simons* v. *Milman*, 2 Sim. 241, Dig. Law J. 237.]

Debt lies against an executor on a contract made by him, or a cause of action accruing after the death of his testator. *Riddell* v. *Sutton*, 7 Law J. C.P. 60, s. c. 5 Bing. 200, s. c. 2 M. & P. 345.

Where a person contracted to erect a building, finding materials, and died after getting the materials ready and bringing them to the spot, but before he did any other act towards the performance; and his executors finished the work, and sued the party with whom the contract was made, upon counts for work and labour done, and materials provided, &c. by the testator, and promises to him, also a count for work and labour by the executors as executors, and promises to them:—Held, that they could recover. *Marshall* v. *Broadhurst*, 9 Law J. Exch. 105, s. c. 1 C. & J. 403, s. c. 1 Tyrw. 348.

An administrator, who has been compelled to pay an annuity for which his intestate was liable, may recover on a plea of *ne unques administravit*, against a party who had covenanted to indemnify the testator against such payment, though such claim of indemnity has not been taken into account in the amount of the stamp on the letters of administration. *Carr* v. *Roberts*, 2 M. & M. 45. [Tenterden]

(*b*) *Pleadings and Evidence.*

By an agreement between the plaintiff and the defendant, as executrix, reciting that disputes and differences had arisen and were depending between them respecting certain unsettled accounts, it was agreed that, for the finally settling such disputes, the said matters in dispute should be referred to the final award and determination of two arbitrators. There was no reservation by the executrix as to assets; and the arbitrators awarded that she should pay the plaintiff a certain sum. In an action of debt on the award—Held, that a plea of *plene administravit* was no answer to the action. *Riddell* v. *Sutton*, 7 Law J. C.P. 60, s. c. 5 Bing. 200, s. c. 2 M. & P. 345.

On a plea by several executors, that they have fully administered, if some are shewn to have assets in their hands, and the others not, the latter are entitled to a verdict. *Parsons* v. *Hancock and others, executors and executrix*, 1 M. & M. 330.

In a suit for administration of assets of a deceased person, who had been discharged many years before under the Insolvent Act, the Court will not order the Master to admit proof by any creditor of a larger sum than that mentioned to be due to him in the schedule filed in the Insolvent Court. *Barton* v. *Tattersall*, 6 Law J. Chanc. 199.

In a creditors' suit for administering the estate of an intestate, and to make the real estate assets—slight evidence of trading will be a sufficient inducement to the Court to direct an inquiry, whether the intestate was a trader at the time of his death. *Chalk* v. *Huband*, 9 Law J. Chanc. 229.

The title of three, claiming as executors, is well evidenced by the probate granted to one only, of the will appointing them all. *Walters* v. *Pfeil*, 1 M. & M. 362.

A person who will be entitled to a distributive share of the intestate's property, is an incompetent witness for the administrator in an action brought against him as such. *Allington* v. *Bearcroft*, Pea. A.C. 212.

On a plea of *plene administravit* to an action against an administratrix, an unsatisfied creditor of the intestate is a competent witness for the defendant. *Davies* v. *Davies, administratrix, &c.*, 1 M. & M. 345.

(*c*) *Costs.*

[See TRUSTEE.]

A legatee, performing the duty of an executor in proving a paper, is entitled to his costs out of the estate. *Williams* v. *Goude* d. *Bennet*, 1 Hag. Ec. 610.

Whether an executor, being a solicitor, and acting as such in the administration of the estate, by bringing or defending suits or otherwise, is entitled to an allowance for costs, in respect of his professional labour, beyond costs out of pocket; and if so, whether as between solicitor and client. *Carmichael* v. *Willson*, 4 Bligh, N. S. 145.

The administrator entitled to his costs out of the produce of the sale of a real estate, his intestate having been a trader. *Winter* v. *Hicks*, 1 Tam. 475.

An executor, conducting suits as solicitor for the legatees under the will of his testator, not allowed his costs in the first instance, where it appeared that he had conducted the suits in a negligent and tardy manner. *Willson* v. *Carmichael*, 2 Dow. & C. A.C. 51.

Where a bill sought either to charge the surviving executors of a testator, personally, with a demand, or to have the debt paid out of the assets of the testator; and the Court decided that the surviving executors were personally liable:—Held, that the representatives of a deceased executor were entitled to have the bill dismissed against them, with costs. *Bradly* v. *Heath*, 3 Sim. 560.

Where, upon a bill filed by a simple contract

creditor, the only specialty creditor is restrained by injunction from proceeding in his action at law, and it turns out, upon the Master's report, that the assets were insufficient to pay the specialty creditors, the executor will have his costs out of the assets, but not the plaintiff.

In such a case the specialty creditor, though not a party to the suit, may appear at the hearing on further directions, without presenting a petition, if the case which he has to make depends only upon what appears in the Master's report. *Young* v. *Keenan*, 1 Russ. & M. 635.

A simple contract creditor, who files a bill for the administration of assets, will not be allowed his costs, if the estate is not sufficient for the payment of specialty debts. *Rawlinson* v. *Tucker*, 1 Russ. & M. 635.

Where an executor pleads non assumpsit by his testator, and also plene administravit, and the plaintiff joins issue upon both pleas, and the issue upon non assumpsit is found for the plaintiff, and that upon plene administravit for the executor, the latter is entitled to his general costs in the cause, upon the rule that there is one plea which answers the action.

But where to such pleas the plaintiff takes issue upon the plea non assumpsit, and admits the truth of the plea of plene administravit, taking judgment of assets quando acciderint, and the issue upon the plea of non assumpsit is found for the plaintiff, he is entitled to the general costs against the executor, upon the principle that he forced the plaintiff on to trial, by a plea which he could not support. *Marshall* v. *Shaw*, 7 Law J. K.B. 325, s.c. 9 B. & C. 655, s.c. 4 M. & R. 607.

Semble, that an executrix, (the widow,) who, after taking probate and acting for many months under a will by which she takes a smaller interest than by a former will, causes the latter will to be opposed by questioning the deceased's capacity, and then proceeds to propound such will, is liable to be condemned personally in the costs of a substituted residuary legatee who propounds and establishes the will, and such return being tantamount to renouncing, would justify the Court in revoking the probate, and decreeing the administration with the will annexed to such residuary legatee. *Williams* v. *Williams & Fenner*, 1 Hag. Ec. 610.

The executor will of a person of fluctuating capacity, totally abandoning the principles of a former disposition, made before the deceased's faculties were impaired, and long adhered to,) propounded against; and the executor, the person principally benefited, who, among other things indicative of fraud, had himself given instructions, and whose son, a minor, alone spoke to the execution, condemned in costs. *Dodge* v. *Meech*, 1 Hag. Ec. 632.

Where the plaintiff, executor, joins counts, laying the cause of action to himself, as executor, with counts laying the cause of action to his testator, and upon the trial the plaintiff is nonsuited—he is liable to costs under the 23rd Hen. 8. c. 15. *Dowlingin* v. *Harrison*, 7 Law J. K.B. 318, s.c. 9 B. & C. 666, s.c. 4 M. & R. 622.

An executor joining counts, laying the cause of action in some to his testator, in others to himself, is liable to costs if nonsuited.

A count stating a debt due to the testator, and that, the debt remaining due, the defendant promised the plaintiff as executor to pay, is a count which will render the plaintiff executor liable to costs on a nonsuit. *Slater* v. *Lawson*, 9 Law J.K.B. 128, s.c. 1 B. & Ad. 396.

An administrator, suing upon an account stated with himself as administrator, of and concerning money due from the defendant to the testator, is liable to the defendant for costs, after trial, and verdict for the defendant. *Johnson* v. *Foster*, 8 Law J. K.B. 378, s.c. 1 B. & Ad. 6.

Declaration by executor stated, that the defendant being indebted to the testator at the time of his death, in consideration thereof, promised the plaintiff, as executor, to pay him the amount. The Statute of Limitations was pleaded:—Held, that the plaintiff being *nonsuited*, was liable to costs, though he did not declare upon an account stated. *Slater* v. *Lawson*, 1 B. & Ad. 393.

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## EXTENT.

A privity between the Crown and the receiver of government duties exists; though the receiver is merely the agent of the party who has given security to the Crown, and is in immediate communication with its officers, and no communication has ever existed between the government and the agent. Therefore, an extent in chief against the country agent of an insurance office was held good, though he kept no distinct account of duties. *Rex* v. *Wrangham*, 9 Law J. Exch. 124, s.c. 1 C. & J. 408, s.c. 1 Tyrw. 383.

The affidavit on which a fiat for an extent in chief against the surety of his principal in a bond to the Crown is obtained, must show a distinct breach of the bond, or the fiat will be quashed on motion, and the extent and subsequent proceedings set aside.

In the present case, the affidavit was, with reference to the bond, held not to be sufficient for the purpose of authorizing the fiat. (Graham, B. *dissentiente*.) *Rex* v. *Marsh*, 13 Price, 826.

A sale under an extent is not vitiated as against a purchaser, by the agent of the Crown making a *bona fide* bidding for himself. *Rex* v. *Marsh*, 1 C. & J. 406.

Fixtures demised with a paper-mill, and used by the tenant in the manufacture of paper, are not liable to be seized under an extent for duties upon the paper, owing by the tenant to the Crown, as utensils for the making of paper, in the custody of the tenant, under the statute 34 Geo. 3. c. 20. s. 27. *Attorney General* v. *Gibbs*, 3 Y. & J. 333.

A person employed in the service of the Crown as deputy commissary general to the forces abroad, and assistant commissary in the islands of Guernsey and Alderney, and employed in the negotiation of Bank of England notes, received from the Paymaster General of the Forces, and of bills of exchange, received from the Treasury on account of the public service, having also received specie on the same account,—is accountable with the Crown, and is, as such accountant, within the statute of the 13th of Eliz. c. 4. s. 1; and his lands, of which he was seized at any time during the period of his account,

ability, are bound by his engagement with the public, and subjected to the prerogative process for security and payment of the balance ultimately declared against him.

Where an extent to find debts had been issued against such a person, and an inquisition taken thereon, such proceeding held to be no objection to a second extent and inquisition, by the same Revenue Board, against the same property, on a prior claim.

To found and support such proceedings, a statement that the party owed to the King a sum of money, claimed to be due from him to the Crown, as the balance of his account, delivered in upon oath to the Commissioners for auditing the public accounts, in his capacity of, &c. is a sufficient averment and finding of a debt due to the King.

A person claiming to be an incumbrancer on lands seized by the Crown under an extent and inquisition against a Crown debtor, is not entitled to notice of the holding of a further inquisition under another extent against the same person, on a similar charge of prior date, although on the first inquisition the jury had returned him an incumbrancer on the estate found to belong to the debtor.

The Court refused an application on the part of the incumbrancer, for an order that he might have notice of the holding any further inquisition. *Rex v. Rawlings, ex parte Wilkinson*, 12 Price, 834.

## EXTORTION.

A collector of post-horse duty demanded of A, a sum of money, alleging that A had let out horses for hire without payment of the duty. A denied that he had done so, and gave the collector a promissory note for 5*l.*, the amount of which, after it became due, was paid by A to the collector, who handed it over to his principal, the farmer of the post-horse duties:—Held, that this was extortion in the collector, and that his having paid the money over to his principal made no difference. *Rex v. Higgins*, 4 C. & P. 247.

## FACTORY.

Amendment of law relating to the employment of children in cotton mills and factories, 10 Geo. 4. c. 51, 7 Law J. Stat. 119.

Regulations as to employment and working of apprentices and other young persons in cotton factories and cotton mills, 1 & 2 Will. 4. c. 39, 9 Law J. Stat. 77.

## FACULTY.

[See BURIAL and CHURCH.]

## FALSE IMPRISONMENT.

A went to the house of B, to demand a debt, which B said he could not pay. Angry words passed, and B told A to leave his house: this, A refused to do, unless he was paid. Upon this, B went for a police officer, and had A locked up in the watch-house:—Held, that if A was making a disturbance, B would have been justified in turning him out of his house; but that he was not justified in imprisoning him. *Green v. Bartram*, 4 C. & P. 308.

If three persons be told, on entering a theatre, that there is room, when in fact there is not, their proper course is to leave the theatre, and demand the return of their money; and such persons are not justified in getting into a private box in the theatre; and, if they do, the proprietor may remove them, using no more force than is necessary; and if, on going out of the theatre, one of them strike a servant of the proprietors in the presence of a constable, such constable will be justified in taking all the three persons into custody, if the jury shall be satisfied that they were acting with common purpose. *Lewis v. Arnold*, 4 C. & P. 354. [Tindal]

An action for false imprisonment can be maintained against a sheriff for arresting a person who is wrongly named in the process, though he be the person against whom it is issued.

But the sheriff is entitled, and is bound to arrest the person, if he be as well known by the name in the process as by his real name.

A person named Samuel, declared against the sheriff for false imprisonment; the defendant justified under a writ against the plaintiff by the name of John, averring that the plaintiff was as well known by one name as the other;—the plaintiff thereupon replied,—traversing that he was so known; but adding, by way of new assignment, that he brought his action for a false imprisonment different from that justified, being a false imprisonment after the sheriff had notice, and was satisfied that the plaintiff was not so known;—the defendant thereupon pleaded to the new assignment a justification as before, under a writ against the plaintiff by the name of John, averring that he was as well known by one name as the other; to which the plaintiff demurred:—Held, that the part of the new assignment which went to the averring notice, &c. to the sheriff was immaterial, and that the plea to the new assignment, which passed it by, and was confined to the question, whether the plaintiff was so known, was a good plea. *Carridge v. Lautour*, 7 Law J. K.B. 33.

A, a hawker, went to the house of B, to sell his goods, and, a dog of B coming out of the house, A knocked out one of its eyes, for which B's wife caused A to be apprehended:—Held, that it was for the jury to say, whether A had struck the dog for his own preservation, and fairly to protect himself; or whether it was a wilful and malicious trespass on his part. *Hanway v. Boulthee*, 4 C. & P. 350, s. c. 2 M. & M. 15. [Tindal]

The person giving another in charge for a felony, and assisting a constable in the arrest, is not entitled to an acquittal on the general issue in trespass brought against him, together with the constable. *Hough v. Marchand and Edwards*, 1 M. & M. 510. [Tenterden]

After arrest, A applied to a Judge at chambers, to be discharged out of custody; and it being represented, that by A's continuing in prison, he would commit an act of bankruptcy, the Judge, on the 4th December 1827, made the following order:—

"Upon hearing counsel for the plaintiff and defendant, I order that the defendant be discharged out of the custody of the sheriff of the county of Cambridge, as to this action, upon giving a fresh warrant of attorney for the sum of 3,000*l.*, with a defeasance on payment of 259*l.* 11*s.* 7*d.*, and the costs, on the 4th day of January next; and the further sum of 1,650*l.*, with the interest due thereon, on the 4th of August next, with liberty to issue execution for the smaller sum, if not duly paid—and afterwards for the larger sum, if default be made in the payment of the said sum of 1,650*l.* and interest, on the said 4th of August next; and upon giving such warrant of attorney, the present judgment be set aside, and that the mortgage do remain as a security, the defendant hereby undertaking not to bring any action for the imprisonment." A did not avail himself of the order.

Held, (by Parke, J.) that this order embodied an absolute agreement of the parties, founded upon good consideration, that A should be forthwith discharged out of custody, and that he should bring no action for false imprisonment; and, therefore, that such an action was not maintainable. *Wentworth* v. *Bullen*, 9 B. & C. 840.

## FALSE PRETENCES.

Where goods are obtained by false pretences under a contract to pay at a given time, whether the seller, upon discovering the false pretences, can maintain an action of trover for the goods against the buyer before the time of credit has expired—*quære.*

But it is clear that under such circumstances he cannot maintain an action for goods sold and delivered, before the time of credit has expired; because the form of the action admits the whole transaction to be matter of contract, and that the property passed to the buyer. *Ferguson* v. *Carrington*, 7 Law J. K.B. 139, s. c. 9 B. & C. 59.

## FALSE REPRESENTATION.

In an action on the case for false and fraudulent representations as to the character of an agent, the jury returned a verdict for the plaintiff, damages 800*l.*, but added, that they considered that there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he had done constituted a fraud in the legal acceptation of the term:—The Court refused to disturb the verdict. *Foster* v. *Charles*, 9 Law J. C.P. 32, s. c. 7 Bing. 164, s. c. 4 M. & P. 761.

In case, for a false representation of the solvency of A B, whereby the plaintiffs trusted him with goods; their declarations at the time, that they trusted him in consequence of the representation, are admissible in evidence for them.

An action commenced before 1st January 1829, but tried after that day, on such a representation, made by parol before the statute 9 Geo. 4. c. 14, is maintainable. *Fellowes* v. *Williamson*, 1 M. & M. 306. [Tenterden]

## FELONY.

[See FORFEITURE and MACHINERY.]

## FEOFFMENT.

Where a feoffment had indorsed upon it, a memorandum, stating that livery of seisin had taken place, and this was subscribed by a person as an attesting witness:—Held, that this person should have been called to prove the livery of seisin. *Doe d. Wilkins* v. *Marquis of Cleveland*, 8 Law J. K.B. 74, s. c. 9 B. & C. 864, s. c. 4 M. & R. 666.

## FINE OF LANDS.

(A) LEVYING, ACKNOWLEDGMENT, AND PASSING.
(B) EFFECTS.
(C) AMENDMENT.

### (A) LEVYING, ACKNOWLEDGMENT, AND PASSING.

The Court will not decree that which seems impossible; and it is more than doubtful whether the old law now prevails, by which a man was compellable to procure his wife to levy a fine. *Frederick* v. *Coxwell*, 3 Y. & J. 514.

Where a fine is covenanted to be levied to certain uses, it is competent to the parties, whilst it is directory, to vary the uses, but the uses must be varied by all the parties, and be an instrument of as high a degree as the former; and the fine ought to be levied to the same conusee; and, therefore, where a fine covenanted to be levied to certain uses was omitted to be levied, and several years afterwards a fine was levied by the same conusee, pursuant to a deed declaring other uses, and to a different conusee:—Held, that the fine operated to the uses of the latter deed, and not to the former. *Houghton* v. *Tate*, 3 Y. & J. 486.

The rule of court requires acknowledgments of fines in *Scotland* to be taken before advocates or writers to the signet; but, where the value of the property intended to pass was very trifling, and the deforciants very numerous, and all living at a great distance from any advocates or writers, the Court allowed a fine to pass which had been acknowledged before "gentlemen"—two, attornies of the sheriff's court, the third, a justice of peace and notary. *Hack, plaintiff, M'Gregor and nine others, deforciants*, 8 Law J. C.P. 108, s. c. 6 Bing. 353, s. c. 4 M. & P. 9.

Entries of fines levied, and an ancient deed, (not relating to the lands in question,) wherein was contained a covenant for further assurance, provided the party should not have to travel from the city of Bristol, unless to the castle of St. B for the purpose of levying a fine; evidence of reputation that St. B was a court having jurisdiction to take the acknowledgment of fines. *Goodtitle d. Bruine* v. *Dew*, Pea. A.C. 204. [Tenterden]

The Court refused to allow a fine to pass, where

the words "taken and received," were substituted in the caption for "taken and acknowledged." *Anon.* 9 Law J. C.P. 230.

Where one of two vouchees had become insane after he had executed the deed to lead the uses, but before the passing of the fine, and so remained,—The Court refused to allow the fine to pass as to the lunatic, but directed that it should be taken as to the other vouchee alone. *Ex parte Crooke*, 7 Law J. C.P. 46, s. c. 5 Bing. 176, s. c. 2 M. & P. 264.

Where more than twelve months had elapsed after the taking of the acknowledgment of the conusors, and one of them had died, the Court would not allow a fine to pass, unless it were shewn that the heir-at-law, or person beneficially interested, assented to the application. *Ball, conusor; Stevens, conusee*, 3 M. & P. 742.

Where one of the deforciants died after the acknowledgment, but before the perfecting of the fine, and upwards of twelve months had elapsed, the Court refused to allow the fine to pass, but left the parties to levy another. *Paul and another, plaintiffs; Stevens and wife, deforciants*, 8 Law J. C.P. 77.

Where, through the negligence of the attorney's clerk, a fine had been delayed beyond the proper time—the Court refused to allow it to be perfected. *Hooper, plaintiff; Green, deforciant*, 8 Law J. C.P. 269, s. c. 4 M. & P. 521.

The Court permitted a fine to pass as of Trinity term, 1807, on payment of the King's silver, upon an affidavit, that every previous step necessary to the perfecting the fine had been duly taken, but that the clerk to the solicitor had omitted to pay the King's silver, having absconded with the money, a fact of which the parties remained ignorant until within a few days of the present term. *Ash and wife and Watts, conusors; Gye, conusee*, 8 Law J. C.P. 63, s. c. 6 Bing. 275, s. c. 3 M. & P. 602.

(B) Effects.

A husband purchases an equity of redemption, with money advanced by his wife's sister of the half blood, and immediately afterwards settles it, subject to an annuity to the sister, on the wife in tail: after her death, the wife levies a fine on the lands:—Held, that the fine was valid and operative, and that the land did not come within the 11 Hen. 7. c. 20. *Watkins* v. *Lewis*, 8 Law J. Chanc. 115, s. c. 1 Tam. 147, s. c. 1 Russ. & M. 377.

A fine passed by a person who has a contingent remainder in fee, effectually passes his interest; because, although, until the contingency happen, it operates by estoppel only, yet, when the contingency has happened, it then operates upon the estate, as if the fine had passed after the happening of the contingency. *Doe* d. *Christmas* v. *Oliver*, 8 Law J. K.B. 137, s. c. 10 B. & C. 181.

The issue of tenant in tail (pending the lives of tenant for life and tenant in tail), made a conveyance and levied a fine with warranty, without proclamations. The estate tail afterwards fell upon the cognizor:—Held, that by force of the warranty, the estate tail was discontinued, and the issue of the cognizor was barred of his right of entry, on the cognizor's death. *Doe* d. *Thomas* v. *Jones*, 9 Law J. Exch. 179, s. c. 1 C. & J. 528, s. c. 1 Tyrw. 506.

Where a party is not in actual possession, and his right is disputed; and subsequently he is paid rent for the period during which his right was in dispute,—that subsequent acknowledgment of his right does not relate back so as to give effect to a fine levied by him, between the time of the dispute and the time of the receiving of the rent. *Doe* d. *Lidgbird* v. *Wilding*, 7 Law J. K.B. 119, s. c. 8 B. & C. 606, s. c. 3 M. & R. 114.

Where a younger son, who had lived with his father some years before his death, and managed his concerns, and had the superintendence of his property, entered on his fee-simple at his decease, and continued for several years in possession—claiming as heir to his father, on the ground of the illegitimacy of an elder son, and levied a fine:—Held, that the entry, possession, and fine did not bar the right of the eldest son to recover possession by ejectment, without an actual entry to avoid the fine. *Doe* d. *Davis* v. *Davis*, 12 Price, 756.

In a deed to lead the uses of a fine to be levied, the property was described as "all those several messuages, dwelling-houses, tenements, warehouses, shops, back houses, and all and singular erections and buildings whatsoever erected and built upon the said piece of ground." The fine was of thirty messuages, "forty cottages, and four acres of land." There were two or three cottages, and forty-nine dwelling-houses on the premises:—Held, that the fine was sufficient. *Doe* d. *Young* v. *Sotheron*, 9 Law J. K.B. 286, s. c. 2 B. & Ad. 628.

(C) Amendment.

The Court refused to allow a fine to be amended, where the affidavit of the commissioners taking the acknowledgment did not pursue the precise form provided by the rule of court of Easter term, 8 Geo. 4. *Anon.* 8 Law J. C.P. 197.

The Court permitted a fine to be amended by the insertion of parishes not named in the deed to lead the uses, the deed containing the general words, "or elsewhere in the county of S," and the closes in question being *named* in a schedule annexed. *Anon.* 8 Law J. C.P. 173.

The Court ordered the indentures of a fine to be made to correspond with the concord, by the insertion of certain limitations of legal estates, which the chirographer had omitted, thinking them unnecessary. *Butt, plaintiff; Noel and wife, deforciants*, 9 Law J. C.P. 118, s. c. 7 Bing. 338, s. c. 5 M. & P. 159.

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## FISHERY.

[1 Will. 4. c. 54, 8 Law J. Stat. 114.
[Amendment of acts for the encouragement of the Irish fisheries, 10 Geo. 4. c. 33, 7 Law J. Stat. 73.]

The defendant engaged the plaintiff as second mate of a vessel in the South Sea whale fishery; and the plaintiff was to have a forty-fifth share of the net produce. On the return of the ship, the defendant paid the plaintiff a sum of money, which he stated to be the forty-fifth share, after the customary deductions. No accounts were produced. The defendant afterwards discovered that several deductions had been made that were not authorized by the custom of the trade. Inquiries directed, whether the deductions made were authorized by the custom of the trade:—Held, that the bill having been filed by the plaintiff on behalf of himself and

[illegible] filed.

[illegible]

[illegible]

[illegible]

dified; and also was convicted in 10*l.*, on the sessed Tax Act, for so using a gun, not having a tificate. A issued warrants of distress, which re returned *nulla bona;* and he thereupon com- ted B for three months on the 5*l.* conviction. the 12th of September, he committed B again three months, on the 10*l.* conviction, without viously taking any other step to levy the penalty. An action was brought by B against A, for the ter imprisonment.

The conviction stated the offence to have been nmitted in the parish of S; but did not state that was in the district of P, for which A was therein ted to act as commissioner.

1. *Quære*—Whether the statute, in so giving the m, restricted the jurisdiction of the commissioner, the cognizance of offences, to those committed thin the district for which he acted, and which s denoted in the form of conviction.

2. *Quære*—Whether the conviction was bad for t shewing that the *locus in quo* the offence was nmitted, was within such district.

3. *Semble*—That it was quashable, unless the con- nitant public knowledge of A's appointment *nomi- tim* for the whole county by statute, could be im- rted into the conviction.

4. *Semble*—That, if such knowledge could be so pported, still, if the convicting jurisdiction of the nmissioner was limited, as mentioned in the first ery, the conviction was quashable, for not stating at the *locus in quo* was within that limit; unless at fact was necessarily implied in the words "duly nvicted"—which, *quære.*

5. *Quære*—Whether, until quashed upon appeal, stood valid for the magistrate's justification in his fence to the action.

6. *Quære*—Whether, for the purpose of such de- nce, the objection was cured by evidence, that the *cus in quo* stated in the conviction was, in fact, ithin the limited district therein stated.

7. *Quære*—Whether, in such a case, supposing e conviction to be quashable upon appeal, the aintiff ought to be nonsuited, or to have a verdict r two-pence damages.

8. *Quære*—Whether the words "duly convicted," the enacted form, comprehended the preliminary eps to the conviction, viz. the information, the mmons, and the appearance, so as to preclude the cessity of the magistrate adducing evidence of ose facts in his defence.

9. *Quære*—Whether, after the interval between e conviction and the second commitment, on the th of September, the magistrate, not having ad- dicated that imprisonment immediately on the turn of *nulla bona* in May, could issue such war- nt of commitment without fresh evidence of *nulla ona* at the time of and as a specific ground for such cond commitment.

10. *Quære*—Whether that objection was answered y evidence at the trial, that there were, in fact, no fects in September. *Dingsgale* v. *Clarke, Esq.* 8 aw J. M.C. 137.

On an indictment under the stat. 7 & 8 Geo. 4. . 29. s. 26, for killing a deer after a previous sum- mary conviction, a conviction by two Justices, of he previous offence, was put in:—Held, that such conviction was good. This conviction, in stating he offence, did not state the place at which it was committed; but the Justices, in awarding the dis- tribution of the penalty, awarded it to the overseers of D in the said county, "where the said offence was committed":—Held sufficient. *Rex* v. *Weale,* 5 C. & P. 135 [Park]

The buying of pheasants is, in all cases, prohi- bited by the statute 58 Geo. 3. c. 75; and conse- quently a contract for the sale of live pheasants, though for the purpose of breeding, is void. *Helps* v. *Glenister,* 7 Law J. K.B. 117, s. c. 8 B. & C. 553, s. c. 3 M. & R. 12.

In an indictment under the 9th Geo. 4. c. 69. s. 9. it was charged, that the defendants did, by night, unlawfully enter divers closes and inclosed lands, in the parish of W, in the occupation of E C; and, upon objection, that the description was not suffi- ciently certain, by reason that the names of the closes were not given, and that the indictment was accumulative, inasmuch as the being in either close was an offence:—Held, that the indictment, in this respect, was sufficient.

*Semble,* that, in such an indictment, the expression, "by night," is sufficient; and that the matter in section 12, which gives the definition of right, is matter of evidence, and not of statement.

But where the indictment charged that the defen- dants, "on the 17th day of December, &c., at &c., together did, *by night,* unlawfully enter, &c., *and were then* and *there* in the said closes and lands, armed" &c.:—Held, that the indictment was de- fective; inasmuch as the first member of the sen- tence did not describe the defendants to be armed; and that the second member did not state that the defendants were armed by night; both facts being necessary; and the expression "then and there" being considered as insufficient to connect the two members, so as necessarily to include the night, as the expression, in its ordinary reference, would point merely to the day and the place. *Davies* v. *The King,* 8 Law J. M.C. 49, s. c. 10 B. & C. 89, s. c. 5 M. & R. 78.

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## GAMING.

[*Taylor* v. *Willans,* 1 D. & C. A.C. 19, Dig. Law J. 252.]

The stat. 9 Anne, c. 14. makes void the securi- ties given for money lent at the time of play; but the money may nevertheless be recovered, in an ac- tion of assumpsit for money lent. *Leapridge* v. *King,* Pes. A.C. 32. [Kenyon]

If a jury be satisfied, upon all the facts, that several persons have been engaged in foul play, and have shared in the fruits of it, they are all liable to an action for money had and received, at the suit of the loser, although some of them may not have been actually present at the time of the play going on, by which the money was won. *Dufour* v. *Ack- land,* 9 Law J. K.B. 3.

A gambling debt secured by warrant of attorney, upon which judgment was entered up. The plain- tiff sold the debt to a third person, to whom the de- fendant, in answer to an inquiry by the buyer, said that he owed the money, and the debt would be paid; upon the faith of this, the buyer completed his purchase. Under these circumstances, the Court refused to set aside the judgment, except upon

equitable terms in favour of the buyer. *Davison* v. *Franklin*, 8 Law J. K.B. 376, s.c. 1 B. & Ad. 142.

## GAOLS.

[Reports respecting Gaols in Scotland, directed by 10 Geo. 4. c. 44, 7 Law J. Stat. 123.]

## GRANTS.

[See PEER.]

If the King makes a grant which cannot take effect according to its terms, it must be taken that he is deceived in his grant, and consequently, the grant is void. Where, therefore, an estate has been previously conveyed by lease, if the lease be not recited in the grant, the King has granted that which he cannot carry into effect. *Alcock* v. *Cooke*, 7 Law J. C.P. 126, s.c. 5 Bing. 340, s.c. 2 M. & P. 625.

In general, a grant which contains an exception, may be construed as intended to pass all which is not within the exception. But an exception cannot be so construed, as to enlarge the terms of the grant itself. Accordingly, the Crown, not being in general bound to pay toll or lighthouse dues, granted letters patent for erecting and maintaining a lighthouse, and for granting certain lighthouse dues payable from all ships which passed, "except ships of war belonging to the Crown":—Held, that as the grant alone, without the exception, would not have entitled the subject to demand the dues in respect of any ship of the Crown, the exception, which appeared to apply only to ships of war, could not so enlarge the terms of the grant itself as to render liable a ship belonging to the Crown, though not a ship of war. *Smithett* v. *Blythe*, 9 Law J. K.B. 39, s.c. 1 B. & Ad. 509.

W B about fifty years ago went, on the invitation of W P, whose daughter he had married, to live in the house of W P. The house was held by W P for a term determinable upon lives. W P died thirty-eight year ago intestate, leaving a widow, several sons, and a daughter, the wife of W B. No letters of administration to W P were ever taken out; but W B continued in possession of a part of the premises which he had in the lifetime of W P parted off; the sons taking possession of the other parts; and he and the sons paid the rent in shares; but the shares not bearing the same proportion to that of their shares of the father's property, in case there had been a legal distribution. One of the sons afterwards went away; and W P took possession of his portion, and paid his share of the rent:—Held, first, that this possession was not adverse; secondly, that no grant to W B could be presumed, as there had been no letters of administration, and there was no person who could legally make a grant. *Rex* v. *the Inhabitants of Okeford Fitzpaine*, 9 Law J. K.B. 32, M.C. 12, s.c. 1 B. & Ad. 914.

## GREENWICH HOSPITAL.

[Management of, 10 Geo. 4. c. 25, 7 Law J. Stat. 49.
[Management of Greenwich out-pensions transferred from the Treasurer of the Navy, 10 Geo. 4. c. 26, 7 Law J. Stat. 57.]

## GUARANTIE.

(A) CONSTRUCTION.
(B) NOTE OR MEMORANDUM WITHIN THE STATUTE OF FRAUDS.
(C) RIGHTS AND LIABILITIES.
(D) PLEADINGS AND EVIDENCE.

### (A) CONSTRUCTION.

[*Pemberton* v. *Oakes*, 4 Russ. 154, Dig. Law J. 233.]

The defendant gave the plaintiff a guarantie for five sacks of flour, to be delivered to a third person. This person complaining of the quality of the flour, a second parcel of five sacks was sent to him by the plaintiff; and, *three days afterwards*, three sacks and a half, the unconsumed portion of the *first five*, were returned to the plaintiff:—Held, that the second delivery was not a delivery under the guarantie. *Kay* v. *Groves*, 7 Law J. C.P. 9, s.c. 4 C. & P. 72, s.c. 6 Bing. 276, s.c. 3 M. & P. 634.

The defendant agreed to be answerable to the plaintiff, in a certain amount, for gold supplied to I S for the purposes of his trade. In the course of their dealings the plaintiff discounted bills for I S, giving him the amount partly in cash and partly in gold:—Held, that this was not a dealing within the meaning of the guarantie. *Evans* v. *Whyle*, 7 Law J. C.P. 205, s.c. 5 Bing. 485, s.c. 3 M. & P. 130, s.c. 1 M. & M. 468.

"I do hereby agree to guarantee the payment of goods to be delivered in umbrellas and parasols to J and E A S, according to the custom of their trading with you, in the sum of 200*l.*":—Held, a continuing guarantie. *Hargrease* v. *Smee*, 8 Law J. C.P. 46, s.c. 6 Bing. 244, s.c. 3 M. & P. 573.

The plaintiff gave the defendant promissory notes, and his cognovit for 500*l.* in full for all claims which the defendant as assignee of J I had against him. The defendant gave to the plaintiff a guarantie, by which, in consideration of the money so secured *to be paid* as aforesaid, he indemnified the plaintiff against all liabilities which he was under on account of J I:—Held, that the consideration for this guarantie was the *security*, and not the *payment* of the money expressed in the notes and the cognovit; and that, in an action on the guarantie, it was not necessary to aver that the money had been actually paid. *Ikin* v. *Brook*, 8 Law J. K.B. 379, s.c. 1 B. & Ad. 124.

### (B) NOTE OR MEMORANDUM WITHIN THE STATUTE OF FRAUDS.

The plaintiff being about to take one J C into his service, the defendant gave him the following guarantie, viz.—"I do hereby agree to bind myself to be security to you for Mr. J C, late in the employ of Mr. P, for whatever (while in your employ) you may intrust him with, to the amount of 50*l.*; in case of any default, to make the same good:"—Held, that, by fair implication, this agreement disclosed a sufficient consideration for the defendant's promise.

*Newberry* v. *Armstrong*, 8 Law J. C.P. 4, s. c. 6 Bing. 101, s. c. 3 M. & P. 509, s. c. 4 C. & P. 59.

Undertaking in these words—"R *v.* A—We jointly and severally submit, undertake and agree to pay to C the debt and full costs in this action, provided, on or before the 1st of January next, 19*l.* be not paid to the said C as the attorney for the plaintiff," (signed by defendant and surety):—Held, that no consideration appeared, so as make it a sufficient agreement to pay the debt of another, to satisfy the Statute of Frauds. *Cole* v. *Dyer*, 9 Law J. Exch. 109, s. c. 1 C. & J. 161, s. c. 1 Tyrw. 304.

### (C) Rights and Liabilities.

Where a guarantie was for "the payment of any debt which A may contract to any amount not exceeding 400*l.*"—and A failed, being indebted 625*l.* in respect of which the creditor received 8*s.* 7*d.* in the pound from his estate:—Held, that the surety was only liable for the remaining 11*s.* 5*d.* in the pound on the 400*l.* *Bardwell* v. *Lydall*, 9 Law J. C.P. 148, s. c. 7 Bing. 489, s. c. 5 M. & P. 327.

A person indemnified cannot charge the person indemnifying with the costs of defending an action for a debt clearly due, unless authorized by him to defend. *Gillett* v. *Rippon*, 1 M. & M. 406. [Tenterden]

A promise made by one co-surety to another, to indemnify him in consideration of his joining him as a surety, is not a promise within the Statute of Frauds, so as to require a written undertaking.

Nor, *semble*, is any promise to indemnify a person in consideration of his becoming surety, a promise within the statute. *Thomas* v. *Cooke*, 7 Law J. K.B. 9, s. c. 8 B. & C. 728.

The plaintiff being sued by his vicar for tithes, and having defended the suit for some time at the instance of the other occupiers of land in the parish, was about to relinquish the defence, when the defendant promised to indemnify him from the costs incurred and to be incurred, if he would allow the cause to proceed:—Held, that this was not an agreement for the debt, default, &c. of another, within the Statute of Frauds. *Adams* v. *Dansey*, 8 Law J. C.P. 165, s. c. 6 Bing. 506, s. c. 4 M. & P. 245.

### (D) Pleadings and Evidence.

The plaintiff declared, that, in consideration that he would defend any action that might be brought against him, on account of certain money which he had delivered to the defendant, the latter promised to indemnify the plaintiff from the consequences of the action; that an action was brought, and that judgment was recovered therein against the plaintiff for 42*l.* 15*s.*, and a *ca. sa.* issued, under which the plaintiff was taken into custody, and paid that sum in order to procure his discharge. The defendant took out a summons to stay proceedings upon payment of 42*l.* 15*s.* and costs. At the trial, the *ca. sa.* was not produced, but evidence was given of the arrest and discharge of the defendant. The jury gave a verdict for the plaintiff for 42*l.* 15*s.*, and also a further sum of 23*l.* 15*s.* by way of damages for the imprisonment.—The Court ordered the verdict to be reduced by the latter sum, and held, that the plaintiff was entitled to recover the former, either under the special count, or under the count for money paid. *Williamson* v. *Henley*, 8 Law J. C.P. 82, s. c. 6 Bing. 299, 3 M. & P. 731.

Letter of guarantie to plaintiff, by defendant, that P C shall "faithfully and honestly discharge any duty assigned to or trust reposed in him." Plaintiff, upon receiving this, employs P C as his agent. Sufficient consideration appears on the face of the guarantie to bind the defendant. Plaintiff, in an action against the surety, shews that he employed the agent first at B, and afterwards at L; and that the agent, when removed to L, was indebted to him in a considerable balance; and produces accounts which bear on the face of them, that various sums remitted by the agent from L, were so remitted as the proceeds of sale made at L:—Held, that the Judge was not bound to direct the jury, as matter of law, that they must consider the remittances from L to be made in discharge of the balance due at B, so as to relieve the surety from his liability; but that he was right in leaving the question to the jury on the whole matter in evidence. *Lysaght* v. *Walker*, 2 Dow. & C. A.C. 211.

## GUARDIAN AND WARD.

A gift by a ward to her guardian, shortly after her attaining her majority, will be set aside by a court of equity. *Faulkner* v. *Salmon*, 9 Law J. Chanc. 155.

The Court will make an order for appointing a guardian and allowing maintenance, upon petition, without bill, where the infant's income does not exceed 300*l.* a year. *Ex parte Lakin, in re Lakin*, 4 Russ. 307.

*Semble*—that the guardian of a minor instituting a suit cannot be condemned in the costs incurred, after a proxy has been exhibited, for the party then become of full age. *Green* v. *Proctor and Newry*, 1 Hag. Ec. 337.

## HABEAS CORPUS.

A prisoner in custody for high treason cannot be brought into court by *hab. corp. ad test.* *Langston* v. *Cotton*, Peo. A.C. 21. [Kenyon]

If, upon a return to a *habeas corpus cum causâ*, the proceedings in the inferior court shew matter against the defendant, part of which is within, and part not within its jurisdiction, the Court above will not, on that account alone, refuse a *procedendo*; but will leave the defendant to his remedy, by writ of error, in case the inferior court should proceed to judgment upon the matter which is not within their jurisdiction. *Clarke* v. *Denton*, 8 Law J. K.B. 333, s. c. 1 B. & Ad. 92.

## HACKNEY CARRIAGES.

[Laws relating to, amended by 1 & 2 Will. 4. c. 22, 9 Law J. Stat. 26.]

## HAWKERS AND PEDLARS.

[Collection of Duties on, placed under the Commissioners of Stamps, 1 & 2 Will. 4. c. 22, 9 Law J. Stat. 26.]

[illegible]

[illegible] within section 23 of [illegible] Act, a person carrying the [illegible] to the neighbouring towns [illegible] by [illegible] without a licence. [illegible] 10 B. & C. [illegible].

[illegible] mercers and pedlars does [illegible] having and selling against the provisions [illegible] by a corporation. *Simmons* [illegible] M. & S. 120, s. c. 2 B. & Ald. 543.

## HAYMARKET.

[illegible] 14, 8 Law J. Stat. 15.]

## HEIR.

[*Hayes* v. *Hayes*, 4 Russ. 311; Dig. Law J. 258.]

[illegible] statute of 3 & 4 W. and M. c. 14, where, [illegible] action of debt on specialty against the heir, [illegible] *per descent*, and plaintiff replies assets [illegible] before action; if the issue is found for [illegible] the jury are to inquire of the value of [illegible] descended. The jury having found for the [illegible] without inquiring of the value of the land [illegible], the verdict was held imperfect, and a [illegible] ordered. *Brown* v. *Shaber*, 9 Law J. [illegible] 120, s. c. 1 Tyrw. 400, s. c. 1 C. & J. 383.

[illegible] of freehold estates, and of customary [illegible], which were not devisable, made a voluntary surrender of the latter to B in fee, in trust, as [illegible] for A; and, after his death, for the purpose of his will: but B executed no declaration [illegible]. A made a general devise of all his real [illegible] and, after A's death, B was admitted [illegible] as a trustee for the devisees, and [illegible] a customary heir. *Wilson* v. *Dent*, 3 Sim. 82.

Where a [illegible], or any part of it, of an inheritable [illegible] remains unpaid, and is made, by the [illegible], a burden on the estate till paid, the [illegible] that part of it which remains unpaid, and [illegible] a burden on the estate, does not go to the [illegible] or administrator, but remains heritable, [illegible] to the heir-at-law. *Mackenzie* v. *Anderson*, 2 Jurr. N. S. A. C. 60.

The heir-at-law entitled to his costs from the [illegible], who may be reimbursed out of the fund in [illegible] without prejudice to the costs of the administration. *Wilsey* v. *Hicks*, 1 Tam. 475.

An heir-at-law, questioning the sanity of his ancestor, [illegible] to an issue *devisavit vel non*; and, if he fails in the issue, will not be compelled to pay costs, if the circumstances justified him in trying the issue, but costs will not be allowed to him. *Shaw* v. *Jeffrey*, 3 Y. & J. 278.

If an heir-at-law, alleging insanity in a devisor, fails in his suit against the devisees, and he fail in the issue *devisavit vel non*, he shall pay the costs of the issue, but not the costs of the suit, unless he might have asserted his claim by ejectment; and then his suit will be deemed vexatious, and he will be ordered to pay the costs of it. *Scaife* v. *Scaife*, 4 Russ. 309.

## HIGHWAY.

(A) Constitution and Dedication.
(B) Surveyors.
(C) Commissioners and Trustees.
(D) Reparation.
(E) Stopping, changing, and diverting.

[See also Driving, Tolls, and Way; and Stat. 1 & 2 Will. 4. c. 43, 9 Law J. Stat. 81, amending the Laws concerning Turnpike Roads in Scotland.]

### (A) Constitution and Dedication.

Upon the trial of an issue directed to try whether, for forty-six years prior to 1822, there existed a public foot road from G to C, it was proved that,

rom the year 1755 to 1789, the road was used by he public without interruption; and that stiles had, n 1789, been placed in the fences, by the owners f the land over which the road passed. From the ear 1797 there were frequent interruptions, down o the date of the trial. The Judge, at the trial, irected the jury, that the interruptions proved ere not sufficient to defeat the right in the public o the footway in question; which right must, in he evidence, be presumed to have been established, y having been used for forty years and upwards rom the date of the interruption, as stated in the ssue. Upon a bill of exceptions to this direction,—eld, that on proof of thirty-four years uninterrupt-d exercise of the right, it was competent for the ury to presume, and that they might in point of aw be directed to presume, an enjoyment corre-ponding with the manner in which the road had een enjoyed during the thirty-four years, esta-lishing, according to the law of Scotland, a pre-criptive right of way. *Harvie* v. *Rogers*, 3 Bligh, n.s. 440.

### (B) Surveyors.

Where a parish consisted of two townships, for ach of which, as long as living witnesses could rove, there had been separate surveyors of high-ways, separate rates for the repairs, and separate ccounts, at the examination of which both sets f the inhabitants attended; but on such occasions here had been an appointment of two surveyors for he parish at large, in order to save expense:—Held, that this was evidence of immemorial exist-nce of separate townships, and that separate sur-eyors should be appointed.

*Semble*—that in such a case, an indictment would ie against either, separately, for non-repair of its wn road. *Rex* v. *the Inhabitants of King's Newton*, 9 Law J. M.C. 54, s. c. 1 B. & Ad. 826.

*Semble*—That a surveyor of highways cannot maintain an action against the late surveyor for the alance remaining in his hands; the proper remedy eing by proceeding for the penalty under 13 Geo. 3. . 78. s. 48.

But, even if such an action is at all maintainable, t cannot be brought until the accounts have been ettled and allowed, or disallowed, in the manner ointed out by the above act. *Heudebourck* v. *Lang-on*, 8 Law J. M.C. 134, s. c. 10 B. & C. 546.

An action against a surveyor of the highways for idening the road, and thereby taking away a part f the land of the person whose land adjoined, must e brought within three months from the time of he act done, according to the 13 Geo. 3. c. 78. s. 81; nd the mere *continuing* of the land separated from he rest of the owner's land, is not an *act* for which e can maintain an action against the surveyor, fter the expiration of three months from the ori-inal separation. *Wordsworth* v. *Harley*, 9 Law J. M.C. 50, s. c. 1 B. & Ad. 391.

### (C) Commissioners and Trustees.

[*Rex* v. *Rogers*, 2 M. & R. 289, Dig. Law J. 260.]

Where, upon the diversion of a turnpike road, fter the new road had been completed, but before he old road was stopped up, the trustees, by the ermission of B, broke down his fence to make a passage from the new road to the close of A, but did not put up a gate or fence to protect the latter close:—Held, that the trustees were wrong-doers, and that B was responsible for their acts. *Winter* v. *Charter*, 3 Y. & J. 308.

By the general Turnpike Act, 3 Geo. 4. c. 126. s. 65, it is provided, that no trustee of any turnpike road shall enjoy any office or place of profit under any act in execution of which he shall have been appointed; and that, if any such trustee shall hold any such office, without having first resigned his office of trustee, he shall forfeit 100*l*., and shall be incapable of acting as a trustee of any turnpike road.

A trustee under a local act was appointed treasurer, and continued to hold both offices. There was no salary attached to the latter. The trustee executed the office by deputy; the deputy being an attorney, who received and paid all the money, and who mixed the money and used it in common with his own. He occasionally assisted his clients with loans of money. There was always a balance in the hands of the deputy in favour of the trust; but the trustee himself did not derive any benefit from the office.

In an action against the trustee, under the above statute, the Court were of opinion, that if the office in question were an office of profit, it was immaterial whether the trustee himself derived the profit or not; and that the question, whether the office was an office of profit, was a question for a jury. The jury having found that the office was an office of profit, and that profit was made of it, the defendant was held liable. *Delane* v. *Hillcoat*, 8 Law J. K.B. 4, *ib.* M.C. 41, s. c. 9 B. & C. 310, s. c. 4 M. & R. 175.

### (D) Reparation.

The inhabitants of a parish are not bound to the repair of a way used by the public and repaired by the parish for more than twenty years, if there be no owner who could dedicate the way to the public, and the repairs by the parish be shewn to have been begun and continued under a mistaken notion of the liability of the inhabitants to repair. The inhabitants are bound by such repairs, if made with full knowledge of the facts, and with the intention of taking upon themselves the public duty.

*Semble*—that roads set out under an inclosure act do not, by presumption of law, belong to the adjoining owners. *Rex* v. *the Inhabitants of Edmonton*, 2 M. & M. 24. [Tenterden]

Whether a parish is liable to repair a road which has been dedicated by the owner of the soil to the public, and has been used by the public generally, except by the inhabitants of the parish in which it is situated, and who have not adopted it—*quære*.

Where a local act provided that the parish should not be liable to the repair of any highway not repaired by the parish before the passing of that act, until it had been first surveyed by two surveyors, one to be chosen by the parish vestry,—and it appeared that a road had been set out by certain individuals for the purpose of forming a street, but the street had been but partially formed, and the chief part of the buildings was only in progress,—the Court, in the exercise of its discretion, refused to grant a mandamus to the vestry, commanding them to appoint a surveyor on their part; to survey

the road. *Rex* v. *the Vestry of the Parish of Paddington*, 8 Law J. M.C. 4, s. c. 9 B. & C. 456.

Where a road has been made under a turnpike act, which act is afterwards repealed, the road ceases to be a public highway; and the public are not bound to repair it. *Rex* v. *Mellor*, 8 Law J. M.C. 109, s. c. 1 B. & Ad. 32.

An indictment for non-repair of a road or bridge on a liability *ratione tenuræ*, cannot be sustained where it appears that the tenement on which the liability is charged originated within time of legal memory. On such an indictment, parishioners are admissible witnesses for the prosecution. *Rex* v. *Hayman*, 1 M. & M. 401. [Tindal]

The lessee for years, or other person receiving the benefit of tithes, is liable, in respect of them, to the highway rates, although he compound with the tithe-payers for the amount, and the tithe is not, in fact, severed. *Chanter* v. *Glubb*, 9 B. & C. 479, s. c. 4 M. & R. 334.

Whether a public carriage highway can be only partially diverted, leaving it still open to the public as a footway—*quære*.

The order of Justices, diverting a public highway, must shew, on the face of it, not only that the proposed substituted highway is commodious, but also that the public right of passage over it will be as permanent as that which they have over the old highway.

Accordingly, where such a substituted highway was, in part, over a turnpike road, made under a local act, the provisions of which did not distinctly appear to be permanent,—the Court held the order of the Justices to be bad. *Rex* v. *Winter*, 7 Law J. M.C. 15, s. c. 8 B. & C. 785.

Where it is proposed to divert a road, and the land through which the old road runs, as well as that through which the proposed new road is to run, belongs to the same person, whether the order of the Justices under the 13 Geo. 3. c. 78. ss. 16, 17, and 21, and 55 Geo. 3. c. 68, may direct an exchange of the old for the new road, or whether it must direct a sale of the old road—*quære*.

Where it is proposed to divert a road, communicating at different points with several other roads —*semble*, that each point forms a road, and that there should be separate orders for each point of the road.

Where an order for diverting a road directed that it should be stopped up, but did not shew on the face of it, that the proposed new road was fit for the reception of travellers, the order was held to be bad.

Where such an order did not state that the Justices had viewed the course of the proposed new road, the order was held to be bad. *Rex* v. *the Justices of Kent*, 8 Law J. M.C. 73, s. c. 9 B. & C. 477.

By the general Highway Act, 13 Geo. 3. c. 78. s. 64, the Court before which any indictment for non-repair of a road is tried, may award costs to the prosecutor if the defence appear to have been frivolous, or to the defendant if it appear that the prosecution was vexatious. This section applies only to cases tried in the ordinary course; and where, on an indictment removed by the defendant by *certiorari*, the Court above had ordered a new trial, and the prosecutor's costs of both trials to abide the event,—it was held, that this special rule took away the authority of the Judge to certify in favour of the defendant. *Rex* v. *the Inhabitants of Salwick*, 2 B. & Ad. 136.

An issue upon an alleged custom to take shingle from the sea beach to amend the highways of the parish, is not such a matter relating to the rates and cesses of the parish, within the meaning of the 54 Geo. 3. c. 170. s. 9, as to render inhabitants who are liable to the highway rate competent witnesses by means of the statute in favour of the alleged custom. *Oxenden* v. *Palmer*, 9 Law J. K.B. 238, s. c. 2 B. & Ad. 236.

(E) Stopping up, changing, and diverting.

[See *Wilkinson* v. *Bagshaw*, Pea. A.C. 165.]

An order of justices for diverting a highway, and stopping up a part of it, described the highway by *termini*, and by reference to a plan. The part to be stopped up was described as so many yards of the said highway, lying between certain letters on the plan, and coloured blue. Notice was published (pursuant to the statute 55 Geo. 3. c. 68.) of the order having been made, but the notice had no plan annexed, and merely described the road by *termini*, and the part to be stopped up as so many yards of such road:—Held, (Littledale J. *dubitante*,) that the order explained by a plan annexed, was good; but, (*per totam Curiam*,) that the notice was insufficient. *Rex* v. *Horner*, 2 B. & Ad. 150.

Where an order is made under the 55 Geo. 3. c. 68. s. 2, not for diverting or turning, but for entirely stopping up a footway, as unnecessary,—it is not requisite to direct that the footway so stopped up should be sold. *Rex* v. *Glover*, 9 Law J. M.C. 58, s. c. 1 B. & Ad. 482.

Where it is proposed to stop up a road under the authority of the general Turnpike Act, 3 Geo. 4. c. 126, and the site of the new road is taken by the trustees in exchange for that of the old, it is not necessary that there should be any formal conveyance made to the trustees of the site of the new road. *Pott and Allnutt* v. *Pott*, 8 Law J. M.C. 151, s. c. 1 B. & Ad. 302.

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## HORSE-RACE.

The clerk of the course at a race cannot bring actions for unpaid stakes. Nor can he set off a claim of an unpaid stake, due from the plaintiff on one race, against a stake of another race, won by the plaintiff's horse. *Charlton* v. *Hill*, 5 C. & P. 147. [Patteson]

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## HUNDRED.

Under the Black Act, 9 Geo. 1. c. 22, where a barn which was the property of the landlord, and the corn contained therein the property of the tenant, was maliciously set fire to and burnt; the hundred were held liable to the extent of 200*l.*, to both parties injured. Notice given by a servant of the tenant, as such servant, is sufficient, in order to support an action by the landlord also. *Adderley* v. *Hundred of Offlow, North*, Pea. A.C. 206.

A person who was not the occupier, but was en-

titled to the reversion, of premises feloniously set on fire, held entitled to recover damages against the hundred under 9 Geo. 1. c. 22. And *semble*, that the occupier might also maintain an action; each party recovering not more than 200*l*.

Where the fire took place on Saturday, and the notice directed by the above act was given on Monday:—Held, that the notice was properly given within "two days" after the damage, as required by the statute.

Where the person entitled to the reversion had no servant in the care of the premises on his behalf:—Held, that he was the proper person to give in the examination required by the above act, although he was not on the spot at the time of the fire.

Where the person who gives in such an examination has, at the time, a suspicion of a particular individual, but does not *know* who is the person who committed the offence, it is not necessary for him to state in his examination, his suspicion of that individual. *Pellew* v. *Hundred of Wonford*, 7 Law J. K.B. 148, *ib.* M.C. 84; s. c. 9 B. & C. 134; s. c. 1 M. & R. 130.

Where the owner of property destroyed by malicious fire, gives in his examination on oath, under statute 9 Geo. 1. c. 22, it is not necessary, in order to enable the owner to recover against the hundred, that any other person should do so.

The provision, that the servants having the care of the premises shall do so, only applies to cases where the owner is away, and has no personal superintendence of the premises; not in cases where he merely happens to be absent at the instant the fire happens. *Rolfe* v. *the Inhabitants of Elthorne*, 2 M. & M. 185. [Tenterden]

It is not a "beginning to demolish" a house, within the meaning of the stat. 7 & 8 Geo. 4. c. 30. s. 8, unless the jury be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into full effect, they would, in point of fact, have demolished it. *Rex* v. *Matthew Thomas*, 4 C. & P. 237. [Littledale]

The party robbed, a competent witness in an action against the hundred. *Porter* v. *the Hundred of Regland*, Pea. A.C. 203. [Chambre]

## IDIOT.

[See LUNATIC.]

## INCEST.

In a criminal suit for incest, instituted under circumstances indicative of vindictive feeling, sleeping in the same room (conduct which the parties proceeded against had been allowed, without objection or complaint, to continue for thirteen years,) though attended by other facts, inducing a strong presumption of guilt, is not sufficient proof of the offence; and the Court, unless most stringent and conclusive evidence be produced, will dismiss the parties, but give no costs. *Griffith* v. *Reed*, 1 Hag. Ec. 195.

## INCLOSURE.

A person had an expectant life-estate in a tenement to which there was a right of common. An inclosure act passed, giving the usual powers to the commissioners to make allotments; declaring that persons should claim before them within a limited time; and that their award should be final. By one of the clauses, it was provided, that the allotments should remain to the same uses and purposes as the tenements. The person having the expectant life-interest made claim before the commissioners in his own name, and they allotted to him, in respect of the tenement, according to his right and interest:—Held, that his claim must be taken to apply only to his interest; and that those who were entitled at his death to the tenement, were also entitled to the allotment, although they made no claim before the commissioners; the claim being considered as made on behalf of, and the allotment as made to, all persons interested, according to their several interests. *Doe* d. *Sweeting* v. *Wellard*, 7 Law J. K.B. 79, s. c. 9 B. & C. 789, s. c. 4 M. & R. 736.

An inclosure act gave the commissioners a power to exchange, directing the exchange to be ascertained, specified, and declared in their award; the consent to the exchange to be by the parties in writing. The award professed to give effect to an exchange, describing part of the subject-matter of the exchange, as "an old inclosure" within the manor; but giving no further description; and the award did not state that this was effected in pursuance of consent, according to the terms of the exchange clause:—Held, that a person who offered for sale an allottment made under this exchange, could not make out a good title. *Wingfield* v. *Tharp*, 8 Law J. K.B. 318, s. c. 10 B. & C. 785.

Under an inclosure act an allotment was made to J R in respect of certain lands. After the allotment, but before the award of the commissioners, the lands in question were conveyed by J R to trustees for the payment of debts and incumbrances:—Held, that the allotment, though not mentioned in the conveyance, passed with the lands in respect of which the allotment was made. *Doe* d. *Dixon* v. *Willis*, 7 Law J. C.P. 170; s. c. 5 Bing. 441, s. c. 3 M. & P. 24.

By an inclosure act, the commissioners were empowered to award to the owners of commonable messuages or cottages a new right of common in lieu of their ancient right; their award to be final, unless the parties objecting should within three months cause an action to be brought upon a feigned issue:—Held, that the time so limited being suffered to elapse, the new right created by the award could not afterwards be called in question. *Phillips* v. *Maile*, 9 Law J. C.P. 9, s. c. 7 Bing. 133, s. c. 4 M. & P. 770.

Where parties had been in possession under allotments in pursuance of an inclosure act for upwards of twelve years, without any occupation road being set out for those allotments, the Court refused to grant a mandamus to the commissioners to set out a road, although the award had not been made; the Court being of opinion that the application was too late. *Rex* v. *the Commissioners under the Cockermouth Inclosure Act*, 9 Law. J. K.B. 38; s. c. 1 B. & Ad. 378.

The clause in inclosure acts, which directs the commissioners annually to pass their accounts, is directory only; and the circumstance of their having neglected their duty in this respect, does not

render void their warrant of distress, for a part of by-gone sums unaccounted for. The remedy against them, is to be sought by appeal, or by application to the Court for a mandamus commanding them to pass their accounts. *Smith* v. *Jones*, 8 Law J. K.B. 402, s. c. 1 B. & Ad. 328.

By a local Inclosure Act it was provided, "That whenever the office of a commissioner should become vacant, the lord of the manor, with the major part, in value, of the proprietors of lands and common rights in the parish (such value to be ascertained according to their respective assessments in the last rate made for the relief of the poor in the said parish,) present at a public meeting, should elect another." And by another clause, "That out of the lands to be allotted, the commissioners should allot a part, in their judgment sufficient, when sold, to defray the expenses of carrying the act into effect; and if it should prove insufficient, the deficiency should be made up by the persons interested in the lands to be inclosed, and should be paid in such proportion, and at such times, as the commissioners should direct." And by another clause it was enacted, "That the commissioners should, once a year, lay their accounts before a Justice of the Peace, and get them allowed by him; and that no charge or item in such account should be binding on the parties concerned, or valid in law, unless the same should have been duly allowed by such justice;" and an appeal was given against the accounts or rates to be made by the commissioners.

The office of commissioner having become vacant, a new one was elected by the lord of the manor, and the major part, in value, of the proprietors of lands, at a public meeting. No one there disputed that he had such majority; but no reference was made to the poor rates:—Held, that nevertheless the appointment was valid.

The commissioners having set apart and sold a portion of the lands to be allotted, in order to defray expenses, found that there was a deficiency, and made a rate upon the parties interested, in order to provide for that deficiency. One of these parties having refused to pay:—Held, that the commissioners might bring ejectment under the 29th section of the General Inclosure Act, 41 Geo. 3. c. 109, to recover the land allotted to him, in respect of which the rate was imposed.

The commissioners, instead of laying their accounts before a Justice annually, had done so only twice in fourteen years, and had not done so for several years before the rate was made; but there never was an appeal against the accounts or the rate:—Held, that the commissioners had power to make such rate, notwithstanding their neglect in passing their accounts. *Doe* v. *Bodenham*, 9 B. & C. 495.

## INDEMNITY.

A gave B authority to distrain on the goods of C, and gave him an indemnity against all costs and charges, that he might be at "on that account." B made the distress, and his men being told by the son of C, that a certain cask contained spent liquor of no value, they took the cask to pieces, and let the liquor run off. It was in fact cochineal dye belonging to D; for the wasting of it D recovered damages against B, in an action of trover:—Held, that B could not recover the amount of those damages from A, in an action on an indemnity, and that such an indemnity would only apply to cases where a distress was illegal, because the landlord had no right to put in such distress. *Draper* v. *Thompson*, 4 C. & P. 84. [Tindal]

## INDICTMENT.

[See SHEEP-STEALING.]

Counsel are not allowed to argue at length at Nisi Prius, the invalidity of an indictment, for the purpose of inducing the Court to refuse to try it. *Rex* v. *Abraham*, 2 M. & M. 7. [Tenterden]

A person whose land is occasionally liable to injury by the overflow of river water, has no right, in his mode of protecting himself against that injury, to produce injury or damage to his neighbours in respect of the course of the same water. *Rex* v. *Trafford*, 9 Law J. K.B. 72, s. c. 14 M.C. 66, s. c. 1 B. & Ad. 374.

*Semble*, that a count for robbery, and for an assault with intent to rob, ought not to be joined in the same indictment. If they are joined, the prosecutor must elect on which the case is to go to the jury. *Rex* v. *Gough*, 2 M. & M. 71. [Park]

Where an indictment states facts which constitute an offence in point of law, the unnecessary addition of other facts will not vitiate the indictment, although the jury expressly negative those unnecessary facts. Accordingly, by stat. 9 Geo. 4. c. 41. s. 30, it was provided, that if any person knowingly, and *with intention to deceive*, gave a certain certificate therein mentioned, he should be deemed guilty of a misdemeanor. In the concluding part of the same section, it was provided, that if any physician, surgeon, or apothecary, should sign any such certificate without having visited and personally examined the individual to whom it related, he should be deemed guilty of a misdemeanor. In an indictment against a surgeon upon the latter branch of this section, it was, in addition to the necessary facts, unnecessarily stated, that the defendant gave the certificate *with intention to deceive*. The jury found the defendant guilty, but negatived the alleged intention to deceive. Held, that this was a good indictment, and judgment was given upon the conviction. The principle above laid down, applies equally to cases where the offence charged is an offence at common law, as where it is created by statute. *Rex* v. *William Jones*, 9 Law J. M.C. 98, s. c. 2 B. & Ad. 611.

If a parish be partly situate in the county of W, and partly in the county of S, it is sufficient, in an indictment for larceny, to state the offence to have been committed "at the parish of H, in the county of W." *Rex* v. *Perkins*, 4 C. & P. 363. [Park]

Where, under a statutable offence, time is material, the time stated in the indictment must, in arrest of judgment, be taken to be the true time, without substantive averment. Thus, where a statute made it penal to exhibit lights to persons at sea, within a particular half of the year, an allegation that the party exhibited lights on a particular day in a particular month, within that half year, is sufficient. *Rex* v. *Brown*, 2 M. & M. 163. [Littledale]

An indictment for stealing a bank note did not conclude *contra formam statuti*:—Held, by the fifteen Judges, that it was bad. *Rex* v. *Pearson*, 5 C. & P. 121.

A box belonging to a benefit society, was stolen from a room in a public house. Two of the stewards had keys of this box; and, by the rules of the society, the landlord ought to have had a key, but in fact he had not:—Held, that the prisoner might be convicted on a count, laying the property in the landlord alone. *Rex* v. *Wymer*, 4 C. & P. 391. [J. Parke]

An indictment for the publication of the following paper—"Will you, farmers and parsons, pay us better for our labour?—If you won't, we will put you in bodily fear.—*Swing*."

The indictment charged the intention to be, to disturb the peace; and it charged a publication generally, without saying to farmers, clergymen, or labourers:—Held, sufficient. *Rex* v. *Savill*, 9 Law J. M.C. 118.

A prisoner indicted for stealing two heifers, said, "I drove away two heifers from the World's End Dolver," (*i. e.* Fen). The prosecutor's farm was called by that name, but he could not swear that there was not any other of the same name in the neighbourhood:—Held, insufficient to warrant a conviction. *Rex* v. *Tuffs*, 5 C. & P. 167. [Lyndhurst]

A prisoner was indicted for night poaching; and it was proposed to shew, that on the occasion in question, one of the prosecutor's game-keepers had lost his coat, and that it was found in the prisoner's house. There was another indictment against the prisoner for stealing the coat:—Held, that this evidence was inadmissible, unless the prosecutor consented to an acquittal on the indictment for the larceny. *Rex* v. *Westwood*, 4 C. & P. 547. [Patteson]

On an indictment for felony, a matter, which was the subject of another indictment for felony, was material to be given in evidence, as it formed a part of the facts of the case. The Judge received the evidence, and did not direct the second prosecution to be abandoned. *Rex* v. *Salisbury*, 5 C. & P. 155. [Patteson]

*Semble*, that if a person be tried at the assizes, on an indictment removed by *certiorari*, the Judge would, under very special circumstances, receive affidavits in mitigation, before he proceeded to pass sentence, under the stat. 1 Will. 4. c. 70. s. 9, but not in ordinary cases. *Rex* v. *Cox*, 4 C. & P. 538. [Patteson]

After conviction for a misdemeanor, the defendant, upon writ of error, objected that the verdict, at the time it was given, was not entered of record: Held to be no objection; first, because the verdict could not be entered on the record until after it had been given; secondly, that there was no necessity to enter it on record immediately after it had been given, the minute of the officer being sufficient for the temporary purpose, until the record was formally made up.

It was also objected, that there was but one of the Justices named in the commission present at the time of the giving of the verdict, the presence of two being necessary by the commission:—Held, that the defendant could not take this objection upon writ of error, in contradiction to the record as returned to the court of error. Held also, that both the above objections upon assignment of error were well answered by the common joinder in error, *in nulle est erratum*, which, although in point of law in the nature of a demurrer, is only an admission of such facts as it is competent for the other party in point of law to assign as error. *Rex* v. *Richard Carlile*, 9 Law J. K.B. 250, s. c. 2 B. & Ad. 362.

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## INFANT.

(A) Rights and Incapacities.
(B) Liabilities.
(C) Maintenance.
(D) Actions and Suits by and against.

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### (A) Rights and Incapacities.

[See 1 Will. 4. c. 65, 8 Law J. Stat. 134.]

A copyholder covenants to surrender to trustees in trust to sell, and dies before surrender, leaving an infant heir; the covenantees agree to sell the estate, and afterwards file a bill for a specific performance:—Held, that the heir is not an infant trustee within 6 Geo. 4. c. 74, and therefore cannot be ordered to surrender immediately; and the bill was dismissed with costs. *King* v. *Turner*, 2 Sim. 549.

A master advanced money to his female servant, who was under age, for her to purchase a silk dress and other articles not necessary for her:—Held, that these advances formed no defence to an action for her wages.

Payments made to an infant, on account of wages due to her, for her to purchase necessaries, are valid payments.

Money paid by a master for coach fares for the mother of his servant, who was under age, cannot be deducted from the wages of the servant.

The statement of an account by an infant, is not binding on the infant. *Hedgley and Wife* v. *Holt*, 4 C. & P. 104. [Bayley]

Though an infant who has entered into a contract, cannot be compelled to complete it, yet he cannot maintain an action to recover back a deposit. *Wilson* v. *Hearse*, Pes. A.C. 196. [Kenyon]

An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. *Flight* v. *Bolland*, 4 Russ. 298.

The testamentary guardians of an infant sold part of his estates, for the purpose of redeeming the land-tax, under the provisions of the act, 38 Geo. 3. c. 60, by which, in cases of sales of estates of infants, for the purposes of that act, it is provided, that the purchase monies shall be paid into the Bank of England, in the manner therein directed. The purchaser of part of the property paid his purchase-money to the agent of the vendors, who was also agent to the purchaser, and the conveyance was executed. The agent did not pay the money into the bank, but misapplied it. The purchaser entered into possession, and continued in such possession for many years, paying, however, the land-tax. The heir-at-law, upon his attaining his age of twenty-one years, settled accounts with his guardians, and afterwards continued to employ the same agent, with whom he, some years afterwards, settled an account,

and for the balance, including the purchase-money, took from such agent a security, which however proved valueless. Nearly twenty years after attaining his age, the heir brought an ejectment against the purchaser, to restrain which, and to obtain a confirmation of the contract, the purchaser filed his bill. The Court dismissed the bill, but without costs. *Hicks* v. *Morant*, 3 Y. & J. 286.

If a child, more than seven and under fourteen years of age, is indicted for felony, it will be left to the jury to say, whether the offence was committed by the prisoner, and if so, whether, at the time of offence, the prisoner had a guilty knowledge that he or she was doing wrong. The presumption of law is, that a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence. *Rex* v. *Elizabeth Owen*, 4 C. & P. 236. [Littledale]

(B) Liabilities.

If a husband educates his wife's child by a former husband, he cannot recover compensation from such child when it comes of age. *Pelly* v. *Rawlings*, Pea. A.C. 226.

Money advanced to place out an infant apprentice, not recoverable on a promise by infant to repay, as not being for necessaries. *Smith* v. *Gibson*, Pea. A.C. 52. [Kenyon]

If a tradesman trusts an infant, he does it at his peril, and he cannot recover if it turns out that the party has been properly supplied by his friends. *Story* v. *Pery*, 4 C. & P. 526. [Tenterden]

(C) Maintenance.

Construction of clauses in a settlement and will, relative to allowances for the maintenance of younger children. *Hunloke* v. *Gell*, 1 Russ. & M. 515.

Testator directed the interest of his residue to be paid to his wife, for the maintenance of herself and her children, until the death of her father, when it was to cease, and to be accumulated for the children, (the testator having understood that his wife's father had made ample provision by his will, for the testator's wife and children,) and the testator directed his residue and the accumulations, to be transferred to his children, when the youngest attained twenty-one, with benefit of survivorship, on their dying under twenty-one and without issue, but if having issue, then the issue to take the deceased parent's share, with a bequest over, in case all the children died under twenty-one, and without issue. Testator died in the lifetime of his wife's father, who died shortly afterwards, without having made any provision for the wife or children. The Court refused to allow maintenance out of the residue, to the testator's infant children, although the legatees over consented to the application. *Kime* v. *Wolfild*, 3 Sim. 533.

Maintenance will not be allowed, without a bill filed, to an infant entitled to real estate, which is of a yearly value exceeding 100*l*. *In the matter of Sir William Molesworth*, 4 Russ. 308, n. [See 1 Jac. & Walk. 151, where the principal cases on this subject are cited.]

Order for a reference as to maintenance out of an infant's freehold estate, made upon petition without suit. *Ex parte Starkie*, 3 Sim. 339.

Dividends, to which infants were entitled, ordered, without a reference, to be paid to their father for their maintenance; the parties being poor, and the property of small amount. *Payne* v. *Low*, 1 Rus. & M. 223.

Order made upon petition, that part of a small sum of stock bequeathed to an infant, should be sold, and the proceeds applied in paying a debt incurred for necessaries on his account, and that the residue of the stock should be transferred into court, and the dividends paid to his mother towards his maintenance. *Ex parte Swift*, 1 Russ. & M. 375.

Order made, upon petition, that executors should be at liberty to apply certain small sums, part of the capital of the residuary share bequeathed by a father to his infant children, towards their maintenance, education, and advancement, though the shares did not vest till the children came of age. *Ex parte Chambers*, 1 Russ. & M. 577.

The father of infants had maintained and educated them since the death of their mother, when they became entitled to a sum of money in this court. The father petitioned for a reference to the Master, on the subject of maintenance and education of the children, and for an allowance, as well for the time past as in future; but the Court refused to make any reference to the Master, with respect to the maintenance of the infants in the time past, but made the usual reference with respect to their future maintenance out of the funds, in case the father was not himself of ability to maintain them. *Simon* v. *Barber*, 1 Tam. 22.

(D) Actions and Suits by and against.

Where a tradesman, who had purchased goods to stock his shop as a grocer, pleaded infancy to the action for goods sold, and the plaintiff replied that the goods were necessaries; it was held, upon proof in support of the replication, that the defendant supplied his family out of the shop, that the articles were necessaries; and that the evidence was sufficient to support a verdict for the plaintiff for a part of the amount of his demand. *Tubbervile* v. *Whitehouse*, 12 Price, 692.

## INFERIOR COURT.

[See Requests, Court of.]

*Semble*, that an action in an inferior court, for a penalty of 5*l*., under a bye-law, is not an action within the 21 Jac. 1. c. 23, so as to prevent the removal of the cause to a superior court. At all events, the Court will not interfere by *procedendo*; but will leave the plaintiff to go on in the inferior court at his peril. *Clark* v. *Le Crew*, 7 Law J. K.B. 186, s. c. 9 B. & C. 52.

## INFORMATION.

(A) In general.
(B) Where granted.
(C) Form and Evidence.
(D) Practice.

(A) In general.

An information for the recovery of penalties is not a criminal, but a panal proceeding, in the nature of a civil action. *Rex* v. *Sidden*, 9 Law J. Exch. 6.

(B) WHERE GRANTED.

The Court will grant a rule for a criminal information, on the sole testimony of a *particeps-criminis* (uncontradicted), where the offence is against the public interests, as bribery in the election of an alderman, who will, by virtue of his office, be a justice of peace. *Rex* v. *Steward and others*, 2 B. & Ad. 12, c. s. as *Rex* v. *Turner*, 9 Law J. K.B. 143.

(C) FORM AND EVIDENCE.

An information for harbouring goods, liable to the payment of duty, is not supported by evidence of harbouring goods which, by reason of the packages in which the goods are imported, are prohibited. *Attorney General* v. *Key*, 1 C. & J. 159, s. c. 1 Tyrw. 92.

An information on the 6 Geo. 4. c. 108. s. 35, for offering a bribe to a custom-house officer, to induce him to neglect his duty, stated the officer's name to be Thomas Dabbs; at the trial his name was proved to be Thomas Tyrrell Dabbs; but it was also proved that he was better known, and particularly as such officer, by the name of Thomas Dabbs:—Held, no variance.

An information described certain goods unshipped without payment of duties as bugles;—a question arising, whether such goods were in fact bugles or beads, it was proved, that articles of that description were known in trade as bugles—were imported and exported as such—as such paid a higher rate of duty at the custom-house on importation, and were in fact also spoken of by the defendant as such:—Held, that the averment in the information was supported. *Attorney General* v. *Hawkes*, 9 Law J. Exch. 16, s. c. 1 C. & J. 121, s. c. 1 Tyrw. 3.

In an information at the instance of the Crown, for the recovery of penalties incurred in harbouring and concealing tobacco and spirits, the tobacco and spirits were described as goods liable to the payment of duties, and imported and illegally unshipped without payment of such duties. By 6 Geo. 4. c. 107, regulating the importation of such goods, the importation of tobacco and spirits (unless in certain casks or cases) was altogether prohibited; and a jury having, by a special verdict, found the tobacco and spirits to have been harboured and concealed in casks and cases not of that description:—Held, that in the absence of evidence to the contrary, they must be taken to be prohibited goods; and, there being no counts in the declaration applicable to that offence, that the information could not be sustained. *Attorney General* v. *Bell*, 9 Law J. Exch. 12, s. c. 1 C. & J. 237.

(D) PRACTICE.

A defendant to an information may plead in person in court, *Attorney General* v. *Carpenter*, 1 C. & J. 409, s. c. 1 Tyrw. 351.

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## INJUNCTION.

(A) WHERE GRANTED OR REFUSED IN GENERAL.
(B) TO STAY OR RESTRAIN PROCEEDINGS.
(C) EXTENDING.
(D) DISSOLVING.
(E) PRACTICE.

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(A) WHERE GRANTED OR REFUSED IN GENERAL.

[See COMPANY; and *Stead* v. *Clay*, 4 Russ. 550, s. c. Dig. Law J. 269.]

A, the inventor of a medicine, employed B, a foreigner residing abroad, to manufacture it for him there, and sold it in England for his own sole profit; a label and seal, denoting that the medicine was manufactured by B and sold by A, were affixed to each of the bottles in which it was sold. The defendant imitated the labels and seals. Demurrer allowed to a bill to restrain the imitation, and for an account of the sales of the spurious labels and seals, A having no interest. *Delondre* v. *Shaw*, 2 Sim. 237.

Lands were devised to a trustee and his heirs, to the use of A for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property or any part of it, and lay out the money in the purchase of other lands, to be settled to the same uses, and in the meantime to invest it in the public funds, and, for the purposes of such sale, to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,000*l.*, exclusive of the timber, which was to be taken at a valuation; and, it being conceived that the tenant for life without impeachment of waste was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed, by which he, in consideration of 2,448*l.*, conveyed the timber to the purchaser, and the trustee, in consideration of 13,000*l.* conveyed the land exclusive of timber. Many years afterwards, the tenant for life, being advised that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much 3*l.* per cent. stock as 2,448*l.* produced at the time of the sale. After the death of A, the next remainder-man, though he had concurred in proceedings, in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of *formedon*, and obtained judgment on the ground that the power of sale was not well executed:—Held, that a court of equity ought not to interfere by injunction, to deprive him of the benefit of that judgment. *Cockerell* v. *Cholmeley*, 3 Russ. 55.

(B) TO STAY OR RESTRAIN PROCEEDINGS.

Where the plaintiff has by tortious means, got into possession of property, pending a suit to establish his equitable title to it, the Court will not stay legal proceedings against him for the recovery of the possession. *Grafton* v. *Griffin*, 1 Russ. & M. 336.

If a cause for the administration of assets has been heard for further directions, and the executors have paid their balances into court, an injunction will be granted to restrain an action against the executors, for breaches of covenant in a lease granted to the testator, and the Master will be directed to ascertain the damages. *Sutton* v. *Mashiter*, 2 Sim. 513.

*Quære*—whether the proceedings of the assignee of a bond in the name of the obligee, are stayed by an injunction, which restrains only the assignee, his counsellors, and agents. *Montague* v. *Hill*, 4 Russ. 128.

### (C) Extending.

The common injunction to stay proceedings at law, cannot be extended to stay trial, after an order to amend. *Brown* v. *Reine*, 3 Y. & J. 389.

### (D) Dissolving.

The common injunction is not dissolved by the plaintiff obtaining an order to amend, without saving the injunction, unless the record is altered. *Davies* v. *Davies*, 2 Sim. 515.

Motion refused to dissolve an injunction, granted on affidavit and certificate, to restrain execution on a judgment obtained by the defendant against the plaintiff, the latter having obtained a judgment to a greater amount against the former. *Williams* v. *Davies*, 2 Sim. 461.

A bill was filed against two partners, for an account, and an injunction to restrain proceedings at law, commenced by them against the plaintiff, and the common injunction was obtained for want of answer. An answer having been put in, exceptions were taken, some of which were allowed. One of the partners, who was resident in England, filed a further answer, admitting the facts stated in the bill, on which the exceptions were founded; but the other partner being abroad, did not put in a further answer. The defendant, who had filed a further answer, moved to dissolve the injunction, on the ground that he had admitted the facts covered by the exceptions, and that even if his answer did not bind his partner, yet the plaintiff could not obtain from the other defendant more than the same admission of the facts charged by him, which, it was insisted, did not entitle him to an injunction. The Court refused the application, the other defendant not having answered. *Prince* v. *Haydn*, 3 Y. & J. 190.

### (E) Practice.

On a motion for an injunction by a plaintiff in an interpleading suit, no affidavit is necessary, except the affidavit denying collusion. *Fry* v. *Watson*, 7 Law J. Chanc. 175.

A plaintiff cannot move *ex parte* for an injunction, after he has served the defendant with subpœna, and the defendant has appeared. *Perry* v. *Weller*, 3 Russ. 519.

An injunction allowed to be moved for *ex parte*, in a pressing case, after the defendants had entered an appearance.

In this case, counsel having been instructed to oppose the motion, although no notice had been given, the Court allowed them to be heard. *Aeraman* v. *Bristol Dock Company*, 1 Russ. & M. 321.

An injunction was prayed for in the prayer of the bill, but was omitted in the prayer of process, and on that account, a motion for an injunction was refused, but leave was given to amend. The bill was accordingly amended, and on the motion being renewed, it was objected that the application could not be repeated, until the time for answering the amended bill had expired; but the objection was overruled. *Wood* v. *Beadell*, 3 Sim. 273.

Where the obligor in a bond has obtained the common injunction to restrain the obligee from proceeding in an action which has been commenced in his name, by an assignee of the bond, the answer of the obligee cannot be read, in opposition to a motion to dissolve the injunction made by the assignee. *Montague* v. *Hill*, 4 Russ. 128.

Upon breach of an injunction, the practice is, either to move that the defendant shall show cause why he shall not stand committed, or to give notice of a motion for his committal.

Service of notice on the defendant that an injunction has been ordered, binds him. *Durant* v. *Mann*, 9 Law J. Chanc. 12.

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## INQUIRY, WRIT OF.

[Writs of inquiry may be made returnable on any day. Proceedings at the return thereof, 1 Will. 4. c. 7, 9 Law J. Stat. 1.]

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## INSOLVENT DEBTOR.

(A) Of the Court for the Relief of Insolvent Debtors.
- (a) *Attornies.*
- (b) *Evidence of Proceedings in.*

(B) Of the Petition.
- (a) *Contents.*
- (b) *Amendment.*
- (c) *Dismissal.*

(C) Of the Assignment.

(D) Of the Assignees.
- (a) *Appointment.*
- (b) *Powers, Rights, and Duties.*

(E) Of the Schedule.

(F) Of the Hearing.
- (a) *Order for.*
- (b) *Notice of.*
- (c) *Examination.*

(G) Opposition.
- (a) *Who may oppose.*
- (b) *Fraudulently making away with Property, and Fraudulent Preference.*
- (c) *Debts fraudulently contracted.*
- (d) *Malicious Injury.*
- (e) *Vexatious Defence.*

(H) Prior Insolvency or Bankruptcy.

(I) Removal of Prisoners.

(K) Discharge.
- (a) *Who entitled to.*
- (b) *Rights, Privileges and Liabilities after.*
- (c) *Pleading and Evidence.*

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### (A) Of the Court for the Relief of Insolvent Debtors.

#### (a) *Attornies.*

Where an attorney accepts a retainer, and there is a change of custody of the insolvent, who then retains another attorney, who prepares his papers, the first attorney, having no lien, cannot oppose the discharge of such insolvent. *In re Polhill*, 1 Cross. 190.

#### (b) *Evidence of Proceedings in.*

Office copies of papers are admissible in the superior courts; the original papers however are allowed

o be sent upon payment of the expense of office opies. *In re Walton*, 1 Cress. 232.

*Quære*—whether copies of the proceedings in the nsolvent Debtors Court are admissible under 7 Geo. 4. c. 57. s. 76, except for the insolvent and reditors. *Nicholls* v. *Downes*, 2 M. & M. 13, s. c. C. & P. 330. [Tenterden]

The provision in the 76th section of the 7th Geo. c. 57, that a certified copy of the petition, schedule, order of adjudication, &c., "shall at all times, e admitted in all courts whatever, as sufficient evidence of the same," does not take away the right of roducing in evidence the original order of adjudication procured from the Court. *Northam* v. *Lauche*, 4 C. & P. 140. [Tindal]

The office copy of an insolvent's petition, attested y the officer of the Insolvent Debtors Court, is ufficient evidence to prove an allegation, that the etition subscribed by the insolvent was duly filed. *Gould* v. *Hulme*, 3 C. & P. 625. [Tindal]

In an action by the assignee of an insolvent ebtor, certified copies of the assignments, and the rder of the Court for the discharge of the prisoner, re sufficient to prove the title of the assignee, and hat the prisoner was discharged under the act; nd it is not necessary to prove the insolvent's petion, in order to shew that the Insolvent Court had urisdiction. *Delafield* v. *Freeman*, 8 Law J. C.P. 0, s. c. 6 Bing. 294, s. c. 3 M. & P. 704.

To make the contents of a schedule evidence gainst an insolvent debtor, *semble*, that some evilence of identity is necessary; and it will not be ufficient that the schedule purports to be the schelule of a person of the name of the insolvent. *Nicholls* v. *Downes*, 4 C. & P. 330, s. c. 2 M. & M. 13. Tenterden]

*Semble*, that certified copies of the petition and chedule, and of the order of the Court, under seal, re sufficient evidence of the discharge of the party nder the Insolvent Debtors Act. *Northam* v. *Lauche*, 8 Law J. C.P. 62, s. c. 3 M. & P. 646.

A copy of an order of the Insolvent Debtors Court, referring the matters of an insolvent's petion to be heard by the Justices at Sessions in *Wales*, n pursuance of the 7 Geo. 4. c. 57. s. 41, together rith a copy of the affidavit of the service of the rder upon the insolvent's creditors, affixed to it rith a pin (the latter only bearing the seal of the Court and the certificate of the proper officer), were endered in evidence under the 76th section of the tatute:—Held, that the certificate and seal on the opy of the affidavit, was a sufficient verification of oth documents. *Jones* v. *Nicholls*, 7 Law J. C.P. 67, s. c. 3 M. & P. 12.

### (B) Of the Petition.

#### (a) *Contents.*

An insolvent having used different names upon ormer hearings, but having, since his last discharge, btained his baptismal register, by which he had ascertained and petitioned in his right name, such escription deemed sufficient. *In re Foster*, 1 Cress. 78.

#### (b) *Amendment.*

The second petition omitting to state the dismissal f the former, but stating insolvent was not discharged under it, is amendable. *In re Blow*, 1 Cress. 180.

The fact of an omission in the petition of a previous confinement being proved at a second hearing, the Court allowed the petition to be amended, instead of dismissing it. *In re Bailey*, 1 Cress. 216.

#### (c) *Dismissal.*

A collusive arrest no ground for dismissing a petition, if there be a *bonâ fide* debt; but where it is accompanied by a disposal of property, the Court will dismiss the petition. *In re Field*, 1 Cress. 236.

Upon an insolvent candidly admitting that his arrest was collusive, the Court forbore their usual practice of dismissing the petition, upon his paying the amount of the sale of his property into court. *In re Hammond*, 1 Cress. 214.

Petition dismissed on proof of perjury. *In re Rothery*, 1 Cress. 195.

Petition dismissed, upon proof of the falsity of the estate paper. *In re Damen*, 1 Cress. 223.

An omission of previous bankruptcy, cause of dismissal of petition. *In re Blow*, 1 Cress. 180.

Where a hearing is adjourned, and the insolvent having been previously declared a bankrupt, omits to appear pursuant to such adjournment, but files a new petition, without applying to dismiss the first, the Court will dismiss the second. *In re Stanley*, 1 Cress. 215.

### (C) Of the Assignment.

The assignment of the real and personal estate and effects of an insolvent debtor, under the statute 7 Geo. 4. c. 57, passes to the assignee only what the insolvent was entitled to at law and in equity; and where an insolvent had deposited with a creditor the title deeds of an estate, as security for a debt:—Held, that the assignee of the insolvent debtor could not recover from such creditor the rent of such estate received by the latter, subsequently to the discharge of the insolvent debtor. *Garry* v. *Sharratt*, 8 Law J. K.B. 306, s. c. 10 B. & C. 716.

A voluntary payment to a creditor, by an insolvent, within three months before his imprisonment, although in discharge of a *bonâ fide* debt, is a fraudulent delivery of money within the 32nd section of the 7 Geo. 4. c. 57, and, consequently void. *Herbert* v. *Wilcocks*, 8 Law J. C.P. 49, s. c. 6 Bing. 203, s. c. 3 M. & P. 515.

A testator devised freeholds to trustees and their heirs, upon trust to apply the rents for the benefit of his son during his life, as they should think fit; and he declared that his son should not have power to sell, mortgage, or anticipate the said rents; after the father's death, the son took the benefit of the Insolvent Act:—Held, that the assignee of his estate was entitled, during the son's life, to the rents of the demised premises. *Green* v. *Spicer*, 8 Law J. Chanc. 105, s. c. 1 Russ. & M. 395, s. c. 1 Tam. 396.

An insolvent, with a view to taking the benefit of the act, and by way of a fraudulent preference of the particular creditor, gave a warrant of attorney, under which all his goods were taken in execution and sold:—Held, that the warrant of attorney so given and acted upon operated as a "transfer" of, or "charge" upon his estate, within the 32nd section of the 7 Geo. 4. c. 57; and that the sale

of the goods under the circumstances was an "assignment" of his effects within the same section. *Sharpe* v. *Thomas*, 8 Law J. C.P. 132, s. c. 6 Bing. 416, 4 M. & P. 87.

### (D) Of the Assignees.

#### (a) *Appointment.*

An assignee may be appointed, prior to filing the schedule, if sufficient grounds of making away with property be shewn. *In re Butt*, 1 Cress. 210.

#### (b) *Powers, Rights, and Duties.*

A being in insolvent circumstances, and wishing to compound with his creditors, had two actions brought against him; A applied to B, an attorney, to defend them, which B refused, unless he was paid 20*l.* in hand. The money was paid to B, who defended the actions, the costs being more than 20*l.*; after this A took the benefit of the Insolvent Act:—Held, that the 20*l.* could not be recovered by the assignees from B, as it was not a voluntary payment. *Troup* v. *Brooks*, 4 C. & P. 320. [Littledale]

Quære—whether the assignee of an insolvent can maintain an action against an attorney, for negligence in preparing a lease for the insolvent, whereby he failed to obtain possession of the premises demised. *Delafield* v. *Freeman*, 8 Law J. C.P. 70, s. c. 6 Bing. 294, s. c. 3 M. & P. 704.

The assignee of an insolvent debtor cannot recover in an action commenced by him as assignee before the assignment executed to him, though it is executed before the trial, but not before the declaration. *Laurence* v. *Miller*, 2 M. & M. 97. [Patteson]

Where a transaction between an insolvent and his creditor (before the imprisonment of the former,) is void against the assignees, under the 7 Geo. 4. c. 57. s. 32, the latter may maintain trover against the creditor for the value of the property in question; although the title of the assignee, taken upon the strict words of the 11th section of that act, would not begin until after the imprisonment. *Sowerby* v. *Wright*, 8 Law J. K.B. 312.

The 16th section of the Insolvent Debtors Act, 7 Geo. 4. c. 57, by which it is provided that "the provisional assignee may sue in his own name, if the Court shall so order, for the recovering, &c. the estate, &c. of the insolvent," is only affirmative of the wrong-side right to sue conferred upon the provisional assignee by the assignment. *Dance* v. *Wright*, 8 Law J. C.P. 153, s. c. 6 Bing. 486, s. c. 4 M. & P. 201.

The defendant sued out a *fi. fa.* on the 30th of June, upon a judgment signed on that day upon a warrant of attorney given by J S. On the 1st of July, the goods of J S were taken in execution, and sold on the 18th; the defendant, who was also the landlord of the premises on which the goods were taken, retaining a sum of 130*l.* for a year's rent, beyond the amount of the judgment debt. J S surrendered himself to prison, at the suit of another creditor, on the 14th of June; and on the 19th of July filed his petition in the Insolvent Debtors Court:—Held, that, under the 34th section of the 7 Geo. 4. c. 57, the assignees of J S were entitled to recover the sum so retained in an action for money had and received—the statute 8 Anne, c. 14. s. 1. contemplating the case of an adverse execution, not an execution at the suit of the landlord himself. *Taylor* v. *Lanyon*, 8 Law J. C.P. 180, s. c. 6 Bing. 536, s. c. 4 M. & P. 316.

The provisional assignee of the Insolvent Debtors Court, is entitled to his costs from the mortgagee in a suit for foreclosure; and the mortgagee will be then allowed to add them to the principal and interest due upon the security. *Peake* v. *Gibbs*, 9 Law J. Chanc. 168.

Assignees of an insolvent mortgagor are not entitled to the costs of a suit for foreclosure, though they by their answer disclaim, and say that if they had been applied to, they would have released the equity of redemption. *Collins* v. *Shirley*, 1 Russ. & M. 638.

The equity of redemption of a leasehold for years, with a covenant for perpetual renewal, is not an interest in real estate within the meaning of the 53 Geo. 3. c. 102. s. 19.

The assignee of an insolvent is not bound, under that section, to dispose of such an equity of redemption by public auction. *Waldron* v. *Howell*, 3 Russ. 376.

### (E) Of the Schedule.

Question of a mis-description of residence, as to whether a casual visit to a friend constituted the last place of abode, and limit of time of residence there. The Court divided in opinion. *In re O'Kerfe*, 1 Cress. 252.

If an insolvent has carried on business alone, but at the same time trades under the fictitious firm of A B & Co., he is bound so to describe and advertise himself. *In re Blondell*, 1 Cress. 254.

Debts barred by the Statute of Limitations must be inserted in the schedule. *In re Longbottom*, 1 Cress. 181.

A party who has given in a schedule on oath, of all his debts and credits to the Insolvent Debtors Court, cannot afterwards claim a debt not there stated. *Nicholls* v. *Downes*, 2 M. & M. 13, s. c. 4 C. & P. 330. [Tenterden]

An old schedule, upon which the petition was dismissed, cannot be used in evidence for the purpose of contrasting the same with the present schedule. *In re Foster*, 1 Cress. 179.

### (F) Of the Hearing.

#### (a) *Order for.*

No order for hearing before a commissioner on the circuit, can be issued later than the 28th day before the day notified in the Gazette for the attendance of the commissioner. *In re Plenderleath*, 1 Cress. 179.

Order for hearing dismissed, materially differs from cases requiring a re-advertisement, as in the latter case either party may compel the other to proceed; in the former not. *In re Young*, 1 Cress. 225.

#### (b) *Notice of.*

The description of an insolvent in the advertisement being merely that of an "agent":—Held, to be insufficient. *In re Gibbons*, 244.

Re-advertisement in consequence of a misnomer, notwithstanding the error originated in the Gazette Office. *In re Watt*, 1 Cress. 177.

The omission of a creditor's name in the schedule,

f verified by affidavit, is ground sufficient for the Court to order an adjournment, for the purpose of assertion of such creditor, and of serving him with notice of hearing. *In re Armsby*, 1 Cress. 248.

(c) *Examination.*

An insolvent may be examined from the interrogatories taken before the commissioners of bankrupts. *In re Barrett*, 1 Cress. 192.

(G) Opposition.

(a) *Who may oppose.*

The hearing of an insolvent having been adjourned for the purpose of enabling him to amend his description, at which hearing only one creditor appeared to oppose, a question arose at the second hearing, as to the admissibility of two new opposing creditors, who had not appeared to oppose at the first hearing. The Court, upon a conference, were equally divided, and no judgment was given in respect of the complaints of the two new opposing creditors. It seemed, however, that if the Court had dismissed the order for hearing, instead of adjourning the case for re-advertisement, that the two creditors would have been entitled to fresh notices, and might have opposed at the second hearing, notwithstanding they had not appeared to oppose at the first. *In re Richards*, 1 Cress. 236.

(b) *Fraudulently making away with Property, and Fraudulent Preference.*

Fraudulent disposal of property, after an offer to compromise. *In re Martin*, 1 Cress. 212.

An insolvent having agreed to assign property to a relation, omits to execute the assignment for some months, deferring it until his affairs are in a state of embarrassment: the execution of such assignment held to be undue preference. *In re Berry*, 1 Cress. 116.

(c) *Debts fraudulently contracted.*

If a debt is contracted *bonâ fide* in the first instance, and it is afterwards discovered that a fraud was used in the payment of such debt:—Held, that no remand can be given for such fraud. *In re Rickerby*, 1 Cress. 185.

If an insolvent, at the time of contracting his opposing creditor's debt, did so without any fraudulent intent, and it appearing by the subsequent act of the insolvent that his intentions were founded on good faith, as far as regarded a promise made to those opposing creditors, the Court will not give an adverse judgment; but, it being proved that his having appropriated a sum of money to his own use, under 20*l.*, the discretionary clause of the act of parliament will be brought into operation. *In re Bate*, 1 Cress. 248.

No fraud being intended at the time a contract is made, the future disposal of the property passed by such contract, no ground for a remand under the act of parliament. *In re Manton*, 1 Cress. 253.

Where a party has been defrauded by an insolvent, and afterwards accepts payment of part of the debt incurred by such fraud, that acceptance will act as a waiver of the fraud. *In re Gibbons*, 1 Cress. 144.

Where debts are contracted without reasonable or probable expectation of payment, the Court require the evidence of the opposing creditor, complaining of the mode of such debts being contracted. *In re Brewster*, 1 Cress. 192.

(d) *Malicious Injury.*

In the absence of proof of a malicious injury in an action of tort, the Court will not pronounce an adverse judgment, *non obstante* the debt being founded on a verdict recovered for the plaintiff in the courts above. *In re Pratt*, 1 Cress. 229.

(e) *Vexatious Defence.*

The only debt in the schedule being the amount of a verdict for trespass committed by the insolvent, who had been once before discharged from a debt of the same nature at the suit of the same party, and in both of which actions he has put his creditor to an unnecessary expense, by pleading the general issue:—Held, that after the right of the creditor had once before been decided, such plea was frivolous and vexatious. Consent of three-fourths of the creditors required. *In re Harris*, 1 Cress. 191.

In an action against the insolvent, as acceptor of a bill of exchange, where the general issue was pleaded, and no defence was offered at the trial, the verdict was for the plaintiff. Upon his hearing under the act, the schedule stated the advance of the money for which the bills were given; but no evidence being offered as to the admission of the debt before the action brought:—Held, the opposition was not supported for want of such admission. *In re Foster*, 1 Cress. 178.

If an insolvent defends an action for the false warranty of goods, and fails in such defence, opposition unavailable, under the 49th section. *In re Everard*, 1 Cress. 195.

Insolvent not liable to be remanded upon the warranty of a horse which was found to be vicious, but of which he was not previously aware. *In re Murrell*, 1 Cress. 202.

(H) Prior Insolvency or Bankruptcy.

In establishing a *locus standi* under the 64th section, if it appears that the insolvent has been dealing in accommodation bills, his case will be adjourned, to obtain the consent of his creditors. *In re Hickman*, 1 Cress. 209.

The consent of creditors required, where insolvent accepted accommodation bills, after his discharge upon a former petition filed within five years of his present application. *In re Cadogan*, 1 Cress. 224.

Consent of creditors required, where the insolvent accepts accommodation bills, within five years of his former discharge. *In re Williams*, 1 Cress. 228.

The consent of three-fourths of the creditors requisite, where an uncertificated bankrupt renews old debts contained in his former schedule, he having been discharged from such debts within five years. *In re Levi*, 1 Cress. 225.

If an insolvent, who is an uncertificated bankrupt, renews a debt contracted prior to such bankruptcy, upon his hearing under the Insolvent Act, such renewal will prevent his discharge, without the consent of three-fourths of his creditors, under the 64th section. *In re Haslewood*, 1 Cress. 197.

The renewal of a debt after discharge, if procured by a threat of prolonged imprisonment, will not be

a ground of opposition, so as to require an insolvent to obtain the consent of three-fourths of his creditors. *In re Venzano*, 1 Cress. 182.

(I) Removal of Prisoners.

Insolvent removed at the expense of creditors, *non obstante* no affidavits filed in support of application. *In re Aglen*, 1 Cress. 205.

Insolvents may be removed at the expense of a creditor, *non obstante* no opposition having been entered in London. *In re Wood*, 1 Cress. 196.

On application to remove an insolvent into the country for hearing, if the counsel for the opposing creditor has affidavits in support of his application, he is not bound to put them in to be read, as the contents might enable the insolvent to baffle his creditors. *In re Ralph*, 1 Cress. 233.

Discharge adjudicated, where an insolvent was removed by *habeas corpus*. *Quære*, if removal contested, could insolvent avail himself of his discharge? *In re Burder*, 1 Cress. 215.

(K) Discharge.

(*a*) *Who entitled to.*

[*Murray* v. *Reeves*, 2 M. & R. 423, Dig. Law J. 282.]

The tap-room of Kingston town prison, held to be a distinct part of the prison; and an objection to an insolvent's discharge being founded upon his having frequented the tap-room after filing his petition, was held to be good, under the 12th section of the act of parliament. *In re Walter*, 1 Cress. 221.

(*b*) *Rights, Privileges, and Liabilities, after.*

A discharge under the 53 Geo. 3. c. 102, as well as under the 7 Geo. 4. c. 57, relieves the insolvent from a judgment on a warrant of attorney to replace stock at a future day. *Sammon* v. *Miller*, 7 Law J. K.B. 337, s. c. 9 B. & C. 770, s. c. 4 M. & R. 551.

*Quære*—whether an insolvent debtor, who has suffered judgment by default, after he has duly obtained his discharge under the 7 Geo. 4. c. 57, (inserting the debt in his schedule,) is entitled to be relieved from an execution, upon a summary application to the Court. *Cook* v. *Townsend*, 9 Law J. C.P. 77, s. c. 5 M. & P. 12.

In replevin, interlocutory judgment was signed against the defendant for want of an avowry. The defendant was afterwards arrested by another creditor, and obtained his discharge under the Insolvent Debtors Act. After the discharge, the plaintiff executed a writ of inquiry, and issued a *fi. fa.* for the amount of damages and costs. The Court refused to set aside the *fi. fa.* for irregularity, holding that the judgment was not such an ascertained debt, at the time of the imprisonment, as to be affected by the insolvent's discharge. *Wilmer* v. *White*, 8 Law J. C.P. 69, s. c. 6 Bing. 291, s. c. 3 M. & P. 671.

Where a person has applied for relief under the Insolvent Act, 7 Geo. 4. c. 57, and the Court has made an order that he shall be discharged from his debts so soon as he shall have remained in custody at the suit of one of his creditors for such a time, to be computed from the date of filing his petition,—such discharge is conditional only; and the condition must be strictly fulfilled.

In such a case, before the prescribed term of imprisonment was over, the debtor compromised with his detaining creditor, and was discharged out of custody:—Held, that under these circumstances his discharge under the Insolvent Act was of no avail; and that, being subsequently arrested for a debt which was duly inserted in his schedule, he was not entitled to be discharged; although he had, on the whole, been in custody more than the prescribed time. *Ex parte White*, 9 Law J. K.B. 97.

A discharged insolvent debtor cannot maintain trespass for breaking and entering the premises in which he resided before his render to prison and assignment of his property, without proving a clear constructive possession in him with the assent of his assignees. *Topham* v. *Dent*, 8 Law J. C.P. 172, s. c. 6 Bing. 515, s. c. 4 M. & P. 264.

A, an insolvent debtor, in his schedule, stated that he had given his acceptance to B, who was the drawer of the bill, but A did not mention the name of the indorsee in his schedule:—Held, that if he did not know the bill to have been indorsed, this would be a bar to an action by the indorsee; but that if the insolvent had been told that the bill was in the hands of the indorsee, the insolvent would be still liable, although the jury might think he had forgotten what he had been told, and that his attorney had made inquiries as to who held the bill, with a view of putting such holder's name into the insolvent's schedule. *Lewis* v. *Mason*, 4 C. & P. 322. [Littledale]

(*c*) *Pleading and Evidence.*

[And see *ante*, A *b*.]

In an action against the acceptor of a bill of exchange, who pleaded his discharge under the Insolvent Debtors Act, the defendant having misdescribed the holder in his schedule, and there being some evidence tending to shew that he knew the holder at the time:—Held, that the true question for the jury was, whether he did so know the holder. *Levy* v. *Dolbell*, 2 M. & M. 202. [Tenterden]

A replication to a plea of discharge under the Insolvent Act, "that the defendant was not duly discharged," puts the discharge only in issue; the petition therefore need not be given in evidence. *Andrew* v. *Pledger*, 2 M. & M. 508, s. c. 4 C. & P. 274. [Tindal]

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## INSPECTION.

[See Production and Inspection of Deeds, Books and Papers.]

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## INSURANCE.

(A) Parties to the Contract.
(B) Interest.
(C) Voyage.
(D) Policy.
(E) Warranties.
(F) Representations and Concealment.
(G) Loss.
(H) Abandonment.
(I) Adjustment.

(K) Return of Premium.
(L) Bottomry and Respondentia.
(M) Insurance on Lives.
(N) Insurance against Fire.
(O) Insurance Broker.
(P) Actions.

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(A) Parties to the Contract.

A ship-owner may effect an insurance on his own goods in his own ship, and by the name of freight, that which would, properly speaking, be freight if he carried the goods of other persons.

But to warrant an insurance of freight on the goods of another, there must be an actual binding contract between the owner of the goods and the assured, as to the freight. *Flint* v. *Flemyng*, 8 Law J. K.B. 350, s. c. 1 B. & Ad. 45.

(B) Interest.

The mortgagee of a ship insured in two separate offices, without communicating to one that he had assured at another. In one, he insured for 2,000*l.*, and another for 1,700*l.* In the policy in each, the value of the ship was stated to be 3,000*l.* The ship was lost; and the insured received the amount of each policy from each office. The fact of the double insurance being discovered, one of the offices brought an action against the assured, to recover back its proportion of the excess of 700*l.* over the specified value in each policy. The defence was, that the defendant insured as well for the interest of the mortgagor as his own; that, in fact, the ship was of the value of 4,000*l.*, and so he had not received any excess:—Held, (especially with reference to the Registry Act, 6 Geo. 4. c. 110. s. 45,) that whether the defendant assured as well for the interest of the mortgagor as his own, was a question properly left to the jury. *Irving* v. *Richardson*, 9 Law J. K.B. 225, s. c. 2 B. & Ad. 193.

(C) Voyage.

Where a British registered ship had sailed with a crew bearing the sufficient proportion of British subjects, according to the 6 Geo. 4. c. 109. s. 12; but that proportion became reduced by deaths in the course of her voyage; and, after a fair and reasonable endeavour, without success, to obtain the requisite supply to keep up the proportion, she sailed with a number of foreigners to complete her crew, and was lost in her voyage home:—Held, that the voyage was not illegal, according to the above act, although no certificate had been procured, nor any statement laid before the proper authorities at home, according to section 19. *Suart* v. *Powell*, 8 Law J. K.B. 391, s. c. 1 B. & Ad. 266.

An insurance effected upon a ship for a voyage to a port which is in a state of blockade at the time of effecting the insurance, is not illegal, unless it appear that there is an intention to violate the blockade. The voyage may be legally made, in expectation that the blockade may have been taken off by the time of the ship's arrival; and inquiry for this purpose may be lawfully made at some port of the blockading country. *Harratt* v. *Wise*, 7 Law J. K.B. 309, s. c. 9 B. & C. 712, s. c. 4 M. & R. 521.

Policy of insurance on goods by all or either of four ships named, at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Great Britain, or to any port in the united Netherlands, or Altona, or Hamburgh, with leave to touch, stay, and trade at any port or place in the *East Indies*, Persia, or elsewhere beyond or on this side of the Cape of Good Hope, at all times and places, until safely arrived; beginning the adventure upon the goods from the loading *as above*; with leave to call at any port in Great Britain to wait for orders; with liberty also to proceed, touch, and stay at any ports or places whatsoever, *particularly* Singapore, Penang, Malacca, and Batavia, Cape of Good Hope, and St. Helena, without being deemed any deviation.

The ship (one of the four) being at Batavia, goods were loaded by the assured to be taken to Antwerp. Thence she went to Sourabaya, a port in the island of Java, in the East Indies, and there loaded other goods also for Antwerp. She returned from Sourabaya to Batavia, and sailed thence for Antwerp.

Sourabaya is not in the direct course from Batavia, Singapore, Penang, or Malacca, to Europe, nor in the direct course from any one to any other of the four. It is distant four hundred miles from Batavia eastward. Any place in Persia would be more than one thousand miles out of the course from either of those four places to Europe:—Held, that there had been no deviation; and that the goods taken on board at Sourabaya were covered by the policy. *Hunter* v. *Leathley*, 8 Law J. K.B. 274, s. c. 10 B. & C. 858; s. c. *in error*, 9 Law J. Exch. 118, s. c. 1 C. & J. 423, s. c. 1 Tyrw. 355, s. c. 5 M. & P. 457, s. c. 7 Bing. 517.

(D) Policy.

[See Stamp.]

Insurance on a vessel "at and from Leith to Shetland, and from thence to Barcelona, and at and from thence, and two other ports in Spain, to a port in Great Britain." The vessel was lost while loading at Saloe; and the question was, whether Saloe was a port within the meaning of the policy. The affirmative held by the Courts below, and the assured declared entitled to recover. Affirmed by the House of Lords. *Sea Insurance Company* v. *Gavin*, 2 Dow. & C. A.C. 129.

Policy of insurance "at and from all or any of the Windward and Leeward Islands to London, of the freight from the time that any part of the cargo should be put on board." *Quære*, whether goods put on board before the ship's arrival at the Leeward or Windward Islands are protected by the policy. *Barnes* v. *Akers*, Pen. A.C. 22. [Kenyon]

A homeward policy on freight at and from A, attaches when the ship is at A in a condition to begin to take her homeward cargo. *Williamson* v. *Innes*, 2 M. & M. 88. [Lyndhurst]

On a policy of insurance on specie from the river Plate to Canton and back, and on the returns thereof in merchandize,—the assured chartered a vessel from Buenos Ayres to Canton and back; and they were to pay for the voyage a sum, in China, necessary for port charges and incidental expenses, not exceeding 2,000 dollars, and to pay the balance, up to 10,000 dollars, after the vessel's return to Buenos Ayres. The specie was shipped at Buenos Ayres, and arrived at Canton, where the port charges and incidental expenses were paid. The ship was lost

on her return. The underwriters had no notice of the terms of the charterparty. The policy was an open policy:—Held, that the assured were not entitled to treat the port charges, &c. at Canton as part of the value of the goods shipped there. *Winter* v. *Haldimand*, 9 Law J. K.B. 313, s. c. 2 B. & Ad. 649.

A and Co., carrying on business in England as an insurance company, had an office and an agent in Scotland, with whom C D, &c., for themselves and others, as joint-owners of a vessel, made an insurance, receiving from the agent a memorandum in general terms, importing, without exception of any sea risks, that the vessel was insured, and that a policy would be prepared and sent to be delivered to the assured, or their order, "on the third Monday in the ensuing month, or on any subsequent day." Notice of the effecting of the insurance was transmitted by the Scotch agent to the principals in London, who, two months after the date of the memorandum, transmitted to the agent a policy of insurance, containing a clause by which the operation of the policy was to be suspended while the vessel should be at sea. This policy was not demanded by, nor delivered, nor shewn to the assured; who, at the end of the year, renewed their policy by the medium of the agent in Scotland, but by a memorandum of renewal, signed by the agent in England, and referring to a specific policy, which, although it was lying at the agent's office, was not then demanded by, nor delivered or shewn to the assured. Soon after this renewal of the policy, the ship was lost, at sea, by fire. Under these circumstances, a judgment of the Court of Session, reserving a sentence of the Judge-Admiral, was affirmed on appeal, but on distinct grounds, the House of Lords being of opinion, that the memorandum was the contract between the parties, and therefore properly admitted in evidence, upon the trial of an issue directed before the Jury Court; that the stat. 6 Geo. 4. c. 18, so far as relates to insurance companies, did not extend to Scotland; that a contract made under the circumstances above stated, was a Scotch contract; and that the principals and their agents were properly included in the same action. *Pattison* v. *Mills*, 2 Bligh, N.S. 519, s. c. 1 Dow. & C. A.C. 342.

(E) Warranties.

A warranty to sail on or before a particular day, is not fulfilled if the ship does not completely unmoor at that day, though she then has her cargo and passengers on board, and is quite ready to sail, and is only prevented doing so by stress of weather. *Nelson* v. *Salvador*, 1 M. & M. 309. [Tenterden]

(F) Representations and Concealment.

A misrepresentation used by the assured to the assurer, as to a cargo, will not avoid the policy, unless the misrepresentation be of a material fact, likely to affect the risk. *Flinn* v. *Headlam*, 7 Law J. K.B. 307, s. c. 9 B. & C. 693, s. c. 1 M. & M. 367.

Whether a proposed assurance be upon shipping, or lives, or against fire, it is the duty of the assured to communicate every material fact necessary to be known to the assurer.

And if any such fact be known and not communicated, the policy will be void, whether the assured did or did not believe it to be material.

Whether the question of materiality be a question of law or fact, or mixed—*quære*.

In a case where directions had been given to insure a ship in case she did not arrive within thirty days after the receipt of the letter, and accordingly, after the expiration of the time, a policy was effected—no communication being made of this direction, or when the letter had arrived, and, a day before the effecting of the policy, a ship had arrived, by which the underwriters might suppose the direction to insure had come,—Lord Tenterden admitted the evidence of a director of the Royal Exchange Assurance upon the question whether, in his judgment, the fact of the date of the arrival of the letter was material to be communicated. He said, it was. The jury found a verdict in favour of the underwriters—The Court held the evidence to be properly received; and observed, that if the question was purely one of law, they were of opinion that the fact was material, and that the not communicating it avoided the policy. *Richards* v. *Murdock*, 8 Law J. K.B. 210, s. c. 10 B. & C. 527.

In general, it is not necessary that the assured should communicate the time of sailing; yet, if it be such as to make the ship a missing ship, then it becomes a material fact, and should be communicated.

It is not necessary, to defeat an action on a policy of insurance on a ship, on the ground of concealment of material facts, that fraud should be made out; but it is enough if the information be withheld, although the party withholding may only have erred in judgment. *Elton* v. *Larkins*, 5 C. & P. 86. [Bosanquet]

(G) Loss.

By the articles of a treaty between Great Britain and Portugal, a full reciprocal liberty of commerce and navigation was given as to all goods, except articles the property of enemies of either power, or contraband of war. The next article specified certain particulars, which were to be considered as contraband or prohibited. A previous article gave to the Portuguese government the right of pre-emption as to articles of military and naval stores imported into their dominions, and which they might be desirous of taking for their own use:—Held, that the exception as to contraband applied only to the time of war.

Where arms and ammunition were exported openly, and described in the manifest; and seized by the government of the country of intended importation, before they were landed; and the information which led to the seizure had been given by the agent of the consignor, who at the time acted *bonâ fide* for the benefit of the parties:—Held, that the underwriter was liable, although the landing had been thus prevented, and the seizure accelerated, by the agent of the consignor. *Wilbraham* v. *Wormsley*, 8 Law J. K.B. 254.

When a ship sails on a voyage from this country, and after she has sailed notice is given by the Gazette, that the port for which she is destined is in a state of blockade, the question, whether the captain received intimation of the blockade, is (for the purposes of insurance) a question of fact for the jury, taking into consideration all the circumstances of time, place, and opportunity. *Hewett* v. *Wise*, 7 Law J. K.B. 309, s. c. 9 B. & C. 712, s. c. 4 M. & R. 561.

A blockading squadron may lawfully lie at any distance convenient for shutting up the port blockaded, provided it does not obstruct any other; and a ship will be considered as guilty of a wilful breach of the blockade which actually comes within reach of capture by the squadron, if the circumstances were such that a prudent man would have inquired whether that were the blockading squadron, although the captain were actually ignorant of its being so, not having inquired. *Naylor* v. *Taylor*, 2 M. & M. 205. [Tenterden]

What is a stranding within the meaning of a policy of insurance. *Burnet* v. *Kensington*, Pea. A.C. 71. [Kenyon]

On a policy on freight, the ship having actually carried full freight, though not that intended for her, the owners cannot recover for the delay and expense as a partial loss. *Brocklebank* v. *Sugrue*, 2 M. & M. 102. [Tenterden]

Where, by means within the reach of the master, a ship can be so treated as to retain the character of a ship, he cannot by selling her, even *bonâ fide*, convert the average into a total loss; but the underwriters are entitled to have those means used on their account. *Gardner* v. *Salvador*, 2 M. & M. 116. [Bayley]

A ship, being wrecked, was sold by the owner and master, and soon afterwards got off by the purchaser, and repaired, though at a great expense. The owner cannot treat this as a total loss, unless the sale at the time, in the exercise of a sound judgment, appeared most beneficial for all parties. If the ship was likely to be repairable, so as to come to England with any cargo, so as upon her arrival to be worth the sum laid out on her, it cannot be treated as a total loss, though she cannot be made fit to carry the cargo originally intended for her. *Semble*—That the law would be the same if she could only return in ballast. The loss of the voyage cannot make a constructive loss of the ship, on a policy on the ship only. *Doyle* v. *Dallas*, 2 M. & M. 48. [Tenterden]

Where a ship is left by the crew under a fair and reasonable apprehension of her sinking, the right of the assured to recover for a total loss in respect of the goods will not be affected by the circumstance of her afterwards being taken in charge and saved by the crew of another vessel.

Where, under such circumstances, the goods are of a perishable nature, and cannot be carried to their place of destination except at an expense greater than their value, the circumstance of the goods being thus saved *in specie* does not deprive the assured of their right to recover as for a total loss. *Parry* v. *Aberdein*, 7 Law J. K.B. 260, s. c. 9 B. & C. 411, s. c. 4 M. & R. 343.

Where a ship is insured upon a policy in which her value is stated and agreed upon, and the assured become entitled to recover as for a total loss, they are entitled to recover the full amount mentioned in the policy, although it be proved that, in point of fact, she was not worth so much. *Allan* v. *Sugrue*, 7 Law J. K.B. 53, s. c. 8 B. & C. 561, s. c. 3 M. & R. 9.

### (H) Abandonment.

Where an offer of abandonment is made upon a supposition of certain facts existing at that time; but, before action brought, it be known that those facts did not exist at that time, the assured cannot rely upon those supposed facts to justify his offer of abandonment.

Accordingly, a ship had been captured, and upon the intelligence arriving the assured offered to abandon; but in the interim the ship had been rescued by the crew, and, at the time when the offer of abandonment was made, was upon her voyage back, and she actually arrived back with the cargo. After her arrival back, the assured brought an action as for a total loss:—Held, that they were not entitled to recover. *Hanatt* v. *Wise*, 7 Law J. K.B. 309, s. c. 9 B. & C. 712, s. c. 4 M. & R. 521.

### (I) Adjustment.

An adjustment of a policy does not admit the loss. *Garron* v. *Galbraith*, Pea. A.C. 37. [Kenyon]

The production, by the assured, of a policy of insurance, with an adjustment on it, and the name of the defendant struck off the policy itself, does not prove the payment of the sum so adjusted. *Adams* v. *Sanders*, 2 M. & M. 373, s. c. 4 C. & P. 25. [Tenterden]

### (K) Return of Premium.

By the terms of a policy of insurance, it was provided that there should be a proportionate return of premium, "for every uncommenced month, if the ship should be *sold, or laid up*:"—Held, that the words "laid up," thus connected with the word "sold," meant a permanent laying up, and not one which took place merely for the purpose of repairing the ship. *Hunter* v. *Wright*, 8 Law J. K.B. 259, s. c. 10 B. & C. 714.

### (L) Bottomry and Respondentia.

The master of a vessel having borrowed money at a foreign port for her repair, gave a bond, obliging *himself, his heirs, &c., and the ship* (whether she arrived or not), to the repayment of the money advanced, with 12*l.* per cent. bottomry premium, eight days after *his* arrival in London. The obligees effected an insurance on their interest, describing it in the policy as an insurance *on bottomry*:—Held, that this was a fatal misdescription. *Simonds* v. *Hodgson*, 7 Law J. C.P. 239, s. c. 6 Bing. 114, s. c. 3 M. & P. 385.

The Court of Admiralty has an undoubted jurisdiction over bottomry bonds, which are founded upon sea risks, and defeasible by the destruction of the ship in the course of her voyage; but the Court, inclining that a bond, absolute, and without dependence on the accidents of the voyage, was not subject to its cognisance,—dismissed a suit on such bond; the more willingly as questions of mercantile practice were involved, more fit to be decided by a reference to merchants.

The Court directed a search for precedents upon the question, whether a bond professing to be a bottomry bond, but excluding maritime risk, is subject to the Admiralty jurisdiction. Five precedents of such bonds, but no judicial decisions on the point, being found,—the Court, after directing an argument, decided that the interest reserved was maritime interest, and that therefore, *ex concessis*, the bond excluding sea risk was void. *Atlas*, 2 Hagg. 48, 65.

Where a bottomry bond is admitted to be drawn in legal form, and entitled to payment, the parties are bound by the terms of the agreement; and the Court will not refer the matter to the registrar and merchants to make such a deduction on account of the rate of exchange as is made in ordinary cases of mercantile negotiation. *Jane Vilet*, 2 Hag. 92.

The Court declined to pronounce forfeited a bond given for the safe return of a vessel to a particular port of this kingdom, the vessel having been carried in distress into another port, and there arrested in suits of salvage and of wages,—holding, that while the vessel was within the jurisdiction of the Court, safe and unsold, the application was premature.

On the valuation of the ship being impeached, a new appraisement, to be made at the expense of the party applying, permitted.

*Quere*, whether bonds should not be limited "to the safe return to this country." *Margaret*, 2 Hag. 275.

In debt on a bond, purporting to be for a loan on respondentia on an East India ship, to which two sets of special pleas were pleaded, one set alleging usury, and the other, illegality under the statute 19 Geo. 2. c. 37. s. 5, it was left to the jury to say whether it was a *bonâ fide* transaction on respondentia, or a loan on usury:—Held, on motion for a new trial, the jury having found for the plaintiff, that the question was sufficiently left to the jury, and that it was not necessary, notwithstanding the provisions of the 19 Geo. 2, to leave it as a distinct question, for them to say whether the money was or was not lent to a person who had no interest in or goods on board the vessel. *Semble*, that pleas of illegality under the above statute should contain an allegation, that the money borrowed was not intended to be laid out in the purchase of goods to be put on board the vessel. *Wynne* v. *Crosthwaite*, 4 C. & P. 178. [Tenterden]

### (M) Insurance on Lives.

A father, merely as such, has not an insurable interest in the life of his son, within the meaning of the 14 Geo. 3. c. 48. *Halford* v. *Kymer*, 8 Law J. K.B. 311, s.c. 10 B. & C. 724.

A wife making an insurance on her husband's life, need not prove that she was interested therein. *Reed* v. *Royal Exchange Assurance Company*, Peake A.C. 70. [Kenyon]

The vendor of a policy of insurance, not professing to sell any interest which he may have in the life insured, is not bound to make any communication on the subject of such interest; and if his interest has ceased since the policy was effected, and the purchaser of the policy, without making any inquiry, complete the purchase, he cannot afterwards recover back his purchase-money, on the ground that, the vendor having no interest in the life, the insurance office would not be *bound* to pay the money. *Barber* v. *Morris*, 9 Law J. K.B. 179.

A insured his life, and afterwards assigned the policy to B, for a nominal consideration. B's executors then sold and assigned the policy to D, for valuable consideration; and then D's executors sell it to E:—Held, that they could make a good title to the policy, and that E was bound to complete his purchase. *Ashley* v. *Ashley*, 3 Sim. 149.

Whether a proposed assurance be upon shipping, or lives, or against fire, it is the duty of the assured to communicate every material fact necessary to be known to the assurer. And if any such fact is known and not communicated, the policy will be void, although the assured did not, at the time, believe it to be material. *Von Lindenau* v. *Desborough*, 7 Law J. K.B. 42, s.c. 8 B.&C. 586, s.c. 3 M.&R. 43.

The plaintiff being about to effect an insurance on the life of one H, and being applied to by the agent of the insurance office for information as to the state of health, &c. of H, said he knew nothing of him, but directed the agent to get the necessary information wherever he could. The agent accordingly applied to the life, who made a false representation as to the medical man who usually attended him:—Held, that the plaintiff was bound by the misrepresentation of the life, though made without his knowledge; and that the policy was void. *Earnes* v. *Desborough*, 7 Law J. C.P. 123, s.c. 5 Bing. 503, s.c. 3 M. & P. 190.

H F assures his life in January 1815, and pays premiums regularly till 1824. In June 1815, H F commits a felony, of which he is convicted in October 1824, and for which he is executed in November of that year. Bill filed in 1825, by the representatives of H F, claiming under him and in his right, for payment of the sum alleged to be due on the insurance, and decree by Master of the Rolls in favour of the representatives; but the judgment reversed by the Lords, on the ground, that by the general policy of the law the insurance became void, as to those claiming under and in right of H F, in consequence of the death being occasioned by his own criminal act. *Amicable Assurance Society* v. *Bolland*, 2 Dow. & C. A.C. 1, s.c. 4 Bligh, n.s. 194; overruling 3 Russ. 315.

### (N) Insurance against Fire.

A policy of insurance against fire provided, that if there should appear any fraud in the claim made, or false swearing in support thereof, the assured should lose all benefit under such policy. The assured having sustained a loss, made a claim for 1,085*l*. The jury having found for the plaintiff for 500*l*., the Court directed a new trial, which had been moved for on the ground, that it amounted to an affirmation of fraud in making a claim to the larger amount. *Levy* v. *Baillie*, 9 Law J. C.P. 108, s.c. 7 Bing. 349, s.c. 5 M. & P. 208.

### (O) Insurance Broker.

An insurance broker who has effected policies is, in general, entitled to recover from the assured the amount of the premiums; although, in point of fact, he may not have paid them to the assurer. The admission in the policy of the receipt of the premium by the assurer, is sufficient to protect the assured.

This general rule is not altered by the circumstance of the insurance broker having entered into a *covenant* with the assurer to pay the premiums. And in such a case the assignees of the bankrupt broker were held to be entitled to recover from the assured the amount of premiums which, as between the assurer and the assured, would in point of law be considered as paid; although, in fact, the broker had not paid them. *Power* v. *Butcher*, 8 Law J. K.B. 217, s.c. 10 B. & C. 329.

Where an underwriter settles a loss with the broker of the assured, by setting off the amount he has to pay, against premiums in other matters due from the broker to himself, such settlement is not a general a payment to the principal.

To make such settlement equivalent to payment to the principal, it must be shewn, either that he have express authority for such a mode of payment, or that, from the course of dealing in business, it must be necessarily implied.

The course of dealing at Lloyd's in such cases, is not binding on persons who are not in the habit of transacting such business there.

Where the underwriter had a general account with the broker, he is not entitled to apply, against the demand of the principal, sums paid in cash on the general account, after the adjustment of the figures with the broker. The payment, to bind the principal, must be specifically on his account.

The striking off the policy the name of the underwriter, by the broker, under the circumstances mentioned above,—held, not to discharge him from liability to the principal, the assured. *Bartlett* v. *Southland*, 8 Law J. K.B. 164, s. c. 10 B. & C. 760.

The underwriter cannot charge against the assured, as payments, money settled in account between the broker and himself for premiums due from the broker to the underwriter on account of other assurances; notwithstanding the usage at Lloyd's; unless it be shewn that the assured was aware of and acquiesced in that usage.

But where an underwriter settled a loss with a broker "to be paid in a month," and paid him before the month was out:—Held, that this was a good payment against the assured. *Scott* v. *Irving*, 9 Law J. K.B. 89, s. c. 1 B. & Ad. 605.

(P) Actions.

Whether underwriters at Lloyd's must be taken, under all circumstances, with reference to insurances, to be cognizant of the contents of the foreign lists lied in the reading-room there—*quere*. *Elton* v. *Larkins*, 5 C. & P. 86. [Bosanquet]

In an action on a policy of insurance, the broker through whom the policy was effected is a competent witness for the assured; although he has a lien upon the policy for premiums paid. *Hunter* v. *Leathley*, 8 Law J. K.B. 201, s. c. 10 B. & C. 858.

A memorandum indorsed on a ship's policy of insurance, for a change of voyage, was signed by an agent of the insurance company. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it; though, when a new policy was required, he always sent the proposals to the company:—Held, that this was sufficient proof of the agent's authority to sign such memorandums; and that the other policies on which such memorandums had been signed need not be produced. *Brocksbank* v. *Sugrue*, 5 C. & P. 21. [Tenterden]

On a policy from London to Preston, the jury found, that the captain was driven by stress of weather to Liverpool. It appeared, however, that there was a bill of lading for Liverpool; and a printed bill was produced, directing an application for freight or passage to Down, agent for the Liverpool traders:—Held, that these documents were sufficient evidence of deviation to send the cause to another jury. *Catterall* v. *Taylor*, 9 Law J. C.P. 205.

Lloyd's List is evidence against the assured, if it be shewn that the broker had read it before the policy was effected. A ship stayed at a particular port for a period of one hundred and nine days, and whether this was an unreasonable time, was held to be a question of fact for the jury. *Bain* v. *Case*, 3 C. & P. 496. [Tenterden]

If a policy of insurance be produced by the agent of the plaintiff, through whom it was effected, and the defendant's name be struck out, and have written against it, "adjusted the general and particular averages at 30*l.* 9*s.* per cent.;" this is proof that the policy has been adjusted; but not that it has been satisfied: but the plaintiff will not be allowed to go into evidence to shew that some of the sums allowed at the time of the adjustment were too small. If the plaintiff could shew that the loss was settled without his authority, or perhaps if he could shew that some sum was entirely omitted, he might go beyond the amount of the adjustment. *Adams* v. *Saunders*, 4 C. & P. 25, s. c. 1 M. & M. 373. [Tenterden]

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## INTEREST.

[See Vendor and Purchaser.]

(A) Where payable.
(B) On Judgments.
(C) How computed.

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### (A) Where payable.

Interest not allowed upon money secured by a written instrument, unless it be expressly reserved on the face of the instrument, or necessarily implied from usage in respect of instruments of that nature.

Not allowed upon a promissory note made in France, payable in one month after the return of the maker to England. *Page* v. *Newman*, 7 Law J. K.B. 267, s. c. 9 B. & C. 378, s. c. 4 M. & R. 305.

The defendants, by an instrument under seal, bound themselves for the due payment of the sum of 1,500*l.*, in three equal payments of 500*l.*, at three, five, and seven months from the date; in failure of which they acknowledged and rendered themselves liable to be sued and proceeded against *for the amount*:—Held, that the payee was not entitled to interest thereon. *Foster* v. *Weston*, 8 Law J. C.P. 295, s. c. 6 Bing. 709, s. c. 4 M. & P. 589.

In assumpsit on the following undertaking: "We hereby undertake to pay you, agreeably to instructions from Mr. J W, the sum of 1,262*l.* 5*s.* 6*d.*, on his account, as soon as we shall have received from Messrs. Rain & Ramsay, of New South Wales, the amount of monies in their hands belonging to Mr. W, and now under attachment by you." The instructions referred to, directed that the payment should be taken by the plaintiff in discharge of a bill for 1,262*l.* 5*s.* 6*d.*, at nine months, and which bill the defendants were to receive at the time of payment:—Held, that, upon this undertaking, the plaintiff was not entitled to recover interest. *Hare* v. *Richards*, 9 Law J. C.P. 87, s. c. 7 Bing. 254, s. c. 5 M. & P. 35.

The underwriter on a policy of insurance is not liable to pay interest on the amount of his subscrip-

tion, although he has no colourable ground for refusing to pay the loss, unless a distinct demand of the money has been made at an earlier period for that purpose. *Bain* v. *Case*, 2 M. & M. 262, s. c. 3 C. & P. 496. [Tenterden]

Lord M dies indebted in more than 100,000*l.*, and leaves funds applicable to the payment of only 50,000*l.* The widow enters into an obligation to pay the whole of her deceased husband's debts:—Held, by the Court of Session, that the English creditors under this obligation are entitled to interest on the bonds and bills of exchange, till the principal is paid, on the ground that such securities carry interest by the law of England. *Secus*, as to the simple contract debts, which by the law of England do not bear interest. *Montgomery* v. *Bridge*, 2 Dow. & C. A.C. 297.

(B) On Judgments.

Interest is not allowed on a judgment, except under special circumstances, and where there is no imputation on the creditor; and therefore, interest was refused on a judgment, where the creditor, being also mortgagee, had been in the receipt of the rents and profits of the mortgaged estates, and the propriety of his conduct was questioned with respect to the manner in which he had become such mortgagee, and with respect to his accounts, both as such mortgagee, and also as solicitor, agent, and steward to the mortgagor. *Lewes* v. *Morgan*, 3 Y. & J. 394.

A judgment creditor is entitled to interest on his debt, where the warrant of attorney authorizes the judgment to be entered up for double the amount of the sum actually due. *Tunstall* v. *Trappes*, (*Lawson's case*,) 3 Sim. 299.

(C) How computed.

[See Banker.]

In an action of debt on an award, interest is recoverable on the sum awarded from the time at which it was demanded. *Johnson* v. *Durant*, 4 C. & P. 327. [Tenterden]

In a case where, in 1811, a written agreement had been obtained to discharge an heritable bond on which interest was due from 1792, which agreement was reduced as fraudulent, the Court of Session, in an action on the bond, adjudged that the simple interest from 1792 to 1811 should be turned into principal, and that on the accumulated fund, from 1811 till payment, interest should be charged on biennial rests. But this judgment was reversed by the House of Lords; the ground of reversal, as stated in the subsequent case of *Napier* v. *Lady Gordon*, being the biennial rests. *Macneil* v. *Jolly*, 2 Dow. & C. 454.

## INTERPLEADER.

[See Pleading and Practice in Equity.]

## INTERROGATORIES.

[See Practice in Equity and Witness.]

## IRELAND.

[Appointment of Lieutenants of Counties, &c. 1 & 2 Will. 4. c. 17; 9 Law J. Stat. 16.]

## ISSUE.

[See Evidence and New Trial.]

(A) Where directed.
(B) Practice.

(A) Where directed.

A portioner is not entitled to an issue as a matter of right. *Lewis* v. *Bridgman*, 3 Sim. 316.

Issues directed by Master of the Rolls, as to a bond, merely upon the surmise and suggestion of a party, the bond being unobjectionable on the face of it, and all the evidence as to the circumstances under which it had been obtained being before his Honour upon a report, made after inquiry by the Master. The order directing the issues reversed by the House of Lords, and the cause remitted, with directions to his Honour to decide upon the matter himself. *Nichol* v. *Vaughan*, 2 Dow. & C. A.C. 420.

A, by his will declaring a purpose to assign the lease of an hotel, in which he carried on business, with the effects in the hotel, and the business of it, to a trustee, in trust for the benefit of his son and daughter, in consideration of an annuity to be paid to him for his life, bequeathed the residue of his personal estate and effects to his son and daughter in equal shares. The testator died without having carried into effect the purpose declared in his will. His daughter, being executrix, carried on the business from the death of the testator to the year 1810, in the house where the testator had carried it on. In that year she purchased, chiefly by means of the assets, the freehold of another house, to which she removed the business, and carried it on there alone until 1819, when she married. Upon the marriage, the freehold house and effects were conveyed and assigned to a trustee, for the daughter and her husband, and the children of the marriage, in the ordinary course of settlement.

In 1820 the son filed a bill against the daughter and her husband, praying that the deed of settlement might be set aside; that the freehold house might be declared to be part of the assets, and sold with the effects, &c.; that an account might be taken of the profits of the business, from the death of the testator to 1819, the date of the marriage; and that half the assets and half the profits of the business might be paid to him as residuary legatee and partner.

The case of the plaintiff as to the partnership was supported by the evidence of the will, and of acts and admissions on the part of his sister, at various times before the marriage, of her liability to account as partner. The defendants insisted, upon an agreement between the plaintiff and his sister, shortly after the death of the father, that the lease of the hotel, and the effects, should be valued, and the produce divided between them; that they were accordingly valued, and that the half of the amount of the valuation had been paid to the plaintiff by his

later; but this alleged agreement did not include ny consideration for the good-will of the business. The defendants also produced in evidence a letter written from Paris by the plaintiff, in which he spoke of the business as not belonging to him; but his letter he sought to explain, by stating that he could not with safety, being in France, acknowledge that he had any property or concerns in England. Upon these pleadings, and evidence at the hearing, issues were directed to try—first, whether there was any agreement for the sale of the lease, effects, and good-will of the business; and if so, secondly, whether such agreement had been abandoned. Upon the trial of these issues, verdicts were given for the respondent on both issues. Upon further directions, the Court (Vice Chancellor) declared, that a partnership in moieties subsisted between the son and daughter from the death of the father to the marriage of the daughter, when the partnership was dissolved; and that the freehold house was part of the assets; and an account was directed accordingly.

Against this decree the defendants appealed to the Chancellor, and the decree being affirmed with a slight variation, the defendants further appealed to Parliament, and insisted that an issue should be directed to try the question of fact, whether a partnership subsisted; but the decree was affirmed, the House being of opinion that it was too late, in that stage of the cause, to ask for such issue. *Burnard v. Nerot*, 2 Bligh, N.S. 215.

(B) Practice.

Order made *nisi*, that an issue might be taken *pro confesso*, the plaintiff in the issue having repeatedly made default. *Powell v. Wood*, 1 Russ. & M. 354.

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## JUDGMENT.

[See Practice.]

(A) In general.
(B) For want of a Plea.
(C) Signing.
(D) Entering up.
(E) Docketing.
(F) Setting aside.
(G) As in case of a Nonsuit.

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(A) In general.

Where an action had been brought in an inferior court, and was thence removed into the King's Bench, where the defendants pleaded, and the cause was brought on for trial:—Held, that evidence of a record of the action, while it was in the inferior court, (by which it appeared that a judgment by default in the action had been suffered by the defendants,) was inadmissible on the trial of the action in the King's Bench. *Bottings v. Firby*, 7 Law J. K.B. 129, s.c. 9 B. & C. 762, s.c. 4 M. & R. 566.

(B) For want of a Plea.

The rule of Court, H.T. 60 Geo. 3. and 1 Geo. 4, authorizing plaintiffs to sign judgment for want of a plea, where declaration is filed and notice given two days before the end of the term in which the writ is returnable, does not apply to cases where the process is returnable on the last term. *Neck v. Southall*, 13 Price, 800.

The defendant pleaded *non assumpsit*, with a notice of set-off, to a declaration in *debt*:—Held, that, the plea being a nullity, the plaintiff, by afterwards obtaining an order for particulars of set-off, did not waive his right to sign judgment as for want of a plea. *Ford v. Bernard*, 8 Law J. C.P. 219, s.c. 6 Bing. 534, s.c. 4 M. & P. 302.

The defendant having pleaded his privilege as an attorney of the Court of King's Bench to an action in the Common Pleas after an imparlance, saving exceptions to the writ and declaration only, the plaintiff, treating the plea as a nullity, signed judgment:—The Court set aside the judgment, on the terms of the defendant pleading to the merits. *Godefroy v. Jay*, 8 Law J. C.P. 230, s.c. 6 Bing. 616, s.c. 4 M. & P. 440.

A declaration in debt demanded 60*l.*, and contained six counts for 10*l.* each; and the defendant pleaded that he did not owe the said sum of 10*l.* above demanded. The plaintiff treated this plea as a nullity, and signed judgment:—The Court set the judgment aside. *Risdale v. Kelly*, 1 C. & J. 410, s.c. 1 Tyrw. 337.

(C) Signing.

A party is not entitled to open the office in order to sign a judgment, or take any other proceeding, on a *dies non*, unless he was entitled to take that proceeding on the previous day. *Harrison v. Smith*, 7 Law J. K.B. 171, s.c. 9 B. & C. 243.

Where a plaintiff is entitled to sign a judgment by default before the essoign day of the term, a judgment signed between the essoign day and full term is regular, and is a judgment of the preceding term. *Beeston v. Beckett*, 7 Law J. K.B. 333.

Although a cognovit be produced to the clerk of the dockets on signing judgment, if it be not filed with him after the taxation of the costs, (pursuant to the rule of court, Hilary 1822,) the judgment will be irregular. *Long v. Sperrin*, 7 Law J. K.B. 332.

Where the proceedings were by original, a judgment signed by virtue of a cognovit on the first day of full term, the defendant having died between the essoign day and that day, held to be regular. *Whittaker v. Whittaker*, 7 Law J. K.B. 161, s.c. 8 B. & C. 768.

(D) Entering up.

Where the representatives of a deceased party have not been able to enter up judgment within two terms, in consequence of necessary delay in procuring letters of administration, this does not deprive the other party of the advantage he gains by the omission so to enter up the judgment. The Court have not the power in such a case to order the judgment to be entered *nunc pro tunc*. *Dowbiggin v. Harrison*, 8 Law J. K.B. 175, s.c. 10 B. & C. 480.

A verdict having been taken at the trial (by consent) on two counts of the declaration, both containing in substance the same cause of action, the Court allowed the plaintiff to amend the *postea* by entering up judgment on the first count only, though the Judge who tried the cause declined to interfere. *Henley v. the Mayor and Burgesses of Lyme Regis*, 7 Law J. C.P. 243, s.c. 6 Bing. 100, s.c. 3 M. & P. 310.

### (E) Docketing.

Judgments not docketed have no reference against heirs, executors, or administrators. *Landon* v. *Ferguson*, 3 Russ. 349.

### (F) Setting aside.

The application for setting aside a judgment, as against good faith, is *ex debito justitiæ*, and the Court will not impose on the defendant, as a condition for setting it aside, that he bring no action. *Cash* v. *Wells*, 1 B. & Ad. 375.

### (G) As in case of a Nonsuit.

In a country cause, judgment as in case of nonsuit cannot be had, till the term next after the second assize from the term in which issue is joined, where the plaintiff has not given notice of trial for the first assize. *Simonds* v. *Folkingham*, 9 Law J. Exch. 191, s. c. 1 C. & J. 513, s. c. 1 Tyrw. 501.

In a country cause, where issue is joined in Michaelmas term, and the plaintiff does not proceed to trial at the assizes after Hilary term, the defendant may, in Easter term, move for judgment as in case of a nonsuit. *Cowley* v. *Dean*, 1 C. & J. 18.

Where a cause goes off at Nisi Prius, because neither party will pray a tales, the defendant cannot afterwards obtain judgment as in case of a nonsuit; nor can he try the cause by proviso. *Phillips* v. *Dance*, 7 Law J. K.B. 338, s. c. 9 B. & C. 769, s. c. 4 M. & R. 584.

A rule for judgment as in case of a nonsuit, will not be made absolute while anything remains due, under an agreement between the parties, to pay by instalments. *Anon.* 1 Tyrw. 378.

Rules for costs of the day, and judgment as in case of nonsuit, may be simultaneous, and will be heard in such order as the discretion of the Court shall determine, according to circumstances. *Hockin* v. *Read*, 9 Law J. Exch. 131, s. c. 1 Tyrw. 386, s. c. 1 C. & J. 466.

Where a plaintiff, with a full knowledge of the defendant having become insolvent subsequent to the action brought, declared, upon being ruled so to do, (that he might avoid the cost of a *non pros.*,) and subsequently discharged the defendant's rule for a judgment as in case of a nonsuit, on giving a peremptory undertaking to try:—The Court refused to interfere in discharging such undertaking. *Cunningham* v. *Rees*, 9 Law J. Exch. 1, s. c. 1 Tyrw. 1.

It is not an inflexible rule in the Exchequer, that an order for judgment as in case of nonsuit, for not proceeding to trial according to notice, cannot be discharged upon a peremptory undertaking, but on terms of paying costs. *Grant* v. *Kearney*, 12 Price, 529.

Where the plaintiff gives a fair reason for not having proceeded, the costs will be ordered to abide the event. *Brown* v. *Tanner*, 13 Price, 803.

On a rule for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice, discharged on a peremptory undertaking, the defendant is not entitled to costs unless mentioned in the rule. *Pertington* v. *Wyatt*, 7 Law J. C.P. 247, s. c. 6 Bing. 171, s. c. 3 M. & P. 216.

An interlocutory motion for discharging a rule for judgment as in case of nonsuit, made absolute with costs; the plaintiff, on whose behalf the motion was made, having left his home, and being unable to be found for more than a year, his attorney apply to the Court for an order, requiring the defendant to pay the costs to them, under the circumstances disclosed by affidavit;—rule granted and made absolute, on cause shewn.

An attachment in such case refused.

Part of the costs allowed on taxation, being for a letter of attorney to demand the amount, the document not being executed, that item was disallowed.

The Court, on making the rule absolute, gave no costs on either side, in respect of the application.

Service of the rule and allocatur a sufficient demand.

Service of the present rule on the defendant's clerk in court, made part of the order. *Cuper* v. *Hatton*, 12 Price, 462.

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## JURISDICTION.

Where a tribunal determines in a matter not within its jurisdiction, the decision is a nullity. *Attorney General* v. *Lord Hotham*, 3 Russ. 415.

The Court of Admiralty, except upon the subject of prize, exercises an original jurisdiction only on the grounds of authorised usage and established authority. *Atlas*, 6 Hag. 55.

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## JURY.

[Jury trial in Scotland in civil causes, 1 Will. 4. c. 69, 8 Law J. Stat. 151.]

A certificate granted by the Judge, to warrant the allowance of costs of a special jury, given by him after he had left the assize town, is unavailing against the positive words of the 6 Geo. 4. c. 50, which requires it to be given "immediately after the verdict;" and the Court cannot receive any explanation why it was not so given. *Upton* v. *Longworthy*, 8 Law J. K.B. 302.

Costs of a view are only allowed where the statute 6 Geo. 4. c. 50. s. 23. and the practice have been complied with; that is, where a sheriff has been named in the writ for each party. *Taylor* v. *Thompson*, 9 Law J. C.P. 102, s. c. 7 Bing. 403, s. c. 5 M. & P. 255.

If the jury cannot agree, the Judge at Nisi Prius has authority to discharge them. *Cook* v. *Caldicot*, 4 C. & P. 315. [Tenterden]

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## JUSTICES OF THE PEACE.

[See Court.]

(A) Powers and Duties.
(B) Actions against.

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### (A) Powers and Duties.

Where a person is charged, on oath, with an offence amounting to felony, and a Magistrate issues his warrant; and, on the party being brought before him, the charge is proved, and he is committed to prison,—the Magistrate is not liable in trespass for false imprisonment, although the charge turns out to be unfounded.—Where, therefore, a party was charged with cutting down a tree adjoining a

lwelling-house, under the statute 7 & 8 Geo. 4. c. 30. s. 19, and committed to gaol, but the person who laid the information did not prosecute:—Held, hat the Magistrate was not liable in trespass, although the party charged was the occupier of the and on which the tree grew. *Mills* v. *Collett*, 7 Law J. M.C. 97, s.c. 6 Bing. 85, s. c. 3 M. & P. 242.

An attorney, merely in that character, has no right to insist upon taking part as an advocate on proceedings before Justices under a penal statute, where it is the practice of the Court in which the proceeding is pending, not to allow persons to practise as attornies or advocates. *Collier* v. *Hicks*, 9 Law J. M.C. 188.

(B) Actions against.

If a Magistrate commit a prisoner for re-examination, stating that he does so in the hope that the prisoner will admit a fact then in dispute; and the jury should be of opinion that the commitment, though in point of form for re-examination, was intended to force an admission from the prisoner of the particular fact, the Magistrate is liable to an action of trespass and false imprisonment, in respect of that commitment.

Whether fifteen days is a reasonable time to commit a prisoner for re-examination; whether the reasonableness of the time is a question of law, or of fact, or is a mixed question—*quære*. *Davis* v. *Capper*, 7 Law J. M.C. 90.

If a Magistrate has power to commit for a specific time, and he exceed that time, his commitment is altogether void, and he is liable to an action of trespass, although he act *bonâ fide*. So, if a Magistrate, having power to commit for a reasonable time—if he commit for a time which, upon investigation, appears to be unreasonable, his commitment is void altogether; and he is liable in trespass, although he act *bonâ fide*. *Davis* v. *Capper*, 8 Law J. M.C. 67, s. c. 10 B. & C. 28, s. c. 5 M. & R. 53, s. c. 4 C. & P. 134.

In computing the six months limited by 24 Geo. 2. c. 44. s. 8, for bringing an action against a Magistrate for false imprisonment, the day of discharge from imprisonment is to be reckoned exclusively. Therefore, where a party, discharged on the 14th of December, sued out a writ on the 14th of June following, it was held, that the action was commenced in time. *Hardy* v. *Ryle*, 7 Law J. M.C. 118, s. c. 9 B. & C. 603, s. c. 4 M. & R. 295.

If the plaintiff bring an action against the Magistrate alone, he is not bound by that action. He may abandon it, and bring another, joining the constable as a defendant with the Magistrate, if he bring the second within time. *Jones* v. *Simpson*, 9 Law J. M.C. 45.

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## LANDLORD AND TENANT.

[See Distress, Ejectment, and Lease.]

(A) Rights and Liabilities of Landlord.
(B) Rights and Liabilities of Tenant.
(C) Contracts between.
(D) Rent.
(E) Repairs.
(F) Notice to quit.

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(A) Rights and Liabilities of Landlord.

Encroachments made by a tenant, upon the waste adjoining the demised premises, belong to the landlord and not to the tenant, at the end of the term, however long; the possession of the tenant during the term not being adverse against the landlord. Nor does the fact of the landlord being also lord of the manor, in which the waste is situate, render the possession of the tenant adverse to the lord of the manor in his character of landlord. *Doe* d. *Gonville and Caius College, Cambridge, and Dickinson*, v. *Stopford*, 9 Law J. K.B. 171.

If a tenant quit, without any intention of returning, the landlord may enter without bringing ejectment. *Lacy* v. *Lear*, Pea. A.C. 210. [Alvanley]

Where a pauper is put into a cottage by parish officers, he may be turned out without ejectment. *Fox* v. *Oakley*, Pea. A.C. 214. [Le Blanc.]

Where the terms of letting contain no stipulation as to arrangements upon quitting, the custom of the country is let into operation in that respect, although the off-going tenant comes within the benefit of the custom by a course of husbandry inconsistent with that which he agrees to pursue during the continuance of the tenancy. The landlord's remedy against the off-going tenant is by action for breach of covenant, and the coming-on tenant cannot prevent the latter taking his off-going crop. *Holding* v. *Pigott*, 9 Law J. C.P. 124, s. c. 7 Bing. 465, s. c. 5 M. & P. 427.

A lessor granted lands, with a condition "that, if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared a bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fieri facias*, or any other writ of execution should issue, it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate." The lessor having entered for a breach of this condition:—Held, that he was entitled to the emblements. *Davis* v. *Eyton*, 9 Law J. C.P. 44, s. c. 7 Bing. 154, s. c. 4 M. & P. 820.

(B) Rights and Liabilities of Tenant.

[*Cornish* v. *Searell*, 1 M. & R. 703, Dig. Law J. 298.]

Upon an information to set aside a lease for ninety-nine years of charity lands, the defendants, the lessees, set up a title adverse to the lease; upon the merits it was held, that there was no ground for the defence; but the Court was of opinion, that, if the merits had been otherwise, the defendants were estopped, and could not dispute the title, while they retained the possession. *Attorney General* v. *Hotham*, 3 Russ. 415.

A tenant has no right to make any alteration in the demised premises; not even that which may improve their value, if such an alteration will affect the evidence of the landlord's title, either by the alteration not having the character of an act done by a mere tenant, or by its causing a difficulty in afterwards proving the identity of the premises. *Young* v. *Spencer*, 8 Law J. K.B. 106, s. c. 10 B. & C. 145, s. c. 5 M. & R. 47.

A tenant of a house, who is bound by agreement to keep it in tenantable repair, may quit without notice in the course of his term, if the premises become unwholesome for want of sufficient drainage, if they cannot be kept dry without extravagant and unreasonable labour and expense on his part. *Collins* v. *Barrow*, 2 M. & M. 112. [Bayley]

A tenant may, by the general rules of husbandry, carry away straw or hay from the premises. *Gough* v. *Howard*, Pea. A.C. 197. [Lawrence]

A pump erected by a tenant, and so fixed as to be removable without injury to the freehold, may be taken away by him at the expiration of his term. *Grymes* v. *Bowerem*, 8 Law J. C.P. 140, s. c. 6 Bing. 437, s. c. 4 M. & P. 143.

If a tenant, who may be entitled to remove certain fixtures, which he has put up during the term, neglect to remove them during his term, and leave them on giving up possession, he has, in point of law, relinquished them to his landlord.

Where, in such a case, the landlord, in the course of a discussion between him and his late tenant about the fixtures, made an offer of a sum to effect a settlement, which was refused:—Held, that this offer did not restore any right in the fixtures to the late tenant. *Lyde* v. *Russell*, 9 Law J. K.B. 26, s. c. 1 B. & Ad. 394.

A lessee of a mill and steam-engine covenanted to repair, reasonable wear and tear excepted. During the lease, he added both to the height and extent of the mill, and removed all the works of the engine except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building, and the new parts of the engine, subject to an action to be brought by the lessors to try the right. *Sunderland* v. *Newton*, 3 Sim. 450.

### (C) Contracts between.

[*Peirse* v. *Sharr*, 2 M. & R. 418, Dig. Law J. 299.]

If, by a written agreement, A agrees to let, and B to take, a messuage from a day past, for a term of ten years, "at and under the rent of 80*l.*," this is an agreement by B to pay a rent of 80*l.*; and therefore, if there be a power of re-entry in case of a breach of "any of the agreements therein contained," A has a power of re-entry for non-payment of rent, although there is no express agreement to pay the rent. *Doe* d. *Rains* v. *Kneller*, 4 C. & P. 3. [Tenterden]

An agreement for the holding of certain quarries, provided that the rent should be 50*l.* a year; that the tenant was to work the whole of the stone, but not to employ more than a given number of men; that the rent was not to be advanced; and that that agreement was to have the effect of creating a new *yearly* tenancy between the parties. It would, in point of fact, take five years to work out the stone with the limited number of men:—Held, that this created only a tenancy determinable by notice to quit at the end of the first year. *Doe* d. *Skrine* v. *Watson*, 8 Law J. K.B. 12.

Where a party by words of present demise lets premises to another, he is bound to give him possession; and if the tenant in possession refuses to quit, the lessee is not bound to proceed against him by ejectment, but may sue the lessor for the breach of the agreement. *Coe* v. *Clay*, 7 Law J. C.P. 162, s. c. 5 Bing. 440, s. c. 3 M. & P. 57.

A tenant from year to year by parol, will not be discharged from the rent of the current year, by an agreement of his landlord to accept a third person as a tenant, unless such agreement is in writing, or the third person take possession, it being a surrender within the Statute of Frauds. *Taylor* v. *Chapman*, Pea. A.C. 19. [Kenyon]

A being a tenant in possession of a farm, which he held after the expiration of a lease, made a proposal by missive, to take a new lease, upon the conditions of an offer made by W, for another farm belonging to the same estate. W had engaged to enter into a lease, which was to contain "all the regulations to be laid down for the estate." G, the owner of the estate, by letter, accepted the proposal of A, on the footing of the offer of W, "and the general conditions laid down by him for the whole estate;" and this letter of acceptance provided, that a lease should be executed as soon as the other leases of the estate could be got ready. Three years after this proposal and acceptance, a document, entitled Articles and Conditions, was signed by G, and various other proposed tenants of the tenants of the estate, but not by W or A. By one of these conditions it was provided, that "all the fodder should be used upon the farm, and none sold or carried away at any time." This document concluded by providing, that the leases on the estate were to be granted upon, and to refer to the conditions therein contained. A few days after the signature of this document, a draft-tack with various blanks, but containing a reference to the articles and conditions, and an obligation to perform them, and a consent to the registration of them, was signed by the tenants, including W, but not A; he did, however, two years afterwards, sign this draft-tack, which was never extended or otherwise executed:—Held, that the draft-tack, as signed by A, was a probative document, and not a new contract between the parties, but referable to the preceding agreement and conditions; and that the condition prohibiting the sale or removal of straw, &c. applied to the last year of the term, and the way-going crop.

The draft-tack not having been produced on the first hearing of the cause, held, that the appellant was liable for all the costs consequent upon the non-production. *Gordon* v. *Anderson*, 3 Bligh, N.S. 351.

### (D) Rent.

[Process for securing rent in the county palatine of Durham and Sadberge, 11 Geo. 4. c. 11, 8 Law J. Stat. 7.]

Payment of rent is *primâ facie* evidence of title in the landlord. *Doe* v. *Clarke*, Pea. A.C. 239. [Bayley]

Where a distress is made for more than a year's rent, after an act of bankruptcy by the tenant, the Court will allow the assignees of the tenant to avail themselves of the 6 Geo. 4. c. 16. s. 74, and to pay a year's rent into court.

But if the landlord under such a rule accept the sum so paid into court, he is entitled to double costs under the 11 Geo. 2. c. 19. s. 22. *Alderson* v. *Gadsden*, 7 Law J. K.B. 89.

Payments by a tenant, of ground-rent due to the superior landlord, or of land-tax, for which, in default of payment, he is liable to be distrained upon, are not voluntary payments, but are such as the tenant is entitled to deduct from the rent paid to his immediate landlord; and a distress by the latter, after notice of such payments, is wrongful, and the subject of an action. *Carter* v. *Carter*, 7 Law J. C.P. 41, s. c. 5 Bing. 406, s. c. 2 M. & P. 732.

A tenant who holds over after the expiration of his own notice to quit, is not liable to double rent from the time of his having offered to give up possession, and having afterwards quitted possession; although he may have previously filled the character of tenant at double rent, by having paid it. A notice is not necessary, by the tenant, to determine such a tenancy, though it may be by the landlord. *Booth* v. *Macfarlane*, 9 Law J. K.B. 161, 1 B. & Ad. 904.

In an action for rent, *semble*, that it is no answer that the landlord has distrained goods for it to the full value of the rent, if he has sold them for a less sum. If he has sold them at too low a price, the tenant's remedy is by action. *Efford* v. *Burgess*, 2 M. & M. 23. [J. Parke]

In an action by a landlord against a sheriff, for removing, under an execution, the goods of his tenant, without securing the payment of a year's rent, as required by the statute 8 Anne, c. 14, the tenant was called to prove the rent due, but objected to as interested, and released by the landlord:—Held, that the release could not be pleaded in bar of the action, *puis darrein continuance*, nor did it reduce the landlord to the necessity of taking a verdict against the sheriff for nominal damages only. The statute 8 Anne, c. 14, s. 1. applies to goods in apartments being parcel of a messuage. *Thurgood* v. *Richardson*, 4 C. & P. 481. [Tindal]

By the Irish statute, 11 Anne, c. 2, it is enacted, (s. 2.) "That when more than half a year's rent is in arrear upon a lease, the landlord or lessor may, without demand or re-entry, serve a summons in ejectment for recovery of the demised premises; and upon proof of the fact that more than half a year's rent was due when the summons was served, and that no sufficient distress was to be found on the premises, shall recover judgment and execution; and if the lessee or person claiming under the lease, shall suffer judgment to be recovered and execution executed, without paying the rent in arrear with costs, or without filing a bill for relief in equity, within six months after execution executed, the lessee, &c. shall be barred from all relief or remedy, in law or equity, &c., and the landlord, &c. shall hold the premises discharged from the lease."

The Irish statute, 4 Geo. 1. c. 5. recites the former statute, and the difficulty of proving the want of sufficient distress, and thereupon enacts (s. 2) "That when one year's rent shall be in arrear upon a lease, although there be sufficient distress upon the land to answer the rent in arrear, the landlord or lessor may serve a summons in ejectment, and upon proof that one year's rent was in arrear, and due before the service of the summons, shall recover judgment and have execution; and if the lessee, &c. shall not pay the rent in arrear with costs, to be ascertained as in the act provided, or deposit the same in a court of equity, on filing a bill, within six months after execution executed, he shall be barred from all relief or remedy in law or equity, &c., and the landlord shall hold the premises discharged from the lease."

The Irish statute, 8 Geo. 1. c. 2, reciting the former statutes, enacts (s. 4.) "That where any lease, for avoiding of which an ejectment is brought, shall, before the bringing of the ejectment, have been mortgaged for a valuable consideration, and the lessee and mortgagee, and their respective assignees, shall be served with the summons in ejectment, and affidavits of the summons made and filed, and the plaintiff shall obtain judgment and execution on the ejectment; if the mortgagee or assignee shall not, within nine months after execution executed, pay or tender to the landlord or lessor the rent in arrear, and costs, to be ascertained as in the former acts provided, the mortgagee or his assignee shall be barred of all relief and remedy, in law or equity, on account of the mortgage, and the landlord or lessor shall hold and enjoy the premises discharged from the mortgage and the equity of redemption."

In the case of a lease, subject to a mortgage, the landlord having recovered judgment, &c. according to the statutes, against the lessee, who did not within six months pay or tender; but where the representatives of the mortgagee, before the lapse of nine months after execution executed, paid the rent in arrear and costs:—Held, that the benefit of that payment enured to the lessee as well as the representatives of the mortgagee.

A suit having been instituted against the landlord by the representatives of the mortgagee, to have the benefit of the lease, an account was directed of what was due for rent and costs. In this stage of the cause, the representatives of the mortgagee entered into an agreement with the landlord, and executed a deed, by which they covenanted not to claim the equity of redemption of the lease.

Upon a bill filed by the representatives of the lessee and mortgagor, against the landlord and representatives of the mortgagee, to have the benefit of the suit, and to carry on the accounts:—Held, that the agreement between the landlord and the representatives of the mortgagee, was incompetent and invalid, and that the representatives of the lessee were entitled to the benefit of the suit and the account. *O'Reilly* v. *Fetherston*, 4 Bligh, N.S. 161.

### (E) Repairs.

A landlord has no right to enter his tenant's premises to repair them, without some stipulation to that effect. *Barker* v. *Barker*, 3 C. & P. 557. [Best]

### (F) Notice to quit.

Where tenant disclaims, no notice to quit necessary. *Doe* v. *Clarke*, Pen. A.C. 239. [Bayley]

Tenant for life granted a lease, rendering rent in money and a quantity of culm to be carried to the lord's house.

After the death of the tenant for life, the remainder man sent his servant to the different tenants for the culm to be brought home. Culm was accordingly sent twice, at intervals, and received:—Held, that, even assuming the lease granted by the tenant for life to be invalid, the remainder-man had adopted the tenant so far, that the latter was entitled

to a notice to quit before ejectment could be maintained. *Doe* d. *Symmons* v. *Morse*, 9 Law J. K. B. 77, s. c. 1 B. & Ad. 365.

Where a person holds as tenant to persons as landlords, who are joint tenants as between each other, a notice to quit by either of them to their tenant, determines the tenancy as between him and all of them. *Doe* d. *Aslin* v. *Summerset*, 8 Law J. K.B. 369, s. c. 1 B. & Ad. 135.

A notice to quit, which is given by an agent of one party, will not be binding on the other, unless it appear that, at the time of giving it, the agent had authority, or that before it begins to operate, the principal had adopted it. *Doe* d. *Mann* v. *Walters*, 8 Law J. K.B. 297, s. c. 10 B. & C. 626.

A six months' notice to quit need not contain six full calender months; a customary half year, as, from the 28th of September to the 25th of March, suffices. *Roe* d. *Durand* v. *Doe*, 8 Law J. C.P. 227, s. c. 6 Bing. 574, s. c. 4 M. & P. 391.

A notice to quit on Lady-day, is a good termination of a holding, either from Lady-day old, or Lady-day new style. *Denn* d. *Willan* v. *Walker*, Peo. A.C. 194. [Heath]

A weekly tenancy commenced on a *Wednesday*. The landlord gave the tenant notice to quit, "on *Friday*, provided your tenancy commenced on a Friday, or otherwise, at the end of your tenancy next after one week from the date hereof":—Held sufficient. *Doe* d. *Campbell* v. *Scott*, 8 Law J. C.P. 110, s. c. 6 Bing. 362, s. c. 4 M. & P. 20.

## LAND-TAX.

Lease for a term of years, in consideration of a premium, at an annual rent. The lease being silent as to taxes and rates:—Held, that the lessor was to bear such proportion of the land-tax, as the reserved rent bore to the total annual value; and the tenant, the remainder.

In such a case the lessor having redeemed the land-tax:—Held, that he was entitled (under the 42 Geo. 3. c. 116. s. 123 or 154.) to recover from the lessee the proportion of land-tax which he was liable to pay, before it had been redeemed. *Ward* v. *Coast*, 8 Law J. K.B. 291, s. c. 10 B. & C. 635.

Summary application against commissioners of land-tax, to compel a due assessment of the land-tax. *Attorney General* v. *Commissioners of Land-tax*, 12 Price, 647.

The securities required by the Land and Assessed Tax Act to be given by the collectors and their sureties, may be united in one bond to commissioners acting under both acts. *Collins* v. *Gwynne*, 9 Law J. C.P. 130, s. c. 7 Bing. 423, s. c. 5 M. & P. 276.

## LARCENY.

Where property is taken under a *bonâ fide* claim of title, in an open manner, such taking is not the subject of an indictment for larceny.

Therefore, where a party has cut and carried away part of a tree, under a claim of right to do so, as a commoner, from the lord's waste, in the presence of his gamekeeper, a conviction, under the 7 & 8 Geo. 4. c. 29. s. 39, "for cutting, destroying, and damaging the same, and stealing the whole or the greater part thereof," was held wrong. *In* v. *Jenner*, 7 Law J. M.C. 79.

*Semble*, that the stealing of brass fixed to tombstones in a churchyard, is a felony within the statute 7 & 8 Geo. 4. c. 29. s. 44. *Rex* v. *Blick*, 4 C. & P. 377. [Bosanquet]

The halves of country bank notes, sent in a letter, are goods and chattels, and a person who steals or embezzles them is indictable for such larceny or embezzlement. *Rex* v. *Mead*, 4 C. & P. 353. [Bosanquet]

If pigeons are so far tame that they come home every night to roost in wooden boxes, hung on the outside of the house of their owner, and a party come in the night and steal them out of those boxes, this is a larceny. *Rex* v. *George Beals*, 4 C. & P. 131. [Taddy, Serj.]

If one employed to carry goods for hire, appropriate them to his own use, but does not break bulk, this is no larceny, although the person so employed were not a common carrier, but was only employed in this particular instance. *Rex* v. *Fletcher*, 4 C. & P. 545. [Patteson]

A delivered his watch to B to be repaired, instead of repairing it, he sold it, and A being informed of this, told B that he would either have his watch back again or the money:—Held, no felony. *Rex* v. *Henry Levy*, 4 C. & P. 241. [Vaughan]

A placed valuable securities in the hands of B, with a written direction to invest the proceeds in the funds, "in case of any unexpected accident happening to A;" no accident did happen to A, and the proceeds were by B converted to his own use:—Held, that B was not indictable under the statute 52 Geo. 3. c. 63, (now repealed), and it seems that he would not be so under the statute 7 & 8 Geo. 4. c. 29. s. 49. An allegation in an indictment, that A placed valuable securities in the hands of B, "with an order in writing to invest the proceeds in the government funds," is not supported by proof of an order in writing directing B to invest the proceeds in the government funds in case of any accident happening to A. *Rex* v. *White*, 4 C. & P. 46. [Tenterden]

If the only evidence against a prisoner charged with a larceny be, that stolen property was found in his possession three months after the loss of it, the Judge will direct an acquittal, without calling upon him for his defence. *Rex* v. *Adams*, 3 C. & P. 600. [J. Parke]

A went to the shop of B, and asked for shawls for Mrs. D to look at. B gave her five; she pawned two, and three were found at her lodgings. Mrs. D was not called as a witness:—Held, that A, on this evidence, could not be convicted of a larceny in stealing the goods of B. *Rex* v. *Savage*, 5 C. & P. 143. [Patteson.]

If a prisoner, who was in the service of the prosecutor, steal a quantity of lace in several pieces, the pieces together being above 5*l.* in value, and bring them all out of his master's house at the same time, this is a capital offence, although it be shown that the prisoner had the opportunity of stealing the lace by a piece at a time, and that no one of the pieces was worth 5*l.* *Rex* v. *Charles Morris Jones*, 4 C. & P. 217. [Bolland]

A prisoner was indicted for stealing three articles

It appeared, that having taken the first article, he returned in about two minutes and took the second, and then returned in half an hour and took the third:—Held, that the last taking was a distinct felony, and could not be given in evidence with the other two; but that the interval of time between the first and second taking was so short, that they must be considered as parts of the same transaction. *Rex* v. *Birdseye*, 4 C. & P. 386. [Littledale]

## LEASE.

[See STAMP and LANDLORD AND TENANT.]

(A) WHAT INSTRUMENT AMOUNTS TO.
(B) INVALID OR FRAUDULENT.
(C) CONSTRUCTION OF, IN GENERAL.
(D) COVENANTS.
(E) ASSIGNMENT.
(F) RENEWAL.
(G) SURRENDER.
(H) FORFEITURE.
(I) ACTIONS.

### (A) WHAT INSTRUMENT AMOUNTS TO.

[*Doe* d. *Henniker* v. *Watt*, 1 M. & R. 694; Dig. Law J. 303.]

Whether an instrument be a lease or an agreement for a lease, must depend upon the whole of the instrument; the words "agree to let" not being conclusive for an agreement. Where there was no distinct reference to a future instrument, and the instrument itself contained all the terms, the Court construed it a lease. *Staniforth* v. *Fox*, 9 Law J. C.P. 175, s. c. 7 Bing. 590, s. c. 5 M. & P. 589.

Where an agreement for a lease contained covenants on the part of the lessee to repair the premises, to pay all taxes, &c., and to paint once in three years; and also a covenant that, *until the lease was executed*, the lessees were "to pay rent, and to hold the premises, subject to the covenants above mentioned:"—Held, that this was an absolute demise, and not a *mere* agreement for a future lease. *Pinero* v. *Judson*, 8 Law J. C.P. 18, s. c. 6 Bing. 206, s. c. 3 M. & P. 497.

An agreement, by which A agrees to "let" premises to B, "on lease" for a certain term, at a certain rent, "subject to the stipulations and covenants in the original lease, under which he holds," and "to keep the said stipulations in every respect until the said lease shall be granted; which lease, when required by B, is to be prepared by A's solicitor, but at B's expense,—is a lease, and not an agreement for one. *Wilson* v. *Chisholm*, 4 C. & P. 474. [Gaselee]

Where, in a contract of sale, it was provided that the intended purchaser should be considered as a tenant to the vendor, at a rent equal to the amount of the interest on the purchase-money, with a power of distress:—Held, that this was not a lease, but a contract of sale. *Hope* v. *Booth*, 9 Law J. K.B. 21, s. c. 1 B. & Ad. 498.

### (B) INVALID OR FRAUDULENT.

A husbandry lease of charity lands for ninety-nine years, at an uniform rent, cannot be supported. *Attorney General* v. *Hotham*, 3 Russ. 415.



Whether the provisions of the statute 13 Eliz. c. 20, go to prohibiting the granting of any lease of the glebe, and other rectorial property of a benefice with cure—*quære*.

But whether they do or not, all such leases made between 1803 and 1816, are good; the statute 43 Geo. 3. c. 84. having repealed the statute of Elizabeth; and the provisions of the latter not having been revived until the 57 Geo. 3. c. 99.

Where such a lease had been granted within the above two periods to secure several annuities; and subsequently, and after the passing of the 57 Geo. 3. c. 99, a new arrangement was made by the incumbent, the grantor of the annuities, by which the annuities were paid off, and the lease was assigned to a new party to secure the payment of a sum of money advanced by that party for the paying off of the annuities, and the further assistance of the grantor:—Held, that such legal estate was well assigned, although it was after the 57 Geo. 3. c. 99. was passed.

But whether, in a court of equity, such legal estate would be allowed to prevail beyond the securing of that part of the charge which was well created between the 43 Geo. 3. and the 57 Geo. 3.—*quære*. *Doe* d. *Broughton* v. *Gully*, 7 Law J. K.B. 201, s. c. 9 B. & C. 344, s. c. 4 M. & R. 249.

The statute 13 Eliz. c. 20. is not repealed by the 57 Geo. 3. c. 99, so far as relates to the charging of benefices.

An instrument drawn in point of form as a lease, but operating in substance as a charge, is void under the first-mentioned statute. *Shaw* v. *Pritchard*, 8 Law J. K.B. 133, s. c. 10 B. & C. 241, s. c. 5 M. & R. 180.

A lease granted by a bishop under the 42 Geo. 3. c. 116. s. 88, (Land-tax Redemption Act,) which did not add the land-tax to the reserved rent, nor contain any express provision for its payment (except the general words, that the rent reserved was to be clear of all taxes),—held to be not binding on the bishop's successor.

Such lease being granted in consideration of the surrender of a former lease, which was in fact surrendered by deed under seal:—Held, that the first lease did not become revived by the circumstance of the second not being binding on the successor. *Doe* d. *the Bishop of Rochester* v. *Bridges*, 9 Law J. K.B. 113, s. c. 1 B. & Ad. 847.

A made a voluntary surrender of copyholds to a trustee, upon trusts for F during her life; and if at her death she left children who attained twenty-one, upon trust to sell, and divide the money among them; but if that event did not take place, upon trust for A in fee. Afterwards, by a deed, reciting that the trustee was seised of the premises upon trust for F and her husband and A, the trustee, and F and her husband and A, concurred in demising the premises, for a valuable consideration, to G, for a long term of years:—Held, that the lessee was to be considered as having notice of the trust for the benefit of the children of F, and that the lease was void as against them. *Malpas* v. *Ackland*, 2 Russ. 273.

### (C) CONSTRUCTION OF, IN GENERAL.

Demise of a tenement, called Woodend, containing nineteen acres, "except all *timber* and other

*trees, wood, underwoods*, sand, marl, mines, &c. The question was, whether the soil of a woodland close, part of Woodend, called Roach Key, was excepted by these words; or only the wood growing thereon. If that close were not included in the demise, only thirteen acres would pass:—Held, that the soil of Roach Key passed by the demise, and was not excepted. *Legh* v. *Heald*, 9 Law J. K.B. 98, s. c. 1 B. & Ad. 622.

Provisos for re-entry in a lease are to be construed like other contracts; not with the strictness of conditions at common law. *Davis* v. *Elsam*, 2 M. & M. 189. [Tenterden]

By an indenture, a farm and lands were demised to a tenant at a yearly rent, and also under and subject to certain yearly payments in case the tenant should not crop, manure, and manage the farm in manner therein specified and covenanted; and also in case the tenant, in the last three years of the term, should sow more than seventy acres of clover in one year, the additional rent of 10*l.* an acre for every acre above seventy acres, for the residue of the term:—Held, that the additional rents were in the nature of liquidated damages, and not of penalties; and therefore, on a bill filed by the landlord for a discovery of breaches of the covenants in aid of an action at law, a plea, that the discovery might subject the tenant to penalties, was overruled. *Jones* v. *Green*, 3 Y. & J. 298.

Lease to A, for a term of years, at a yearly rent, and under and subject to the payment, at stipulated periods during the term, of certain sums of money in the nature of fines; with a covenant on the part of the lessor, at the end of the term, on due and punctual payment being made of the rent, and gross sums or fines, at the times appointed for payment thereof, to grant a further or renewed lease. A assigned to B a part of the premises, for the same term and interest as A himself took under the lease, subject to the payment of a proportional part of the rent and gross sums or fines; (the amount of the proportion was not specified). C afterwards purchased of the lessor the reversion of the premises, expectant on the lease to A; and, subsequently to acquiring the reversion, purchased A's interest in all the premises demised to A by the lease, and not assigned by him to B. After this purchase by C, one of the gross sums or fines became due, but was not paid; and no proportion of it was demanded by C from, or was paid by B:—Held, that the double character filled by A relieved B from the strict performance of the covenant; and that the non-payment by B of a proportion of the gross sum or fine was not, under the circumstances, a refusal to pay, or such a breach of the covenant as to deprive B of his claim to a renewed lease of the property assigned to him. And a demurrer for want of equity was overruled. *Statham* v. *Liverpool Dock Company*, 3 Y. & J. 565.

### (D) Covenants.

A lease of an undivided third part of certain mines, reciting that by permission of the lessor and the owners of the other two thirds, the lessee had pulled down an old smelting-mill, and had agreed to build another of larger dimensions, contained a covenant by the lessee to keep such new mill in repair, and so leave it at the expiration of the term; but contained no covenant by the lessee to build the new mill:—Held, that such a covenant by the lessee might be implied, and that the lessor might sue upon the implied covenant in respect of his interest. *Easterley* v. *Sampson*, in error, 1 C. & J. 105, s. c. 6 Bing. 644, s. c. 4 M. & P. 601, s. c. 9 B. & C. 505, s. c. 4 M. & R. 422.

A tenant for life, remainder over, by indenture demised to the lessee, his executors, &c., for the term of fifteen years, without any express covenant for quiet enjoyment. The lessee was evicted by the remainder-man, after the death of the tenant for life, but before the expiration of the term:—Held, that the lessee could not maintain an action of covenant against the executor of the tenant for life, in respect of such eviction. *Adams* v. *Gibney*, 8 Law J. C.P. 242, s. c. 6 Bing. 656, s. c. 4 M. & P. 491.

*Semble*—that a covenant by tenant with a brewer landlord, to purchase of him all the beer which shall be sold on the premises, is not a covenant which would pass to the assignee of the lessee.

But even if such covenant should so pass, it cannot be enforced where the business of the original brewer landlord is not carried on at the same place by the assignee. *Doe* d. *Calvert* v. *Reid*, 8 Law J. K.B. 328, s. c. 10 B. & C. 849.

### (E) Assignment.

[See Debtor and Creditor.]

An agreement on a lease stamp, whereby A agreed to let to B certain premises from Michaelmas next, upon condition that A should paint, &c., is an actual demise, and may be assigned. *Doe* d. *Green* v. *Fidler*, Peo. A.C. 33. [Kenyon]

A covenant that the lessee, his executors or administrators, will not assign without the consent of the lessor, does not bind the assignee of the lessee, so as to enable the lessor to maintain ejectment for the breach of the covenant.

And *semble*, that the lessor has no remedy whatever against the assignee. But if he have any, he cannot sue the assignee for breach of the other covenants in the lease subsequent to his assigning over; founding his action upon the supposed privity of estate. He must recover, if at all, upon an action against the assignee for damages, by reason of the assignee having wrongfully destroyed the privity of estate. *Paul* v. *Nurse*, 7 Law J. K.B. 12, s. c. 8 B. & C. 486, s. c. 2 M. & R. 525.

In deeds, the proper office of the *habendum* is to restrain the generality of the premises. An assignment (indorsed upon the counterpart of a lease granted by the assignor) of *all the estate, right*, title, and interest of the assignor in a messuage, &c. of which he is possessed, for a term of years, to hold to the assignee from thenceforth, for *all such time* or term therein as within mentioned, conveys to the assignee that portion only of the assignor's term, for which he has granted the lease. If the lessor grants his reversion for a *limited* term only, it will enable the grantee to maintain an action on the covenants in the lease; and a grant from the lessor for a term exactly co-extensive with the lease, gives the grantee, whilst such *grant continues*, a right to sue on the covenants in the lease, the same being incident to the immediate reversion. A conveyance by lease and release of a messuage, &c. and

'the reversion, &c. and all the estate of the grantor," passes a chattel reversion, expectant on a term for years. The assignee, by way of mortgage of a lease, who retains the lease and assignment, is liable to the rents and covenants in the lease. Therefore, where L, tenant in fee, leases for years to B, who under-leases for a portion of his term to M, and then assigns to L, his lessor, for such portion of the term as is leased to M, and L mortgages in fee by lease and release in the usual form, containing the words 'and the reversion and all the estates," &c. to the plaintiff; and M mortgages by assignment his under-lease to the defendants, who keep the under-lease and mortgage deed, the plaintiff can, as assignee of a portion of the reversion, maintain covenant on such under-lease, and the defendants are liable as assignees of the lease, although their mortgage-money has not become due, and they have never actually entered. *Burton* v. *Barclay*, 9 Law J. C.P. 231, s. c. 7 Bing. 745, s. c. 5 M. & P. 785.

If a leasehold interest is assigned by way of mortgage, the assignee, unless there is a special provision to the contrary, takes the interest, subject to all the covenants and obligations of the original lessee.

B N, having an interest, which he held subject to head-rents, under the see of Kilmore for terms of years, renewable periodically on payment of fines, granted under-leases at certain annual rents, and subject to fines for renewal; and he covenanted with the sub-lessees to renew the under-leases as often as he should obtain renewals from the see of Kilmore, the sub-lessee paying all head-rents and renewal of fines.

The interest in these under-leases vested in R, who assigned and conveyed to a trustee his interest in the terms, together with other lands, to secure the payment of annuities which he had granted to F.

The interest of B N in the leaseholds was mortgaged and sold under a decree of foreclosure, and finally assigned to H in August 1814. In September 1814, the interest of R in the under-leases was assigned to H, as purchaser, under a commission of bankrupt.

In 1815, the annuitants filed a bill, praying a sale of the lands charged with the annuities, and payment, subject only to the head-rents; and afterwards, upon discovery that the leases had expired, a supplemental bill was filed against H, praying that they might be renewed upon reasonable terms. Upon a reference under the decree, the Master having found that the rents and fines paid by H, and the lessees under the see for renewals, were a charge upon the lands prior to the annuities, his report was in this respect overruled by the Court, upon exceptions; and upon a second report, the Court below held, that the annuities were a charge prior to the fines. But this decree was reversed upon appeal.

In such a case the covenant does not run with the land, but is personal, and the right under the lease to deduct the rent and fines is not merged by the union of the principal and under-leases in the same person. *Haig* v. *Homan*, 4 Bligh, N.S. 380.

A agreed to take an assignment of a lease of a house, which was out of repair, from B, and by the agreement it was stipulated that all outgoings should be paid by B up to April 23rd; and, by an assignment indorsed on the lease (executed by B, but not by A), B assigned the residue of the term, subject to the performance of all the covenants of the lease, which, from the 22nd of April, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, and so to deliver them up; and, after the assignment, the reversioner sued B, and recovered for dilapidations which occurred before April 22nd:—Held, that B could not maintain an action on the case against A for these dilapidations, even though it could be proved that A gave a smaller price, because the premises were out of repair.—Held, also, that the Judge could not look beyond the written instruments, viz. the written agreement and the assignment. If B assign the lease of a house to A by deed, subject to certain covenants, and A take possession, whether B's remedy for a breach of the covenants is by an action of covenant, though A never executed the deed—*quære*. *Hawkins* v. *Sherman*, 3 C. & P. 459.

### (F) Renewal.

Every presumption is to be made to support a right of renewal, where, from 1682, leases for twenty-one years, at a small rent and fine certain, of the tithes of a parish, had been regularly granted by the respective bishops of Ely, who were impropriate rectors of the parish, to the vicars for the time being. *The Attorney General* v. *the Bishop of Ely*, 4 Russ. 102.

Decree against a corporation to grant a new lease according to a covenant for perpetual renewal, though the whole of the reserved rent has been for many years applied uniformly to one charitable purpose. *Goxna* v. *the Aldermen and Burgesses of Grantham*, 3 Russ. 261.

In a lease for a term of years determinable on the deaths of three persons, it was covenanted that on the death of either of the lives, the lessee should, within twelve months, renew, and pay a fine of nine guineas; and each party bound himself unto the other in a penalty of eighteen guineas, to renew, and to grant and take the new lease respectively; two of the lives died before the lessee made his application to renew, when he offered to pay the fines and a penalty, but the owner of the land refused to renew.

Held, that no accident will entitle a party to renew, unless it could not have been avoided by reasonable diligence.

Held, that the penalty did not give an option to the lessee, and that a direction given by a former owner in his will to renew, only left the trustees to do what the testator himself would have done.

Held, that if the lessee omit to renew on the death of the first life, he is not entitled to renew on the death of the second life.

Held, that communications which have passed between the lessor or solicitors, and other lessees, regarding their renewals, cannot be read in evidence. *Reid* v. *Blagrave*, 9 Law J. Chanc. 245.

The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted, upon the death of one of the *cestuis que vie*, to apply for a renewal within the six months, filing his bill praying relief, upon the ground that he did not, within the six months, know that the person was dead, or that the deceased

person was one of the *cestuis que vie* named in the lease. The bill was dismissed with costs; because the plaintiff might have known the facts, if he had used reasonable diligence, and acted with ordinary prudence. *Harries* v. *Bryant*, 4 Russ. 89.

A testator devised premises, which he held by lease under the dean and chapter of Westminster, to A for life, subject to the payment of all fines and rents as they became due yearly; and he directed that, after A's decease, the premises should be vested in two trustees, who were to manage the same to the best advantage, and were to pay all rents and fines until B should attain his age of twenty-one years, to whom the testator bequeathed all the remaining term and interest, which he had in the lease; the lease was holden at a nominal rent, and contained no covenant to renew; but the custom of the dean and chapter was, to renew every seven years, on receiving a reasonable fine; and at the death of the testator, about thirty years of the term were unexpired:—Held, that A was not bound to renew the lease at any time during her life. *Capel* v. *Wood*, 4 Russ. 500.

A lease of lands in Ireland contained a covenant on the part of the lessor for perpetual renewal; and a covenant on the part of the lessee, to pay 1*l.* sterling for every perch of bog, cut otherwise than thereby covenanted, and to be distrained for as additional rent. Upon a bill filed by the assignee of the lease and his mortgagee against the assignee of the lessor, for a specific performance of the covenant for renewal, it appeared that three years before the filing of the bill, a notice had been given by the landlord to the tenant, to name new lives in the place of those which had expired, and to pay the fines with interest, &c.; but in the interval, a correspondence had taken place, from which it was to be collected, that the tenant had always been ready to pay the fine; but that the landlord alleging, by his answer in the suit, supported by evidence, that the tenant had cut large quantities of turf in breach of his covenant, and had also made encroachments upon other lands, refused to renew until those two questions were settled; and although no actual tender of the fines had been made, it was clear from the correspondence that they would have been refused if made.

Held, affirming the decree of the court below, that, under these circumstances, the delay of three years was not, under the Irish Tenantry Act, such gross laches as ought to deprive the tenant of the right of renewal, and work a forfeiture of the lease; but that the landlord ought to be compelled specifically to perform the covenant for renewal. Held, also, that in making this decree for the performance of part of the contract between the parties, it is not necessary for a court of equity to provide for the performance of the other part, namely, the covenant against cutting turf, otherwise than by leaving the landlord at liberty, by the decree upon further directions, to bring an action at law upon that covenant, especially as that liberty had been given by the original decree; and an action brought against the tenant, which abated by his death, and thereupon no application had been made by the landlord to the court of equity for its assistance. *Trant* v. *Dwyer*, 2 Bligh, N.S. 11, s. c. 1 Dow. & Cl. A.C. 125.

By a will, a renewable lease was devised to A for life, remainder to B for life, or so long as the said lease should continue, remainder to trustees for sale and division of the produce amongst various persons. C, the husband of A, purchased the life-interest of B, and then obtained a renewal of the lease to himself, for three lives; and died. The personal representative of C was held, by the Court, to be a trustee for those claiming under the will of the original lessee; and was decreed to convey as they should direct, on payment of their respective due portions of the expenses of the renewal; but the price given by C for the life-interest of B was not allowed to be considered as a portion of those expenses, although B was himself the last surviving *cestui que vie* of the original lease, and therefore was not likely to have renewed. *Cridland* v. *Lunn*, 9 Law J. Chanc. 99.

If a tenant for life of an under-lease for eighteen years, granted by a person who himself holds the premises so underlet, along with other property, under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from his superior lessor a renewal of the lease thus purchased, the renewed lease is subject, so far as regards the premises which were comprised in the underlease, to the same trusts as would have affected the under-lease, if it had not been merged or had not expired by the effluxion of time.

The same rule holds, though, at the time of the purchase the property was vested in a trustee upon trusts, under which he could not have granted a renewal of the under-lease, and though the tenant for life outlived, by twenty-five years, the time at which the under-lease would have expired by effluxion of time. *Powell* v. *Sonnet*, 3 Russ. 556.

### (G) Surrender.

[See Surrender.]

The mere cancelling in fact of a lease is not a surrender of the term thereby granted within the Statute of Frauds, which requires such surrender to be by deed or note in writing, or by act or operation of law.

Nor, where such a lease appears to have been once in the possession of the lessee, who entered into possession of the property, will the fact of the lease being produced by the lessor in a cancelled state, unaccompanied by any other evidence, be sufficient to warrant a presumption that there has been a valid surrender. *Doe* d. *Courtail* v. *Thomas*, 7 Law J. K.B. 214, s. c. 9 B. & C. 288, s. c. 4 M. & R. 216.

### (H) Forfeiture.

[*Doe* d. *Hannibar* v. *Watt*, 1 M. & R. 694, Dig. Law J. 307.]

By the terms of a lease, the lessee was to insure and keep insured the premises demised, and deposit the policy with the lessor. There was the usual clause of re-entry on non-performance of the covenants. The lessee never insured, but assigned the premises; and the assignee never insured. The lessor distrained for rent due from the assignee; and afterwards brought ejectment for the forfeiture by the not insuring; laying the day of the demise in his declaration of ejectment a few days after he had so distrained:—Held,

1. That the lease was conditional, and therefore, whether the covenant to insure run with the land or not, (so as to subject the assignee to an action) the lessor was entitled to re-enter on the forfeiture for condition broken.

2. That the covenant to insure and keep insured was a continuing covenant; and although the distress for rent was a waiver of the forfaiture up to the time, the lessor might recover for the forfeiture incurred each day afterwards: and therefore the above ejectment was well brought. *Doe d. Sir Charles Flower, Bart. v. Peck*, 9 Law J. K.B. 60, s. c. 1 B. & Ad. 428.

A lease contained a covenant that the lessee should not make certain erections on the premises. There was a clause of re-entry in default of the performance of the covenants, after thirty days' notice; —Held, that this clause only applied to covenants affirmative, to pay rent, to repair, and the like, and not to a negative covenant like the above; and, therefore, that the lessor was not entitled to re-enter after thirty days' notice to remove erections which had been made in breach of the covenant. *Doe d. Peck v. Marchetti*, 9 Law J. K.B. 126, s. c. 1 B. & Ad. 715.

Building lease from A to B. B underlet to C. C was to build houses; but, by his inability to do so, his lease became forfeited to B, and B's lease also became forfeited to A. B assigned all his interest to D, who applied to A for an extension of time to complete the original contract, which was granted.

D brought an ejectment against C, for his breach of covenant, and recovered a verdict.

Motion for an injunction to stay execution of the writ of possession, refused. *Hillier v. Parkinson*, 9 Law J. Chanc. 156.

A forfeiture of a lease occasioned by the *using* of the premises, in a manner prohibited by the covenant, is not waived by a subsequent receipt of rent, if the prohibited user be continued afterwards. *Doe d. Ambler v. Woodbridge*, 7 Law J. K.B. 263, s. c. 9 B. & C. 376, s. c. 4 M. & R. 302.

B, the assignee of certain leases of lands in Ireland, for long terms of years, being in arrear for rent, suffered judgment to be recovered on ejectment by the lessor, and possession of the lands was delivered by writ of *habere* on the 18th of July 1823. By the Irish Statute, 4 Geo. 1. c. 5. s. 3, a court of equity is empowered to annul the proceedings in ejectment, and restore the possession to the lessee, if a bill in filed, and the amount of rent and costs paid into court, within six calendar months after execution had been executed in ejectment. On the 17th of January 1824, B filed a bill in the Exchequer to redeem the lands, and obtained an order, dated on the 17th of January, and signed by one of the Barons of the Exchequer, to lodge the amount of rent in arrear and costs in the Bank of Ireland. The order was left with the accountant-general on the 17th, after the bank was shut. On Monday the 19th of January, the money was paid in to the bank, and the accountant-general gave a certificate accordingly. A treaty for a compromise then took place, and was for some time pending.

On the 7th of May 1825, on the motion of B, it was ordered that the order for lodging the rent and costs should be entered as of the 17th of January; and that the lodgment of the money should be receipted on that day, instead of the 19th, and that a certificate should be granted accordingly by the accountant-general.

On the 7th of July 1825, the lessor obtained an order to take out of court, without prejudice to the rights of the parties, the rent and costs which had been deposited, and that he might be at liberty to proceed on the recovery of the lands.

Having, under this order, taken the money out of court, the lessor appealed against the order, directing the alteration in the date of the payment of the rent and costs. The order was reversed. *Vesey v. Bodkin*, 4 Bligh, N.S. 64, s. c. 1 Dow. & Cl. A.C. 456.

### (I) Actions.

[*Fancy v. Scott*, 9 M. & R. 335, Dig. L. J. 308.]

Although the lessee, when sued in covenant by the lessor, cannot dispute the lessor's title, yet, when sued by the assignee of the lessor, he may deny that the lessor had such a title as could pass the right of action to the assignee.

Accordingly, where a person, suing as assignee, declared that A, being seised in fee, demised by deed, and then averred that the lessor devised the reversion to him the plaintiff—the defendant, (who claimed through the lessee,) was allowed to plead that A was not seised in fee. *Seymour v. France*, 7 Law J. K.B. 18.

Covenant against A and B, on a covenant supposed to be implied as incident to a demise by lease. On production of the lease, it appeared, that, in point of law, A only demised, and that B, who had an equitable interest, merely confirmed:—Held, that the action was not maintainable against A and B. *Smith v. Pocklington*, 1 C. & J. 445, s. c. 1 Tyrw. 309.

A lease purported to have been signed by the mark of the party; a person proved the hand-writing of the subscribing witness, and that he had gone abroad, and another person proved that the defendant had spoken of the term that he had under the lease:—Held, that this was sufficient proof of the execution of the lease by the defendant. *Doe d. Wheeldon v. Paul*, 3 C. & P. 613. [Tenterden].

## LEATHER.

[Repeal of duties of Excise and drawbacks on, 11 Geo. 4. c. 16, 8 Law J. Stat. 21.]

## LEGACY.

(A) Construction of, in general.
(B) Who take as Legatees.
(C) What Property passes.
(D) What Interest vests.
  (a) *Absolute.*
  (b) *For Life.*
  (c) *Tenancy in Common.*
(E) Survivorship.
(F) Specific.
(G) Accumulative.
(H) Vested.
(I) Contingent.
(K) Conditional.

(L) On what Property chargeable.
(M) Interest upon.
(N) Investment of.
(O) Abatement.
(P) Payment.
(Q) Ademption.
(R) Lapsed.
(S) Void.
(T) Residue or Surplus.
(V) Legacy Duty.
(W) Rights of Legatees.

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### (A) Construction of, in general.

[*Livesey* v. *Livesey*, 3 Russ. 287, Dig. Law J. 312. *Grant* v. *Lynam*, 4 Russ. 292, Dig. Law J. 311. *Cole* v. *Turner*, 4 Russ. 376, Dig. Law J. 310.]

Construction of will.—Continuance of annuities.—Construction of a gift over, if certain persons should die. *Astley* v. *Declieve*, 8 Law J. Chanc. 20.

Construction of wills as to a claim of priority by legatees over annuitants. *Long* v. *Hughes*, 7 Law J. Chanc. 105.

Testator bequeathed to his grandchildren, naming them, the sum of 1,000*l.*, payable to each of them on their attaining twenty-one; and, in case of the death of either of them before that period, the legacy to be divided amongst the survivors:—Held, that the grandchildren were entitled to one sum only of 1,000*l.*, and not each of them to a separate legacy to that amount. *Stewart* v. *Garnett*, 3 Sim. 398.

The construction of a will, as to whether a sum to be raised out of the rents and profits of real estate shall be raised by the annual rents and profits, or by sale or mortgage. *Wilson* v. *Halliley*, 8 Law J. Chanc. 171, a. c. 1 Russ. & M. 590.

Bequest of land, and of 5*l.* per cent. stock and 3*l.* per cent. stock to trustees, to apply a sufficient part to the support and education of R, the stock to remain in the testator's name, and the surplus of the dividends and rents to accumulate; and when R attained twenty-one, to transfer to her the lands, stock, and accumulations, but if R died under twenty-one, (as happened to be the case,) testator gave his lands to E, without any words of limitation, and his 5*l.* per cent. stock to M, provided they were living at the decease of R, not else. The plaintiffs were the residuary legatees. R died under twenty-one.

Held—That E took the lands in fee.

Held—That M took the capital of the 5*l.* per cent. stock.

Held—That the plaintiffs were entitled to the accumulations of the rents and dividends. *Powles* v. *Jopling*, 9 Law J. Chanc. 224.

A direction in a will, that the testator's brother should be his executor to arrange, dispose of, and settle his affairs, and the appointment of the brother to be the guardian of the testator's daughter, an only child, who was afterwards discovered to be illegitimate, does not amount by implication to a bequest of the personal estate in favour of the daughter. *Davies* v. *Davies*, 1 Russ. & M. 645.

A testator gave one-third of the residue of his personal estate to trustees, to lay out the same in the purchase of a government annuity for the life of his sister, which annuity he gave to his sister for her sole and separate use and benefit, independent of any husband she might happen to marry, and her receipts to be good discharges; and he declared the annuity to be for her personal benefit and maintenance, without power for her to assign or sell the same by way of anticipation.

Held, that the sister, being a feme sole, was entitled to the capital or to the annuity, at her option; and decree accordingly: but costs paid out of the said one-third. *Woodmeston* v. *Walker*, 9 Law J. Chanc. 257.

Testator gave to his daughter and her children 5,000*l.*, 3,000*l.* to be paid in one year after his decease, and 2,000*l.* after the decease of his wife, and appointed A B trustee of those sums for his daughter and her children:—The Court declared the 5,000*l.* to be in trust for the daughter for life, and, after her decease, for all her children, whether born in the testator's lifetime or after his decease. *Morse* v. *Morse*, 2 Sim. 485.

A son died before his father, leaving a widow, to whom he gave all his property. The son's estate being insufficient for the payment of his debts, the father, by a codicil to his will, directed his trustees and executors to pay his son's debts, and named the son of his son the residuary devisees and legatees. The true construction of the father's codicil is, that he intended only the payment of such portion of the debts of the son as his son's estate would be insufficient to pay. *Walker* v. *Lodge*, 3 Russ. 559.

A testator having by his will given an interest for life in a sum of stock to two persons, and the survivor of them, with remainder to another for life, and afterwards to the children of such other person, by a codicil substitutes an annuity, nearly equal to the amount of the dividends of the stock, in the place of the first gift: the gift in remainder is not accelerated; but its value is to be computed according to the price of stock at the time of the testator's death, when, but for the substitution, the gift of the prior life interest would have taken effect. *Davis* v. *Ross*, 1 Russ. & M. 687.

A testator by will gives his moiety of an estate called H, to his sister and her children, and subsequently, by a codicil, which purports to give them the whole of that estate, if he shall possess it at his death, charges it with a sum of money to legatees. At the date of the will and codicil, he was owner of only one moiety of H, but before his death he acquired the other; although the devise fails as to the after-purchased moiety, the charge is good for the whole sum, and equity will make no apportionment. *Lushington* v. *Sewell*, 1 Russ. & M. 169.

### (B) Who take as Legatees.

[*Hayes* v. *Hayes*, 4 Russ. 311, Dig. Law J. 312. *Hardwick* v. *Thurston*, 4 Russ. 381, Dig. Law J. 312.]

Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controlled by the context of the will; and the heir-at-law will take the legacy, not the next of kin.

In such a case it makes no difference, that there are three co-heirs. *Mounsey* v. *Blamire*, 4 Russ. 384.

A testator bequeathed "to the two sons and the daughter of A B 50*l.* each." At the date of the will, and the death of the testator, A B had one son and four daughters:—each of these five children is entitled to a legacy of 50*l.* *Harrison* v. *Harrison*, 1 Russ. & M. 72, a. c. 1 Tam. 273.

A testator, after devising an estate to his son-in-law B, gives the residue of his real and personal estate to his daughter S B for her natural life, for her sole and separate use and benefit, and so as the same should not be subject to the debts of her said husband; he then gave, after the decease of his said daughter, all the rest, residue, and remainder of his real estates, of what nature or kind soever, unto her second, third, fourth, and every younger child or children, share and share alike, as tenants in common, with a limitation over in case his daughter should die leaving no issue, or if her second and other children did not attain his, her, or their respective age or ages of twenty-one years, and were not married before such age, with the consent of his son and daughter, and the survivor of them; and he declared his will and meaning to be, that his son and daughter, or the survivor of them, should be subscribing witnesses or witness at the wedding of such child or children that should so marry before his, her, or their respective age or ages of twenty-one years, otherwise such child or children should not have or receive any benefit from his will. B died; and the daughter married a second husband:—Held, that the children of the second marriage were entitled, as well as the children of the first; that the shares did not vest till the children attained twenty-one years, or married with consent. *Critchett* v. *Taynton*, 8 Law J. Chanc. 143, s. c. 1 Russ. & M. 541.

The term grandchildren, in a clause of a will directing legacies in a given event, extended so as to include great-grandchildren who had been previously named. *Strutt* v. *Finch*, 7 Law J. Chanc. 176.

A bequest to the children of the testator's late aunts, Rachael Walker and Diana Walker, who should be living at his death. The testator had no aunt nor any relative named Diana Walker; but he had a cousin, the daughter of his aunt Rachael, named Dinah Walker, who married Harrison long before the date of the will, and survived the testator. Evidence proved that the testator called his cousin by her maiden name of Walker after her marriage:—Held, that the children of Dinah Harrison were not entitled as the children of his late aunt, Diana Walker. *Shearman* v. *Jennett*, 9 Law J. Chanc. 148.

A testator, having one nephew and one niece, and eight great-nephews and nieces, living at his death, gave one-tenth of his residue to his nephew, and another to his niece, and the remainder to trustees in trust for their children at twenty-one: and he empowered his trustees to apply all or any part of their respective shares for their advancement:—Held, that all the great-nephews and nieces born before the eldest attained twenty-one, though after the testator's death, were entitled to shares. *Titcomb* v. *Butler*, 3 Sim. 417.

A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after-taken wife. *Garratt* v. *Niblock*, 1 Russ. & M. 529.

### (C) What Property passes.

[*Kendall* v. *Kendall*, 4 Russ. 360, Dig. Law J. 313. *Newburgh* v. *Ayre*, 4 Russ. 454, Dig. Law. J. 313.]

Devise of "one moiety of the rents, issues, and profits of my estate named I, in the parish of M, to be divided equally amongst my grandchildren; the other moiety of the rents, issues, and profits of my said estate I give to K. and his heirs:"—Held, that the grandchildren take the fee as tenants in common, in a moiety of the estate. *Stewart* v. *Garnett*, 3 Sim. 398.

A testator, after giving several annuities for lives, each gift commencing with the word "item," proceeds thus: "Item, I give to my wife 1,200*l.* a year during her life, and also my furniture and house, and after her decease to S S and his heirs:"—Held, that S S was entitled to the fund for payment of the annuity, as well as to the house and furniture. *Oldman* v. *Slater*, 3 Sim. 85.

I B, at his death, had a balance due from his banker, and was also entitled to a share of the balance due to A B, from his banker, A B having received monies for him from time to time, and with his knowledge paid them to his own bankers, as his own monies; but I B had no concern with A B's bankers, nor did they know that he was interested in the monies paid by A B. I B bequeaths all his money in the hands of any banker:—Held, that his balance at his own banker's, and also his share of A B's balance, will pass; and that evidence is admissible to shew that he so intended. *Benson* v. *Whittam*, *Heming* v. *Whittam*, 2 Sim. 493.

A bequest of a cabinet, with whatever it contains "except money," will not pass a promissory note payable to the testatrix, of a date anterior to the will, and which, at her death, was found in the cabinet. *Read* v. *Stewart*, 4 Russ. 69.

A bequest of "property in the English funds" will not pass India Stock or Exchequer bills.

Stock standing in the testator's name at the time of his death, and which his bankers had purchased with monies received by them on his account, without any express authority for their so doing, will not pass by a bequest of the testator's stock. *Johnson* v. *Digby*, 8 Law J. Chanc. 38.

A bequest of household furniture and other household effects in a dwelling-house and premises, comprises all property placed there, either for ornament, or for use or consumption in it. *Cole* v. *Fitzgerald*, 3 Russ. 301.

A testator by his will bequeaths his leasehold messuages, together with all his pictures, prints, drawings, or paintings in miniature or enamel, with all his gold and silver coins, medals, watches, and trinkets, of every kind whatsoever; as also his coaches, carriages, harness, and furniture to the same belonging; also, all and singular the fixtures appurtenant to his said leasehold messuage, together with the household furniture, plate, linen, wines, liquors, and other his estate and effects whatsoever, in and about the same, and that should be in his possession at the time of his decease, or in and about his said dwelling-house, or the out-houses and offices appurtenant thereto, and by him held, used, occupied, and enjoyed therewith: by a codicil he makes a different disposition of the house, "with all its furniture and appurtenances thereunto belonging:"—Held, that pictures placed in the house as ornamental furniture, and plate (including plate deposited for safe custody at a banker's), and linen, passed by the codicil; but that the disposi-

tion of the other articles mentioned in the will, not being household furniture, was not affected by the codicil. *Cremorne* v. *Antrobus*, 7 Law J. Chanc. 68.

A testatrix directs all her plate and jewels to be sold for the payment of her debts, except Lady Mary Duncan's ring set with diamonds, which she desires may be restored to her; and she bequeaths to her three cousins the remainder of her rings, and all her trinkets, necklaces of every description, pearls, garnets, cornelians, and watches:—Held, that a diamond necklace and cross, and diamond rings, did not pass to the cousins, but were to be included as jewels, among the jewels that were to be sold.

By a codicil, the testatrix gave to her niece all her trinkets and pearls, and several jewel ornaments particularly described:—Held, that a pearl necklace passed to the three cousins, under the bequest of necklaces, and not to the niece, under the bequest of pearls. *Attorney General* v. *Harley*, 7 Law J. Chanc. 31.

A testator (a sculptor) by his will gave articles used in his profession, by description, some of which were very obscurely written:—Held, that the articles so obscurely described would not pass. *Goblet* v. *Beechey*, 9 Law J. Chanc. 200.

### (D) What Interest vests.

#### (a) *Absolute.*

[*Butter* v. *Ommaney*, 4 Russ. 70, Dig. Law J. 314.]

Bequest to a wife for her own use, and if she make no disposition thereof, either by expenditure, sale, transfer, assignment, gift, or otherwise, in her lifetime, or by her last will and testament, then over:—Held to be a bequest by which the property bequeathed vested in the wife absolutely. *Bourn* v. *Gibbs*, 8 Law J. Chanc. 151, s. c. 1 Russ. & M. 614.

Bequest of 40*l.* *per annum* to A for life, and after her decease to B or his heirs:—Held, that "or" must be construed disjunctively; and that therefore B did not take an absolute interest in the annuity. *Girdlestone* v. *Doe*, 2 Sim. 295.

A testator bequeathed all his personal property, not before disposed of by his will, unto his trustees, in trust for his five sons, "and their respective issue (if any), such issue to take *per stirpes*, and not *per capita*, to be divided amongst them in equal shares and proportions; the shares of such of them as shall have attained the age of twenty-one to be paid them respectively forthwith after my decease, and the shares of such of them as shall be under the age of twenty-one years to be paid to them when and as they shall respectively attain such age:"—Held, that this bequest was an absolute gift, to each of the sons, of the fifth part of the property thus bequeathed; and that, if any of the sons had died before the testator, the issue of such son would take his share by substitution. *Pearson* v. *Stephen*, 2 Dow. & Cl. A.C. 328.

#### (b) *For Life.*

[*Reith* v. *Seymour*, 4 Russ. 263, Dig. Law J. 314.]

#### (c) *Tenancy in Common.*

By will, after giving a life-interest to A, in stock, "and after her decease I give and devise the said stock to her children when they attain the age of twenty-one years:"—Held, that the children who attained twenty-one took vested interests as tenants in common. Only two children attained twenty-one, one of whom died in the lifetime of the tenant for life; and, on a bill filed by the survivor for the whole stock, a general demurrer by the representatives of the other was allowed. *Woodgate* v. *Atkins*, 9 Law J. Chanc. 166.

### (E) Survivorship.

"Survivors or survivor" construed in one part of a clause to mean "others or other," though in another part of the same clause the same words are used in their literal meaning, and though, in other parts of the will, the distinction between "survivors or survivor," and "others or other," is carefully observed. *Earl Winterton* v. *Crawford*, 8 Law J. Chanc. 134, s. c. 1 Russ. & M. 407.

A testator gives a fund to his wife for life, and, after her death, to five persons, A, B, C, D, and E, equally; and he directs, that in case of the death of any of these five persons, without lawful issue, before his or her share should become payable, the share of him, her, or them, so dying, should be equally divided between the survivors of them. A died, leaving a son; then B died, leaving issue, who survived the tenant for life; then the son of A died, without issue; then C died, without issue; next D died, leaving issue; and lastly, the tenant for life died:—Held, that, upon the death of A's son, A's share went over; that C's accrued share of A's original share did not go over, on C's death without issue; that the shares, which went over, accrued only to such of the five persons as were living at the time of the accrual. *Crowder* v. *Stone*, 7 Law J. Chanc. 93, s. c. 3 Russ. 217.

### (F) Specific.

Testatrix bequeathed to A B and C D "50*l.* each of Bank Long Annuities stock, now standing in my name:"—Held, that each of the legatees was entitled to a specific legacy of 50*l.* Long Annuities; and that evidence of the state of the testatrix's assets was not admissible. *Boys* v. *Williams*, 5 Sim. 563.

### (G) Accumulative.

A, by each of two several codicils to his will, directed his just debts to be paid, and in particular a debt of 12*l.* By the one of them, he gave 100*l.* to a charity; and by the other, he gave 200*l.* to the same charity:—Held, that the legacies were not accumulative, and that the latter legacy was only a substitution of the former. *Sevinon* v. *Barber*, 1 Tam. 14.

Equal sums given to the same person by a will and codicil,—held, from the character and objects of the latter, to be substitutional, and not accumulative, although the legacy given by the codicil was only conditional. *Fraser* v. *Byng*, 1 Russ. & M. 90.

A testatrix by her will gave to T L 50*s.* a month during his life, in lieu of his giving up all other notes and claims; and, by a codicil, she gave him 3*l.* a month during his life, and concluded by directing that all other things should be paid and done as directed by her will:—Held, that T L was entitled to both the monthly payments. *Lord* v. *Sutcliffe*, 8 Sim. 273.

### (H) Vested.

The testator directed his personalty to be invested for the sole use and maintenance of his daughter

until she arrived at twenty-one; and when she attained twenty-one, the remainder to be paid to the daughter. She died under twenty-one:—Held, a vested interest. *Ross* v. *Sowerby*, 1 Tam. 376.

A testator gave to his wife 300*l.* a year, and an annuity of 100*l.* a year for each of his three children during their respective minorities, for their maintenance, with a direction, that upon the death or marriage of his wife, the 300*l.* a year should be divided among his three children in like manner as his other effects; and, subject thereto, he gave all the residue of his personal estate to his three children and the survivors or survivor of them:—Held, that they took a vested interest in their respective shares at the death of the testator. *Bass* v. *Russell*, 9 Law J. Chanc. 177, s. c. 1 Tam. 18.

Vesting of legacies, where, by the bequest therein, they were given to be paid on a day certain, "and in case any of the legatees should die before that day, that their legacies should be given to whomsoever of his or her children to whom he or she should bequeath it." *Tolner* v. *Marriott*, 9 Law J. Chanc. 14.

A testator devises and bequeaths his property, after his wife's death, to trustees, who are to invest it in securities, and to pay the interest to his daughters, Jane and Eliza, in equal shares, and also to pay to, or apply for the benefit of, his grandson Edmund (Eliza's eldest son), 200*l.* annually, when he attains twenty-one; and before that period, such part of the 200*l.* bequeathed to him as they may judge proper. In a subsequent part of his will he gives his daughters power to dispose of the moieties of his property, of which they respectively took the interest, in favour of their respective children or grandchildren, except that 4,000*l.*, part of Eliza's share, out of which the interest to the grandson is to arise, and which is to be that grandson's property; and he directs that, in case either of his daughters shall die without leaving issue, the fortune of the one so dying shall go over for the benefit of the other and her children, and she shall have the power of limiting an annuity of 100*l.* *per annum*, out of her moiety, to a surviving husband. The grandson Edmund attained twenty-one, and died in the lifetime of his mother:—Held, that the annuity of 200*l.* a year ceased upon his death; that the 4,000*l.* did not become a vested interest in him. *Livesey* v. *Livesey*, 7 Law J. Chanc. 120.

### (I) Contingent.

[*Smart* v. *Clark*, 3 Russ. 365, Dig. Law J. 316. *Newburgh* v. *Ayre*, 4 Russ. 454, Dig. Law J. 316.]

Where a testator gives an annuity to A for life, and after A's death to B, if she be a widow, and not otherwise:—Held, that if B were not a widow at the death of A, she could not take the annuity. *Bartleman* v. *Murchison*, 9 Law J. Chanc. 60.

Bequest to H D, for his own use; and in case he should die in the testator's lifetime, or afterwards, without having any child or children, then over. H D survived the testator, and died without having had a child:—Held, that the gift over took effect. *Stone* v. *Maule*, 2 Sim. 490.

A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate, or encumber them; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency, or otherwise, should be assigned or become payable to any other person, or be or become applicable to any other purpose, than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children. Long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, the nephew took the benefit of the Lords' Act (1 Geo. 4. c. 119.) in the usual way; and some years afterwards the testator died:—Held, that this insolvency operated as a forfeiture of the life interest given to the nephew by the will. *Yarnold* v. *Moorhouse*, 1 Russ. & M. 364.

### (K) Conditional.

[*Hemming* v. *Gurney*, 1 Dow. & Cl. A.C. 35, Dig. Law J. 316.]

A testator gives a specific bequest to A, and directs, that, in consideration of the bequest, A shall pay his debts; and makes A his residuary legatee and executor: the payment of the debts is a condition annexed to the specific bequest; and, if A accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him. *Messenger* v. *Andrews*, 4 Russ. 478.

A testator gave to his daughter a legacy of 10,000*l.*, "payable and to be paid unto her in manner following, viz. a sum of 5,000*l.* upon her marriage under twenty-one, with the consent of his trustees, and the sum of 5,000*l.* within two years afterwards. The daughter married under twenty-one, without consent of the trustees; and, her first husband dying, she married a second husband at the distance of thirty years from the first marriage. *Quære*, if, on such second marriage, she became entitled to the 10,000*l.* *Clifford* v. *Beaumont*, 4 Russ. 325.

Where a testator directs a legacy to be paid, if the legatees claim within a given time:—Held, that a bill filed for the administration of the assets is a claim sufficient to satisfy the words of the will. *Tolner* v. *Marriott*, 9 Law J. Chanc. 14.

### (L) On what Property chargeable.

[*Kirke* v. *Kirke*, 4 Russ. 435, Dig. Law J. 318.]

Construction of a will as to the question, whether the proceeds of real estate were made the primary fund for the payment of certain legacies. *Ricketts* v. *Ladley*, 3 Russ. 418.

Testator by his will, gave an annuity, payable out of his freehold, copyhold, and personal estate, and by a codicil, not duly attested, revoked the annuity: Held, that it was a subsisting charge upon the freehold. *Mortimer* v. *West*, 2 Sim. 276.

A, by his will, limited his lands to E, his daughter, and H, her husband, for their lives, &c., remainder to their sons successively in tail, remainder to M, his daughter, and F, her husband, for their lives, &c.; remainder to their sons successively in tail; with divers remainders over, including C and his sons, and their issue; and he declared and provided by the will, that in case M or F, or the sons

or sum of F and M, or either of them, should become entitled to the estate under the limitations of the will, a sum of 2,000l. should be charged on the lands in remainder, for the use of the younger children of F, in certain specific proportions. E and H died without issue. The sons of M and F died before the estate became vested in them; and after the death of M and F, and the expiration of the preceding life estates, G a grandson of M and F, became entitled under the limitations of the will to an estate tail.—Held, in the court below, and on appeal, that the lands having vested in a grandson, and not in a son of M and F, were nevertheless liable to the charge created by the will in favour of the younger children of F. Gore v. Lord Lorton, 2 Bligh, N. S. 286, s. c. 1 Dow & Cl. A.C. 190.

J. S. by a will properly executed, gave a sum of 4,000l. to be laid out in government or real securities, in trust for L. the wife of S. for her separate use for her life, remainder to J. for his life; remainder to the children of L. by S. he then devised certain lands and tenements specified to various persons named in the will, and after bequeathing several pecuniary legacies, he concluded thus:—"And I do hereby expressly charge and make liable my real and personal estate to and with the payment of the aforesaid several legacies."—Held, reversing the decree of the court below, that the lands specifically devised, were not liable to the payment of the legacies on a deficiency of the personal estate. *Spong* v. *Spong*, 3 Bligh, N.S. 84, s. c. 1 Dow. & Cl. A.C. 365.

A testator had covenanted, that on his decease 3,000l. should be paid to trustees on trust to pay the interest to the husband of his daughter A for life, remainder to his daughter A for life, remainder to his children, &c.: by his will he gave a third part of his residuary estate to A for life, remainder to her children, and declared that his estate was not to be charged with the payment of the 3,000l. or interest thereon. A died without issue; upon whose event the share of the residue, given to her and her children, was limited over to B: the issue of A, who took nothing under the will, claimed the annuity:—Held, that the annuity was to be borne exclusively by that share of the residue, which had been given to his wife for life, and was now enjoyed by B. *Winterton* v. *Crawford*, 8 Law J. Chanc. 134, s. c. 1 Russ. & M. 407.

Where a testator creates a mixed and general fund from real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies; and if some of the legacies fail by lapse or otherwise, that part of the fund, which would have been applicable to those purposes, been unappropriated, belongs, as far as it is composed of real estate, to the heir, and, as far as it is composed of personal estate, to the next of kin. *Roberts* v. *Walker*, 1 Russ. & M. 752.

### (M) Interest upon.

A testator gave legacies to illegitimate children, provided they attained twenty-one; with a bequest over if they died under that age; and appointed trustees and guardians of the children, earnestly requesting those trustees and guardians to take care of the interests of the children:—Held, that the children were entitled to interest on their legacies during their minority. *Mills* v. *Roberts*, 8 Law J. Chanc. 141, s. c. 1 Russ. & M. 555, s. c. 1 Tam. 66.

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for A during her life, and, after her death for B. The trustees permitted a share, which the testator had in an Indian loan, bearing interest at 10*l.* per cent., to remain for several years on that security, during which time they paid to A the interest at 10*l.* per cent., which it yielded annually; and, the loan being afterwards paid off, they invested the money in the 3*l.* per cents., at a time when the funds were so low that the amount of stock purchased was considerably greater, than if the conversion had taken place at the end of a year from the testator's death:—Held, that the tenant for life was not entitled to the actual interest which the money yielded, while it remained on the Indian security, but only to the dividends of so much 3*l.* per cent. stock as would have been purchased with it at the end of a year from the testator's death.

That the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest; and that they ought to be allowed in their discharge as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security and invested in the 3*l.* per cent. stock, at the end of a year from the testator's death. *Dimes* v. *Scott*, 4 Russ. 195.

### (N) Investment of.

Where an annuity is given with a direction for purchase, if the annuitant does not waive his or her right, and dies before the purchase is made, his or her personal representatives are entitled to the purchase-money.

Accordingly A directed a government annuity to be purchased within a given time, for the benefit of his wife; the executors request a delay, to which the wife assents, and she dies before the annuity is purchased:—Held, that her representatives are entitled to the amount for which the annuity could be purchased. *Dawson* v. *Hearn*, 8 Law J. Chanc. 153, s. c. 1 Russ. & M. 606, s. c. 9 Law J. Chanc. 249.

A testator directs a sum of 4*l.* per cent. bank annuities to be invested in the names of his executors, in trust to accumulate during the life of his daughter, and after her death, to be transferred to her children: at the date of his will he was possessed of a large sum of old 4*l.* per cent. bank annuities, and also of a small sum of new reduced 4*l.* per cent. bank annuities; the former stock was converted in the testator's lifetime into 3½*l.* per cent. stock:—Held, that the trustees were bound to purchase the specified amount of a stock bearing 4*l.* per cent. interest, and that the legacy would not be satisfied by purchasing the specified amount of 3½*l.* per cent. stock. *Banks* v. *Sladen*, 8 Law J. Chanc. 101, s. c. 1 Tam. 407, s. c. 1 Russ. & M. 216.

A testator gave the yearly sum of 2,000l. sterling

money to his wife and daughter during their joint lives, and to his wife after the death of his daughter, and to trustees, to the separate use of his daughter, during her life, and, after her death, upon the same trusts as were declared of the yearly sum of 3,000*l.* He then gave the yearly sum of 3,000*l.*, to issue and arise out of and from the dividends of a sufficient quantity of stock in the navy 5*l.* per cent. annuities, to be appropriated and invested in the names of his trustees for that purpose, to his daughter for life, to her separate use, and after her death to her children; and, in a subsequent part of his will, he directed his executors to appropriate and invest in their names such a quantity of stock in the navy annuities as should be fully sufficient to answer the payment of the yearly sums of 2,000*l.* and 3,000*l.*; and, subject to his debts and these legacies, he gave the residue of his real and personal estate to his son; the executors invested a sufficient sum in the purchase of 100,000*l.* navy 5*l.* per cent. stock, the dividends of which were paid to the daughter and widow: that stock being afterwards reduced to 4*l.* per cent.:—Held, that the daughter and widow were not entitled to more than the dividends of the appropriated stock, reduced as they had been. *Kendall* v. *Russell*, 8 Law J. Chanc. 108, s. c. 3 Sim. 424.

### (O) Abatement.

Rule to be followed, where legatees and annuitants are to abate proportionally, in making the abatement. *Long* v. *Hughes*, 7 Law J. Chanc. 105.

A testator gives charitable legacies, charged on a mixed fund of realty and personalty, and gives the residue to charity:—Held, that all the charitable legacies fail in the ratio of the real to the personal estate, and that the deficiency ought not to be made up out of the residue of personalty. *Patten* v. *Smith*, 8 Law J. Chanc. 132.

Where a testator gives to three different persons three leasehold estates, one of which is mortgaged, and directs that the mortgage shall be paid out of his residuary personal estate, which proves insufficient for that purpose, the legatee of the mortgaged leasehold takes it *cum onere*, and the legatees of the two other leaseholds shall not contribute towards the payment of the mortgage debt. *Halliwell* v. *Tanner*, 1 Russ. & M. 633.

A testator, by his will, gave certain annuities, and directed that the sums set apart to secure them should, as the annuitants died, sink into the residue of his personal estate. By a codicil to his will, he stated, that in case his property would not provide an income equal to the annuities, they should be rateably reduced. His estate was deficient, and the annuities were rateably reduced. Upon the death of any annuitant, the sum set apart to secure the reduced annuity, will belong to the residuary legatees, and is not to be applied to increase the reduced annuities to the amount given by the will. *Farmer* v. *Mills*, 4 Russ. 86.

### (P) Payment.

Payment of a legacy decreed to a married woman, "whose receipt was to be a discharge to the executor, notwithstanding coverture," her husband (a bankrupt) and his provisional assignees being first cited. *Norris* v. *Hemingway*, 1 Hag. Ec. 4.

A sum of money being left to the executors, in trust to invest and pay the interest to A for life, and after A's death to divide the principal among his issue, on their respectively attaining the age of twenty-one, with benefit of survivorship till that age. A being dead, his only three children majors, and the shares of two of them paid over, the Court will proceed, in a suit of subtraction of legacy against the executor, to enforce payment of the third's share, holding that the character of trustee is at an end, and that of executor alone subsisting. *Grignion* v. *Grignion*, 1 Hag. Ec. 535.

Legacy given to be paid within one year, without interest, and, in case of default or refusal, devise of life estate. The year expired; and on a bill filed, the Court decreed a sale of the land to raise the legacy—interest from the end of the year, and costs of the suit. *Bell* v. *Skelton*, 9 Law J. Chanc. 214.

Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings before a foreign tribunal, which are not likely to be speedily settled; the Court, in administering his assets, will not be induced, by that circumstance, to direct an appropriation of the fund in court to answer pecuniary legacies, subject to such demands as creditors may eventually establish.

If, in a suit to administer a testator's assets, it clearly appears that a surplus will remain, after discharging all his debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the Court will, by anticipation, direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors.

Principles on which such anticipated payments are to be applied in reduction of the claims of the legatees. *Thomas* v. *Montgomery*, 1 Russ. & M. 729.

In the progress of a suit for the administration of a testator's assets, which was more than sufficient to pay the legacies with interest, it was ordered that the Master should ascertain one-fourth part of the legacies and interest, and that the same should be paid out of a fund in the cause:—Held, that the payment ought to be applied, first, in discharge of the whole of the interest on the legacies, and then in the reduction of one-fourth of the principal. *Thomas* v. *Montgomery*, 2 Sim. 348.

A testator makes his will in Ireland prior to the act of 6 Geo. 4. c. 79. for assimilating the English and Irish currency; and dies after that act:—Held, that an annuity given by the will was to be paid in Irish currency. *Holmes* v. *Holmes*, 8 Law J. Chanc. 157, s. c. 1 Russ. & M. 660.

A testator, domiciled in Jamaica, gave legacies in Jamaica currency to J C, H C, and M C, persons also domiciled in that island, and desired them to be paid out of the money due to him on certain bonds, which the will specified. At his death, which happened in Scotland in 1790, no such bonds were to be found; but J C was then indebted to his estate upon other bonds, in a sum which exceeded the value of his legacy, and which, a year after the testator's death, including interest, was equal to the amount of the penalties. In 1794, actions were brought in Jamaica upon those bonds, by the testator's personal representative there, and judgments recovered against J C for the full penalties and

[illegible] unsatisfied. [illegible] testator's death the legatees [illegible] in Jamaica, [illegible] their legacies [illegible] 1817. In the year 1818, H. C. and I. [illegible] respective legacies to the plaintiff, who was the personal representative of I. C., the [illegible] testator's [illegible] the bill for the purpose of [illegible] interest:—Held, that as they were payable [illegible] in this country, their value was [illegible] according to the standard par of exchange between Jamaica and British currency, and [illegible] according to the actual rate at the time of payment.

[illegible] considered as having been paid [illegible] the amount out of the bond [illegible] amount was to be deducted, [illegible] there are made from the [illegible] upon the bonds, as at the [illegible] after the death of the testator; and interest was [illegible] on the balance till [illegible] for which the judgments were recovered, and no further.

[illegible] could not be allowed [illegible] which the plaintiff [illegible] and that the assigned [illegible] circumstances, and after the [illegible] seven years, without demand, ought [illegible] to have been satisfied. [illegible] 9 Law J. Chanc. 234, s. c. [illegible]

### (Q) Ademption.

[illegible] will, gave 300*l.* bank stock and 500*l.* [illegible] trust for his daughter, then unmarried, [illegible] after her decease upon trust [illegible] appoint; in default, for [illegible]. After the execution of his [illegible] marriage of his daughter, he gave her [illegible] a sum of 300*l.* bank stock, [illegible] for her life, then for her husband for [illegible] amongst the children:—[illegible] was an ademption of the legacy, [illegible] the daughter took less under [illegible] than by the original bequest. [illegible] 9 Law J. Chanc. 91.

[illegible] 10,000*l.* to trustees, in trust [illegible] the interest to his daughter for life, provided [illegible] married, one moiety of the 10,000*l.* [illegible] her or her husband, and that the [illegible] should be held in trust, to pay the interest [illegible] for life, and, after her decease, [illegible] her children; and if she had no children, [illegible] the residue of his personal estate, [illegible] to the two sons. The daughter married [illegible] the testator's lifetime, and the testator [illegible] in trust for his daughter for life, for [illegible] son, and, after her decease, in trust for [illegible] husband for life, and, after the decease of the survivor [illegible] in trust for the children of the marriage, as [illegible] husband and wife should jointly appoint; and, [illegible] such joint appointment, then as the [illegible] should appoint; and in default of any appointment, [illegible] in trust for the issue of the marriage [illegible] failure of such issue, then in trust for the issue of the testator living at the death of the survivor of the husband and wife:—Held, that the provision made by the settlement was a satisfaction of the legacy. *Platt* v. *Platt*, 3 Sim. 503.

The same rule of presumption applies between persons standing in *loco parentis et filiæ*, as between parent and child. Where a provision is made by will, and afterwards a provision is made by a settlement, on the marriage of the party intended to be benefited by the will, parol evidence is admissible to show that the settlor had placed himself *in loco parentis*, and what was his intention as to provision: and the Court held, that the settlement was a satisfaction of the provision intended by the will. *Booker* v. *Allen*, 9 Law J. Chanc. 130.

A testator, domiciled in Jamaica, gave by will in 1768, legacies in Jamaica currency to three persons domiciled there, with a direction that they should be paid out of certain monies due to him on bond. In 1790, he died in Scotland, and there was no such bond to be found. A, one of the legatees, was indebted to him upon other bonds, the penal sums of which, with interest from a year after the testator's decease, were equal to the amount of the legacy. Actions were brought in 1794, in Jamaica, by the representatives of the testator, upon the bonds due from A, and judgment had for the full penal sums and costs: but no execution was levied. Before the actions in Jamaica, all the three legatees came to England, and they never returned. In 1818, two of the legatees (who had claimed their legacies for the first time a year before) assigned their legacies to the plaintiff, who was the personal representative of A, the other legatee. In 1821, administration to the effects of the testator was taken out in England, and there the bill was filed for payment of the legacies:—Held, that the legacies were not to be considered as ademed. *Campbell* v. *Graham*, 9 Law J. Chanc. 234, s. c. 1 Russ. & M. 453.

A gift of a sum of money to one, to be paid out of the produce of a real estate, directed to be sold, followed by a gift to others, of the residue of that produce, is substantially a gift of the whole estate, and not a gift of legacies, with a collateral charge upon the estate; and these gifts are ademed, if the testator sell the estate in his lifetime. *Newbold* v. *Roadknight*, 1 Russ. & M. 677, s. c. 1 Tam. 492.

### (R) Lapsed.

[*Law* v. *Thompson*, 4 Russ. 92, *Dig. Law Journ.* 320.]

A legacy was given to the separate use of a married woman during the joint lives of her and her husband, and in case she survived him, to her absolutely, but if she did not survive him, to such person as she should by will appoint, and in default of appointment, to her next of kin, exclusive of her husband: she died in the lifetime of her husband and the testator:—Held, that the legacy lapsed. *Baker* v. *Hanbury*, 3 Russ. 340.

A testator gave the residue of his estate to three persons for life; remainder to his two nephews, share and share alike; in case either of them died without issue before his share became payable, his share was to go to the survivor: one of the nephews died in the testator's lifetime:—Held, that the share did not lapse, but went to the survivor. *Humphreys*

v. *Howes*, 8 Law J. Chanc. 165, s. c. 1 Russ. & M. 639, s. c. 1 Tam. 497.

Under a bequest of stock to A for life, and after the decease of A, to the testator's great grandchildren, share and share alike, if they were living at the time of A's death; but that they should not receive any part of the capital till they arrived at twenty-one. But if any one or all of the said children should die before they arrived at the age of twenty-one years, the shares or part of those so dying should go to B and C, share and share alike:—Held, that the attaining twenty-one was not confined to the event of surviving A; and therefore, that on the decease of one of the children, in the lifetime of A, under twenty-one, the share of such child passed to B and C, and did not lapse so as to go to the testator's residuary legatee. *Goodchild* v. *Fenton*, 3 Y. & J. 481.

Testatrix gave her real and personal estate to trustees, for sale; and directed that the proceeds of realty should be considered as personalty—that, out of monies arising from the sale, and other her personal estate, her legacies should be paid; and gave the residue of personalty and of money arising from sale of realty, to A for life, with remainder over:—Held, that the real estate was not absolutely converted into personalty; and that the legacies which lapsed belonged to the heir-at-law, as not being so converted. *Amphlett* v. *Parke*, 9 Law J. Chanc. 161.

(S) VOID.

[*Attorney General* v. *Mill*, 3 Russ. 328, Dig. Law J. 320, affirmed 2 Dow. & Cl. A.C. 393. *Emanuel* v. *Constable*, 3 Russ. 436, Dig. Law J. 320. *Prichard* v. *Arbouin*, 3 Russ. 456, Dig. Law J. 320. *Hayes* v. *Hayes*, 4 Russ. 311, Dig. Law J. 320. *Palmer* v. *Holford*, 4 Russ. 403, Dig. Law J. 320.]

A bequest of a sum of money to pay off a debt secured, by an equitable charge only, upon a meeting-house, is void. *Waterhouse* v. *Holmes*, 2 Sim. 62.

Where a testator, who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase-money, is an interest in land, within the Statute of Mortmain; and the purchase-money will not pass by his will to a charity. *Harrison* v. *Harrison*, 1 Russ. & M. 71, s. c. 1 Tam. 273.

Bequest to charitable purposes, of money secured on mortgage and judgment, void, except as to legacies for life specially named. Testator directed his executors to lay out his personal estate in the funds, and pay the interest to A, B, C, and D, for lives equally; after the death of any one, her share to be received by any widow answering particular description, to be appointed by the vicar for the time being of N, and so that always four persons answering such description should receive the bounty for life. Part of the personal estate consisted of a debt due to testator on mortgage, and a debt due to him upon a warrant of attorney, on which judgment was entered up during his life:—Held, that the bequest *quoad* the mortgage and judgment) was within the Mortmain Act, and void; but that A, B, C, and D, should take for life as being specifically named. *Collinson* v. *Peter*, *Collinson* v. *Knibb*, 9 Law J. Chanc. 158.

A school-house, built prior to the 9 Geo. 2. c. 36, on waste of a manor given by the lord for that purpose, and paid for by subscriptions from the lord of the manor and other parishioners, and never subsequently used, otherwise than as a public school-house, is so dedicated to charity, and in mortmain, that a bequest for the purpose of repairing and enlarging it, and of providing a salary for a schoolmaster, is a valid legacy. *Ingleby* v. *Dobson*, 4 Russ. 342.

A testator, who had long resided in India, gave a legacy "to T P, who resided at A when I left England, or to his heirs, executors, administrators or assigns." T P died in the testator's lifetime:—Held, that the bequest over was void for uncertainty. *Waite* v. *Templer*, 2 Sim. 524.

A legacy to a witness to a will relating to personal estate only, is not void under 25 Geo. 2. c. 6. *Foster* v. *Banbury*, 3 Sim. 40.

A testator gave an annuity to a person for life, and after his death, to the eldest surviving son of A, and failing the male issue of A, to the daughters of A living at the demise of such male issue: at the death of the tenant for life of the annuity, A had no son living, but he had daughters:—Held, that the gift to them was valid, and that they were entitled to the annuity. *Murray* v. *Addenbrooke*, 8 Law J. Chanc. 79, s. c. 4 Russ. 407.

A testator gives personalty to his daughter for life to her separate use, remainder to her children who should attain twenty-three:—Held, that the gift to the children is too remote.

The daughter taking the corpus of the fund as the sole next of kin of the testator:—Held, that she could not, during coverture, part with her interest in the corpus. *Bull* v. *Pritchard*, 7 Law J. Chanc. 41.

A testatrix gives the residue of her personal estate to trustees, upon trust to pay the dividends to A during her life, and after her death, to apply the dividends to the maintenance, or accumulate them for the benefit of A's children, till they respectively attain twenty-two, at which age each of them is to be entitled to his or her share of the principal; with limitations over of the shares of such of them as die under twenty-two:—Held, that the gift to A's children, and the limitations over, are void, as being too remote. *Vawdry* v. *Geddes*, 8 Law J. Chanc. 63, s. c. 1 Tam. 361, s. c. 1 Russ. & M. 203.

A testatrix, by her will, limits personal property to her children for life, remainder to her grandchildren, in such words as would include all grandchildren, whether *in esse* at her death, or born afterwards: by a codicil, she directs the shares of the grandchildren to be settled on them for life, and afterwards to revert to their issue; but, in default of issue, they were to dispose of their respective shares as they thought proper:—Held, that the limitations to the great-grandchildren were too remote, and that the grandchildren retained the absolute interests given them by the will. *Arnold* v. *Congreve*, 8 Law J. Chanc. 88, s. c. 1 Russ. & M. 209, 1 Tam. 341.

Testator bequeathed his residuary estate to trustees, in trust to pay the income of one-third part to his daughter Sarah, for life, and upon her death, to

stand possessed of that third in trust for her child or children, and to be transferred to them on their attaining twenty-five; but in case his daughter should leave but one child her surviving, then the whole of the one-third part to go to such only child, on his attaining twenty-five, and to be transmissible to his executors; and in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five, then over: —Held, that the children were not intended to take vested interests until they attained twenty-five, and that, therefore, the bequest to them was void for remoteness. *Judd* v. *Judd*, 3 Sim. 525, s. c. as *Judd* v. *Hubbs*, 8 Law J. Chanc. 119.

Bequest to J A for life, remainder to his eldest son for life, and to remain entailed on the eldest son of J A and his posterity for ever. But in case of the death or want of issue of J A, to M (a brother of J A) and his descendants as above mentioned from one generation to another for ever. J A survived the testator and died a bachelor:—Held, that the bequest over to M and his descendants was void for remoteness. *Monkhouse* v. *Monkhouse*, 3 Sim. 119.

### (T) Residue or Surplus.

[*Da Costa* v. *Keir*, 3 Russ. 360, Dig. Law J. 322.]

A bequest of a reversionary interest in personalty to an executor, affords a presumption that the testator intended to exclude him from the residue. But parol evidence is admissible to rebut the presumption. *Oldman* v. *Slater*, 3 Sim. 85.

A bequest to executors for the care and trouble they might have in the execution of the testator's will, renders the executors only trustees of, and not beneficially interested in, the residue undisposed of by the will.

The presumption in such a case is so strong, that parol evidence is not admissible to rebut it. *Whitaker* v. *Tatham*, 9 Law J. C.P. 189, s. c. 7 Bing. 628, s. c. 5 M. & P. 628.

The testator gave the residue of his estate to his wife during her life, and at her demise, to the eldest surviving son of A, the interest thereof to be applied to the use of the said eldest son, as to the trustees should seem fit, until he attained twenty-five; or failing such male issue, to the daughter or daughters of A, living at the time of the demise of such male issue. There being no son of A living at the death of the widow:—Held, that the limitation over of the residue to the daughters was not too remote; and that they, upon the death of the widow, became entitled to the residue. *Murray* v. *Addenbrooke*, 8 Law J. Chanc. 79, s. c. 4 Russ. 407.

J C, by a deed of trust and settlement, gave all his lands, &c. to trustees, among whom was his brother, who accepted the trust, for the payment of debts, legacies, and other purposes, among which were donations to certain specified charities. The deed then contained this passage: "And in regard I have not yet determined in what way and manner the further distribution of my means and estate shall take place, I hereby reserve to myself power and liberty to make such distribution at any time preceding my death, either in holograph instructions to my said trustees, to be executed informally, or by a formal deed," &c. In a codicil to this testamentary instrument, he made this declaration: "In the event of my failing to make a distribution of my means and estate, which shall remain after fulfilling the purposes before specified, either by holograph instructions, though not formally executed, or by a formal deed of instructions, which I reserve to myself full power to do, then it is my wish that such remaining means and estate shall be applied to such charitable purposes, and in bequests to such of my friends and relations, as may be pointed out by my said dearly beloved wife, with the approbation of a majority of my said trustees; and in the event of her decease, or entering into a second marriage, before such application shall have been pointed out and approved of as aforesaid, then I hereby empower the majority of the said remaining trustees to make the application, in the way and manner they would conceive to be most agreeable to my wishes if in life." In a question between the brother, claiming as next of kin, and the trustees,—Held, first, that that acceptance of the trust was not such an homologation of the deed as to bar his title to sue; secondly, that the testamentary instruments contained a valid disposition of the residue. *Crichton* v. *Grierson*, 3 Bligh, n.s. 484.

A testatrix bequeathed one moiety of the residue of her personal estate to her daughter Hannah, for her separate use, during the joint lives of her and her husband; and if she survived him, to her absolutely; if not, to such of her children, living at her decease, as should attain twenty-one; with a bequest over, if there were no such children, to another daughter, Mary, and her children: and she bequeathed the other moiety to her daughter Mary, for her separate use, during the joint lives of her and her husband, and after her decease, to such of her children living at her decease as should attain twenty-one; and if there were no such children of Mary, to Hannah and her children, in like manner as the first moiety; with a proviso, that if Hannah died in her husband's lifetime, and should not have a child living at her decease who should attain twenty-one, the second moiety was to go over to Hannah's executors and administrators; and that, in like manner, the first-mentioned moiety, in the event in which it was limited over, should, if Mary had not a child living at her death who should attain twenty-one, go over to Mary's executors and administrators. By a codicil, the testatrix gave 1,500*l.*, if Mary died without leaving any child who attained twenty-one, to Hannah and her children, in the same manner as was in the will directed touching the first-mentioned moiety of the residue; and in case both daughters died without leaving any child living who should attain twenty-one, she bequeathed the 1,500*l.*, together with all the residue of her personal estate, to A. Both the daughters died without issue; but Hannah survived her husband:—Held, nevertheless, that A was entitled to the residue. *Hopkins* v. *Towle*, 3 Russ. 304.

A testator having directed his executors to pay the interest of his residue to a woman during her life, and after her decease to divide the residue amongst the next of kin:—Held, the next of kin at the time of the testator's death were the persons entitled. *Collisham* v. *Sams*, 1 Tam. 346.

A testatrix gives the residue of her property to executors, upon trust to dispose of the same at such times and for such purposes as they should think fit;

t being her intention that the distribution thereof should be left entirely to their discretion:—Held, hat the next of kin were entitled to the residue. *Fowler* v. *Garlike*, 8 Law J. Chanc. 66, s. c. 1 Russ. & M. 232.

Construction of will—Vesting of shares of a residue. *Hardinge* v. *Pratt*, 7 Law J. Chanc. 179.

A testator devises a leasehold to E, the only surviving child of his son A, and bequeathe the residue (subject to a life estate) to the children of A, B, and C: E was illegitimate, and A had no other child:—Held, that E was not entitled to a share of the residue. *Bagley* v. *Mollard*, 8 Law J. Chanc. 145, s. c. 1 Russ. & M. 581.

Testator bequeathed his residuary estate to trustees, upon trust to transfer the same unto his great-nephews and nieces; the shares of the boys to be transferable to them at twenty-one, and those of the girls at twenty-one or marriage, and to accumulate for them in the meantime, with benefit of accruer and survivorship; and in case of the death of all the said children except one, before their shares became vested, then upon trust to transfer the whole to the survivor, at the age or time aforesaid:—Held, that a great-nephew, born after the testator's death, but before any of his other great-nephews or nieces attained twenty-one or married, was entitled to a share of the testator's residuary estate. *Balm* v. *Balm*, 3 Sim. 492.

A gift of a moiety of the residue of the testator's personal estate,—held, upon the context of the will, to pass also a moiety of the interest of the proceeds of real estate directed to be sold. *Byam* v. *Munton*, 3 Law J. Chanc. 156, s. c. 1 Russ. & M. 503.

The general rule is, that all which a testator has, passes by the residuary clause, unless an intention appear, from other parts of the will, to limit the effect of that clause.

A testatrix devised certain copyhold estates to her mother for life; then to other persons for their lives, and to their children in fee. All the residue she devised to her mother in fee; but charged such residue, real and personal, with an annuity of 20*l.* to her grandmother for life:—Held, that the provision for the grandmother did not indicate an intention to limit the effect of the residuary clause; and, consequently, that the reversion in the copyholds passed to the mother. *Doe* d. *Moreton* v. *Fossick*, 8 Law J. K.B. 389, s. c. 1 B. & Ad. 186.

A testatrix directed her residuary estate to be divided into three equal shares; and gave one share to the children of J M; one share to the children of W H (subtracting from their share the 2,000*l.* that W H owed the testatrix); and the remaining third part to the children of R H:—Held, that the 2,000*l.* was to be considered as part of the residue; that the residue was to be divided into three equal parts, and that the 2,000*l.* was to be taken as part of the share of the children of W H. *Murray* v. *Samson*, 3 Sim. 536.

A testator devises the residue of his real and personal estate to such of his children as shall attain twenty-one, or marry under that age with consent. All the children are entitled, although interests are contingent, to have allowances out of the residue for their maintenance during their minorities. *Brown* v. *Temperley*, 3 Russ. 263.

An allowance out of a residue, which was directed to be accumulated, made for the support of a legatee, in the interval between the time when the legatee attained his full age, and the time fixed for the distribution of the accumulated fund. *M'Dermott* v. *Keelan*, 3 Russ. 624.

R N, by his will, gave all his personal estate to R F and J N, that is to say, (he then enumerates several particulars,) in trust for the following purposes: that the same be not liable or resorted to for the payment of mortgages or bond debts, until the legacies, debts, and charges thereinafter mentioned should be satisfied; and as soon as that could be effected, the same was to be resorted to in relief of his real estate. The testator then gave several legacies to his wife and children, and bequeathed the residue, after the respective charges thereby made thereon, to his eldest son:—Held, that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned. *Nicholas* v. *Nicholas*, 1 Tam. 269.

### (V) Legacy Duty.

[*Smith* v. *Anderson*, 4 Russ. 352, Dig. Law J. 324.]

The forgiveness of a bond debt by will is a legacy, and as such is liable to the payment of legacy duty.

But where a specific sum is bequeathed, or a specific debt forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt or sum of money between the time of such death and the period when the executors close their accounts.

The obligee of a bond, after the death of the principal therein, but during the life of the surety, who was his brother, made his will, containing the following directions relative to the bond: "I hereby forgive the bond debt, both principal and interest, due to me, and entered into by J W and my brother J H, with and for him, for the said J W's paying me the principal sum of 4,000*l.*, and interest at 4*l.* per cent., &c., and do order the said bond, at my decease, to be delivered up and cancelled." The interest upon the bond was paid up to the death of the testator, whom his brother survived:—Held, that this was a legacy whereon legacy duty was payable by J H, testator's brother, but upon the principal sum only, and not in respect of interest accruing subsequent to the testator's death. *Attorney General* v. *Holbrook*, 3 Y. & J. 114, s. c. 12 Price, 407.

An annuity was given by a will, clear of all deductions, and was directed to be paid out of certain sums of stock standing in the testator's name:—Held, that it was not subject to the legacy duty. *Dawkins* v. *Tatham*, 2 Sim. 492.

Testator gave an annuity of 300*l.*, free from all taxes and stamp duties, to J and H, during their joint lives, and to the survivor during her life; and after the death of the survivor, to G, for her life. By a codicil, he revoked the annuity of 300*l.* given to J and H, and gave them an annuity of 100*l.* each, with benefit of survivorship:—The annuities of 100*l.* are subject to the legacy duty. *Burrows* v. *Cottrell*, 3 Sim. 375.

A bequest to the poor of the parish of A, of 50*l.* *per annum*, to be laid out at Christmas in bread, and distributed by the minister, &c. to the most needy objects in the parish, is liable to the legacy

duty at the rate of 10*l.* per cent., payable upon the whole sum. *In re Franklin's Charity*, 3 Y. & J. 544, s. c. 3 Sim. 147.

A bequest of a residue of whatever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to the testator's son and his wife (a stranger in blood) for their lives, with remainder to the grandchildren of the testator, in equal proportions, is liable to legacy duty, to be calculated at the rate of 1*l.* per cent. for the son's moiety, and 10*l.* per cent. for that of the wife, upon the principle that the son and his wife each take a life interest in one moiety of the income of the residue. *Attorney General* v. *Burnie*, 3 Y. & J. 531.

A testator, a British subject, and whose domicile was in this country, died possessed of stock in the American, French, and Russian funds; the executor possessed himself of such stock abroad, and was proceeding to transfer the same to the residuary legatee in those countries:—Held, that the property must be considered as English personal property, and consequently, liable to the payment of legacy duty. *In re Ewing*, 9 Law J. Exc. 37, s. c. 1 C. & J. 151, s. c. 1 Tyrw. 91.

When a legacy is not paid at the time appointed by the testator, legacy duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest, which is ultimately received by the legatee. *Thomas* v. *Montgomery*, 3 Russ. 502.

The rule for an attachment, for not accounting to the legacy office, is a rule *nisi*, which makes itself absolute by a certain day, unless in the meantime cause be shewn. *In re Vivian*, 1 C. & J. 409, s. c. 1 Tyrw. 379.

### (W) Rights of Legatees.

Where a sum of money is bequeathed, in terms that give an absolute interest to the legatee, the mere addition by subsequent words of a power to dispose of the legacy by will, during the continuance of a prior life interest in the money, does not by implication exclude the right of the legatee to dispose of it by deed *inter vivos* during the same period. *Comber* v. *Graham*, 1 Russ. & M. 450.

Residuary legatees may sustain a bill for an account against the executor and the surviving partner of the testator, though collusion between the executor and the surviving partner is neither charged nor proved. *Bowsher* v. *Watkins*, 1 Russ. & M. 277.

Testator devised to his executors, their heirs and assigns, his lands, upon trust to sell the same; and directed that the money arising from the same sale should be deemed part of his personal estate, and that it should be subject to the disposition made concerning his personal estate. He then directed his personal estate to be sold, and when the money arising from the sale of his personal and real estate should be collected, he disposed of it in the manner mentioned in the will; and among other dispositions he bequeathed a legacy to A B:—Held, that the money arising from the sale of the real estate was equitable assets, and that a legatee could not maintain a suit in the ecclesiastical court to recover his legacy. *Barker* v. *May*, 9 B. & C. 489, s. c. 4 M. & R. 386.

A testator charged his real estate with an annuity to his widow, and subject thereto, devised it to S A, in fee, and appointed her his executrix. The testator had insured a house. The policy expired a few months after his death, and was then renewed by S A. Soon afterwards the house, which was the whole of his real estate, was burnt down. The insurance money was ordered to be paid into court, on a motion by the widow, in a suit instituted by her against S A, for the administration of the testator's estate. *Parry* v. *Ashley*, 3 Sim. 97.

A legacy having been given to a legatee in a name she had for many years assumed, the Court will direct an inquiry, who was the person meant. The deposition of an admission of a residuary legatee and executrix is good evidence, it being against her own interest. *Neathway* v. *Ham*, 1 Tam. 316.

The Court having decided that a legatee, in a separate paper, is not executrix according to the tenor, she cannot oppose the validity of a former will, if she is paid her costs, and if the executor of that will is ready to take probate of the paper by which she is benefited, and to pay her full bequest. *Hillam* v. *Walker*, 1 Hag. Ec. 71.

Costs are peculiarly in the discretion of the Court; and though the general rule is, that a legatee *ex executoris*, propounding and establishing a paper, is entitled to his costs out of the estate, his unwise delay in producing the paper, and thus occasioning the suit, is a ground for refusing them. *Huntington* v. *Holloway*, 3 Hag. Ec. 280.

A legatee under a former will, who, after long acquiescence, calls in probate of and contests a later will, setting up a case of incapacity and undue influence, which is disproved—will be condemned in costs from the time of giving in an allegation.

*Semble*, a next of kin—*à fortiori*, a legatee under a former will—contesting a will, under circumstances manifestly vexatious, may be condemned in the whole costs. *Green* v. *Proctor and Neary*, 1 Hag. Ec. 337.

An allegation on the part of the executors, responsive to a libel in a suit of subtraction of legacy, and pleading circumstances dehors the will, is admissible to explain a latent ambiguity as to the subject of the bequest; but the Court rejected the testator's declaration to the drawer of the will, as inconclusive, and expressed a strong disinclination to their admission, in such a suit, under any circumstances. *Capel* v. *Roberts and Neald*, 3 Hag. Ec. 156.

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## LIBEL.

(A) Action for.
(B) Pleadings.
(C) Evidence.
(D) Informations and Indictments.
(E) Damages.

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### (A) Actions for.

It is not libellous fairly and honestly to criticise a painting publicly exhibited, however strong the terms of censure used may be. *Thompson* v. *Shackell*, 2 M. & M. 187. [Best]

If the surveyor to a society, which publishes an account of the different classes of ships, for the in-

bmitation of merchants, underwriters, &c., is requested by a ship-owner to survey his ship, and does so in consequence, and makes a report to the society, who class the vessel according to his report, such shipowner cannot maintain an action against the members of the society for a libel, in misdescribing the ship, nor against the surveyor, unless he made a false report; and *quære*, whether such an action is maintainable at all, without evidence of express malice? *Kerr* v. *Sheelden*, 4 C. & P. 528. [Tenterden]

It is not actionable without the aid of prefatory averment in the declaration, to write of a Magistrate, that "as chairman of a finance committee, he audited accounts containing items of 12,000*l.*, for the nominal purpose of furnishing lodgings, plate, &c., for the Judges; but which expenditure was in reality to find accommodation for the Magistrates, as the sheriff always found the Judges suitable lodgings, without putting the county to any expense." *Adams* v. *Metedew*, 8 Y. & J. 219.

Where a declaration complained of a publication, which charged the plaintiff with having insulted two females and some gentlemen, in a most barefaced manner; and the declaration also averred that special damage had been sustained: and the jury found a verdict for the plaintiff, but negatived the special damage:—Held, that the action was maintainable, in respect of the publication, without proof of special damage. *Clement* v. *Chivis*, 7 Law J. K.B. 189, s. c. 9 B. & C. 172, s. c. 4 M. & R. 127.

In an action for a libel for publishing a hand-bill, offering a reward for the recovery of certain bills of exchange, and stating that A B is suspected of having embezzled them, it is a good defence on the general issue, that the hand-bill was published solely with a view to the protection of persons liable on the bills, or to the conviction of the offender. *Finlen* v. *Westlake*, 1 M. & M. 461. [Tindal]

An action will lie for the publication in a newspaper of a story calculated to render a party ridiculous, although the plaintiff has himself first spoken of it. *Cook* v. *Ward*, 8 Law J. C.P. 126, s. c. 5 Bing. 409, s. c. 4 M. & P. 99.

It is no justification for the publishing of a libel, that, at the time of publishing it, the name of the person who communicated it to the defendant was also published. *De Crespigny* v. *Long Wellesley*, 7 Law J. C.P. 100, s.c. 5 Bing. 392, s.c. 2 M. & P. 695.

To justify the publication of a report of a trial, it must be a fair and accurate account of the whole trial—setting forth the evidence, and not the mere unsupported statements of counsel. *Saunders* v. *Mills*, 8 Law J. C.P. 24, s. c. 6 Bing. 213, s. c. 3 M. & P. 524.

An account published in a newspaper of proceedings in a court of law, containing matter redounding to the discredit of a person in his business of an attorney-at-law, is, whether true or false, rendered actionable as libellous, by the paragraph being headed or introduced with the line, "Shameful conduct of an attorney."

Pleas by way of justification, therefore, in such a case, averring that the supposed libel contained a faithful and true account of the proceedings in a court of law, were determined to be bad pleas, by reason of the preceding words.

Affirmed on writ of error. *Clement* v. *Lewis*, 10 Price, 181.

DIGEST, 1828—1831.

Where, in an answer to an application to a former master, for the character of a servant, he writes a letter to the applicant, giving an unfavourable account of the servant during his service, and also stating matter injurious to his character in respect of his conduct out of that service, at the time the letter is written, the mere circumstance of the letter going thus far beyond the matter of inquiry, will not deprive it of the protection given to a privileged communication. But if it be shewn that the facts, which are thus stated out of the matter of immediate inquiry, be untrue,—that circumstance may be evidence of malice to go to the jury. The onus of proof in such case appears to lie upon the servant.

Nor, in the case of the writing such a letter, would the circumstance of the master going to persons who had recommended the servant to him, and making statements similar to those contained in the letter, be of itself sufficient evidence of malice to deprive the letter of the protection given to a privileged communication. *Child* v. *Affleck*, 7 Law J. K.B. 272, s. c. 9 B. & C. 402, s. c. 4 M. & R. 338.

Where a gentleman, voluntarily and unsolicited, writes a letter to another, touching the character of a person who has lived with the writer as a servant, and is about to be, or is, engaged with the person to whom the letter is addressed, the mere circumstance of its having been voluntarily written, will not deprive it of the protection given to a privileged communication, although it may reflect on the character of the servant; but such a letter, to be entitled to the protection given to a privileged communication, must have been written fairly and *bonâ fide*; and whether it has been so written is a question for the jury. *Patterson* v. *Jones*, 7 Law J. K.B. 26, s. c. 8 B. & C. 578, s. c. 3 M. & R. 101.

The plaintiffs having obtained a contract for a supply of timber for the navy, agreed with the defendant for a share in it. The contract, however, not turning out to be so advantageous in its terms as was anticipated, the defendant withdrew himself from it, and afterwards wrote to a house at Sierra Leone, who had engaged to supply the timber to the plaintiffs, a letter reflecting on the character of the plaintiffs, and tending to embarrass them. The jury having found a verdict for the defendant, the Court directed a new trial. *Ward* v. *Smith*, 8 Law J. C.P. 294, s. c. 6 Bing. 749, s. c. 4 M. & P. 595, s. c. 4 C. & P. 303.

In an action for a libel, the question for the consideration of the jury is, not whether the defendant intended to produce an effect injurious to the plaintiff; but, whether the publication has a tendency to produce such an effect. *Haire* v. *Wilson*, 7 Law J. K.B. 302, s. c. 9 B. & C. 643, s. c. 4 M. & R. 605; s. p. *Fisher* v. *Clement*, 8 Law J. K.B. 176, s. c. 10 B. & C. 472.

### (B) PLEADINGS.

In declaring on a libel, it is not necessary to set out every part of it, provided the sense of the part set out is not varied or altered in its quality or effect, by that which is omitted. *Rutherford* v. *Evans*, 8 Law J. C.P. 86, s. c. 6 Bing. 451, s. c. 4 M. & P. 162, s. c. 4 C. & P. 77.

The declaration, in an action for libel, averred that the plaintiff carried on the business of a carpenter, builder, and surveyor, and had been ap-

pointed the surveyor, agent, and steward of a certain company or society of persons, called "The New England Company;" and that the defendant published, concerning him, and concerning his said employment by the said company, and concerning him in the said trade of carpenter, builder, and surveyor, &c., in a letter to one J G, he, the said J G, then and there being the treasurer of the said company, a certain libel, &c. It appeared that the company in question was a corporation, and that its name was "The Society for the Propagation of the Gospel in New England and parts adjacent, in America:"—Held, that this misdescription of the company was not, under the circumstances, any ground of nonsuit. *Rutherford* v. *Evans*, 4 C. & P. 77.

In an action for a libel, imputing to the plaintiff, a proctor, that he had been *thrice* suspended from practice, for extortion; the defendant in his plea of justification, averred that the plaintiff had been suspended *once*:—Held, that, inasmuch as the plea professed to be a justification of the whole libel, and did in fact only justify a part, the plea was bad, on demurrer. *Clarkson* v. *Lawson*, 8 Law J. C.P. 36, s. c. 6 Bing. 266, s. c. 3 M. & P. 605.

Where a libel is in its nature divisible, a plea of justification may be pleaded, as to part of it. Thus, where the plaintiff, a proctor, declared on a libel in which he was alleged to have been *thrice* suspended from practice for extortion, and the defendant pleaded a justification as to *one* suspension—The Court, on demurrer, held the plea good. *Clarkson* v. *Lawson*, 8 Law J. C.P. 193, s. c. 6 Bing. 587, s. c. 4 M. & P. 356.

*Semble*—That if a libel consist of distinct propositions, any one of them may be separated from the rest, and justified. But where a libel charges the plaintiff with having committed a felony, the defendant cannot justify by shewing circumstances which amount to suspicion only, and without averring in the same terms as the libel, that which charges the actual commission of the felony. *Mountney* v. *Watson*, 9 Law J. K.B. 298, s. c. 2 B. & Ad. 673.

If a defendant, in an action for libel, imputing want of skill to a surgeon, plead that the plaintiff did want skill, and that he performed an operation in an unsurgeonlike manner, occupying unnecessary time, and causing unnecessary pain; these are all affirmatives on the part of the defendant. *Cooper* v. *Wakley*, 3 C. & P. 474, s.c. 1 M. & M. 248. [Tenterden]

### (C) Evidence.

On the trial of an indictment, information, or action for libel, against any person who has made an affidavit at the Stamp Office, according to the 38 Geo. 3. c. 78, it is not necessary to produce the newspaper filed at the Stamp Office in pursuance of that act, or to give any proof of the publication of the newspaper containing the alleged libel.—Proof of the affidavit, in the manner pointed out by the act, with the mere production of a newspaper, corresponding in the title and the names mentioned in the affidavit, with the particulars given in the affidavit, will be sufficient *primâ fâcie* evidence of the publication. *Mayne* v. *Fletcher*, 7 Law J. K.B. 69, s. c. 9 B. & C. 382, s. c. 4 M. & R. 311.

Evidence that the defendant accounted with the stamp-distributor for the amount of stamp-duties on advertisements inserted in a country newspaper, is sufficient proof of publication by him. *Cook* v. *West*, 8 Law J. C.P. 126, s. c. 6 Bing. 409, s. c. 4 M. & P. 99.

If a libel, purporting to be a circular, written by the secretary of a society for the protection of trade against swindlers, impute certain specific facts to the plaintiff, a witness cannot be asked what he understands by finding a person's name inserted in such a circular; but he may be asked whether there is any meaning in such a circular, beyond what appears on the face of it.

If the members of such a society agree to contribute towards all law expenses respecting it, and an action be brought against the secretary of it for a libel, it seems that a member of the society is a competent witness for the defence, because an agreement by parties, that they will bear each other harmless in doing wrong, is void. In this case, a member of the society was examined for the defence, but the secretary released him before he gave his evidence. *Humphreys* v. *Miller*, 4 C. & P. 7. [Tenterden]

In case for a libel on the plaintiff in the way of his trade, the declaration alleged that the plaintiff exercised and carried on his trade in *an honest and lawful manner*:—Held, that, under the general issue, the defendant might give evidence to shew that the plaintiff's *was not a lawful trade*. *Manning* v. *Clement*, 9 Law J. C.P. 60, s. c. 7 Bing. 362, s. c. 5 M. & P. 211.

In an action for a libel, which is only libellous on a man in the execution of his office, where the plaintiff has stated, by way of inducement, his due discharge of its duties, the defendant cannot, on the general issue, give evidence of negligence in discharging them in answer to that allegation. *Dunn* v. *Robson*, 1 M. & M. 294. [Tenterden]

*Semble*—that a defendant who is sued by a servant, in an action of libel for the writing of a letter touching his character, may, under the general issue, (and without pleading a justification,) give evidence of facts, tending to shew that *the letter was* written *bonâ fide*, although the facts themselves, in an ordinary case, would amount to a justification. *Patterson* v. *Jones*, 7 Law J. K.B. 26, s. c. 8 B. & C. 578, s. c. 3 M. & R. 101.

In an action for a libel, for publishing a hand-bill, offering a reward for the recovery of certain bills of exchange, and stating that A B is suspected of having embezzled them, evidence is admissible that the party publishing the hand-bill, followed it up by preferring a charge of the same nature against A B before a Magistrate. *Finden* v. *Westlake*, 1 M. & M. 461. [Tindal]

### (D) Informations and Indictments.

[60 Geo. 3. c. 8. repealed, so far as relates to sentence of banishment on second conviction for publishing seditious and blasphemous libels, 1 Will. 4. c. 73, 8 Law J. Stat. 164.]

In an information for a libel, the jury are to consider whether the defendant published it with a criminal intent or not. *Rex* v. *Reeves*, Peo. A.C. 84. [Kenyon]

In an indictment for libel, the proprietor of a newspaper is *primâ facie* answerable for what appears in it; but the presumption arising from proprietorship may be rebutted and an exemption established.

*Rex* v. *Gutch, Fisher, and Alexander*, 1 M. & M. 433. [Tenterden]

Where a libel charges a person with having committed an indictable offence, the defendant, upon being brought up for judgment for publishing that libel, is not at liberty, in mitigation of punishment, to shew, upon affidavit, that the person was guilty of that offence, except by shewing a record of his conviction. But the defendant, in such a case, is at liberty to shew, upon affidavit, that he published the libel, believing the statement to be true; and to shew what were the reasons operating upon his mind at the time, which induced him so to believe. *Rex* v. *Halpin*, 7 Law J. M.C. 75, s. c. 9 B. & C. 55, s. c. 4 M. & R. 8.

(E) DAMAGES.

[Amount of bonds given by publishers of newspapers increased, and plaintiffs in libel cases, entitled to execution for damages, enabled to recover on such bonds, 1 Will. 4. c. 73, 8 Law J. Stat. 164.]

In an action for a libel, the defendant may, on the general issue, prove, in mitigation of damages, any ground of suspicion short of facts, which would, if pleaded, have amounted to a complete justification. *Knobell* v. *Fuller*, Pea. A.C. 139. [Eyre]

In an action for a libel published in a newspaper, the defendant cannot be permitted to shew, in mitigation of damages, that the libel has already been before published in several other newspapers. *Saunders* v. *Mills*, 8 Law J. C.P. 24, s. c. 6 Bing. 213, s. c. 3 M. & P. 524.

In an action for a libel, the defendant cannot, under the general issue, give evidence of any fact in mitigation of damages, which would be evidence to prove a justification of any part of the libel. He ought to justify as to that part. *Vessey* v. *Pike*, 3 C. & P. 512. [Tenterden]

The declaration in an action for libel, alleged that the plaintiff was a good and faithful subject, &c., and that he was a medical practitioner, and stated the libel to have been published of and concerning him, and of and concerning him in his said practice. No evidence was given of any licence or authority to practise, nor was the plaintiff mentioned in the libel as a regular medical man, but merely as "Physician extraordinary to several ladies of distinction," and "doctor, or rather quack":—Held, that this did not withdraw the claim to damages in the medical capacity from the consideration of the jury, but that they might give such damages as they thought right, both for that and the libel on the plaintiff's private character. *Long* v. *Chubb*, 5 C. & P. 55. [Tindal]

The jury having found a verdict for the plaintiff in an action for a libel, on the issues joined upon the plea of not guilty, and also on the second and sixth special pleas, without assessing damages, and having found for the defendant on the other issue, as far as it related to all the other five special pleas, the Court below ordered judgment to be entered for the plaintiff on the issue on those pleas, *non obstante veredicto pro defendente*.

The verdict found for the plaintiff in the action on the first issue joined on the plea of not guilty, and on the second issue in so far as it related to the second and sixth special pleas by way of justification—held to be imperfect, by reason of the omission on the part of the jury, who tried the issue, to assess the damages, and therefore void. Affirmed.

The Court below having also awarded a writ of inquiry, to assess the unassessed damages on the issues found for the plaintiff below, whereupon judgment was afterwards entered up for the damages found by the inquisition; the judgment of the Court of King's Bench in that respect was annulled for error in awarding a writ of inquiry, and the final judgment reversed.

Such omission on the part of the jury is not to be supplied by a writ of inquiry, because the defendant would thereby lose his right to the remedy by attaint, for a finding of excessive damages.

The defendant to the action, therefore, held to be entitled to a *venire de novo*, by reason of the void verdict, for want of assessment of damages as to the issues found for the plaintiff.

[Since this decision, see 6 Geo. 4. c. 50. s. 60, abolishing the process of attaint of juries.]

*Semble*, the Judge before whom the issues were tried, should have directed the attention of the jury to the question of damages on the finding for the plaintiff.

The course of practice in such cases, to correct the erroneous proceedings of the court below, is to remit to them the record, requiring them "anew" to command the sheriff to cause a jury to come, &c. to try, (&c., the issue and part of issue for the plaintiff,) *Clement* v. *Lewis*, 10 Price, 181.

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## LICENCE.

[1 Will. 4. c. 51, 8 Law J. Stat. 107.]

[The general sale of beer and cider in England, permitted and regulated by 1 Will. 4. c. 64, 8 Law J. Stat. 127.]

A retail brewer of strong beer, whose brewery is situate out of a city or market town, and who obtains a licence to retail strong beer in a city or market town next adjoining his brewery premises, under the stat. 5 Geo. 4. c. 54. s. 7, can retail at that place only the strong beer brewed by him at his country brewery.

A retail brewer of strong beer, under the stat. 5 Geo. 4. c. 54. s. 6, whose brewery is situate in a city or market town, can retail from his brewery such strong beer only as is brewed by him upon his brewery premises.

Where a brewer of strong beer, who has two breweries, the one situate out of a city or market town, and the other situate in a city, obtains a licence to retail the beer brewed at the former in the next adjoining city, and another licence to retail that brewed at the latter place where it is brewed, he cannot retail at both places the beer brewed by him at his country brewery. *Attorney General* v. *Overington*, 3 Y. & J. 440.

The stat. 25 Geo. 2. c. 36, relating to places for public dancing, music, &c., extends to licensed taverns and hotels; and it is no defence, that the company frequenting the performances were respectable, or that the admission money was not received for the benefit of the keeper of the house. The 13th section of that statute which gives a form of the declaration, extends to common informers. *Green* v. *Botheroyd*, 3 C. & P. 471. [Tenterden]

## LIEN.

[See ACCOUNTANT.]

(A) AT LAW.
(B) IN EQUITY.
(C) WAIVER.

### (A) AT LAW.

Calico printers have a lien for the general balance. *Webb* v. *Fox*, Pea. A.C. 167.

A stereotype printer has no general lien on stereotype plates not manufactured by himself, but put into his hands to print from them. *Bleaden* v. *Hancock*, 2 M. & M. 465, s. c. 4 C. & P. 152. [Tindal]

A trainer has a lien on a race-horse, for his charge in keeping and training him. *Bevan* v. *Waters*, 2 M. & M. 236, s. c. 3 C. & P. 520. [Best]

If a person go to a coach-office, and direct that a place be booked for him by a particular coach, and that be done, and he leave his portmanteau, the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but, if the party merely leave the portmanteau while he goes to inquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lien at all. *Higgins* v. *Bretherton*, 5 C. & P. 2. [Tenterden]

A applied to B (the proprietor of a house with cellars, which he was in the habit of letting), telling him that he wanted cellar room to do a pipe of wine, but adding, that he did not know but very shortly he might want a good deal of room; B, upon this, said that he had better put it into his (B's) own cellar, which he did:—Held, that under these circumstances, B was entitled to detain the wine, till a reasonable and proper sum had been paid him for rent. *Gray* v. *Chamberlain*, 4 C. & P. 260. [Tindal]

### (B) IN EQUITY.

What possession, and what agreement, as to the possession of title deeds, shall constitute an equitable lien. *Roberts* v. *Jefferys*, 8 Law J. Chanc. 136.

A conveys an estate to B, in consideration of B entering into the covenants contained in the deed, for paying an annuity to A, and 3,000*l.* to certain persons in the event of his, B's, marrying:—Held, that the covenants did not create a lien on the estate. *Clarke* v. *Royle*, 3 Sim. 499.

Lien established against the produce of West India estates, in respect of supplies furnished to the estates, upon an agreement implied from the course of dealing and conduct of the parties. *Simond* v. *Herbert*, 1 Russ. & M. 719.

A person, indebted on bond, being entitled to certain prize-money, and being pressed by his creditor for payment, promised that the debt should be paid out of the prize-money, and delivered to him the following written order, addressed to "Colonel Francis Hastings Doyle: My dear Friend,—As I shall leave to you the distribution of the prize-money as soon as it shall be issued for me, I have to mention, that the executors of the late William Sims are claimants on that fund for a bond debt, with interest—faithfully yours—Hastings:"—Held, that the debt was not an equitable charge on the prize-money. *Watson* v. *the Duke of Wellington*, 8 Law J. Chanc. 159, s. c. 1 Russ. & M. 602.

A business which was the property of A, was carried on in the name of B, who was the agent of A, at a fixed salary; A being under considerable liabilities, in respect of that business, B became bankrupt; A was held to have a lien on the property of the concern, to the extent of his liabilities; and the assignees of B were restrained from interfering with the business or the property belonging to it, and from receiving monies due to it. *Paxcraft* v. *Weed*, 4 Russ. 487.

The indorsee of a bill has a lien upon property deposited with the drawee as security. *Ex parte Perfect, in re Neville*, 1 Mont. B.C. 25.

### (C) WAIVER.

Where a person was assumed to have had a lien upon goods for his general balance as a wharfinger, and upon being applied to by the consignor made a charge only in respect of the particular goods; but was not paid at the time on account of the difficulty of getting change for a bank note; and the card of the consignor, with the consent of the wharfinger, was nailed on the goods, and the parties separated upon the understanding that the consignor should send for the goods and pay the sum which had been named:—Held, that these facts amounted to a waiver by the wharfinger of his lien for his general balance, and that he could not detain the goods after a tender of the sum he had previously named. *Morley* v. *Hay*, 7 Law J. K.B. 104.

## LIGHTS.

[See REVERSIONER.]

A, the owner of two adjoining houses, grants a lease of one of them to B. He afterwards leases the other to C, there then existing in it certain windows. After this B accepts a new lease of his house from A:—Held, that B cannot alter his tenement so as to obstruct windows existing in C's house, at the time of C's lease from A, though the windows are not twenty years old at the time of the alteration. *Coutts* v. *Gorham*, 1 M. & M. 396. [Tindal]

In an action of trespass for removing boards, on a plea of justification that they obstructed an ancient window, through which the light ought to pass, it is sufficient to shew that the window was one through which the light ought to be allowed to pass, though the window is proved to have been within living memory. *Penwarden* v. *Ching*, 1 M. & M. 403. [Tindal]

## LIMITATIONS, STATUTE OF.

(A) WHERE AVAILABLE.
  (*a*) *At Law.*
  (*b*) *In Equity.*
(B) COMPUTATION OF TIME.
(C) PROMISE OR ACKNOWLEDGMENT.
(D) PLEADINGS.

### (A) WHERE AVAILABLE.

(*a*) *At Law.*

The Statute of Limitations does not run against an attorney's lien; and, therefore, when, six years

after judgment in an action, the plaintiff himself sued out a *fieri facias*, the Court stopped the fund produced by that writ to satisfy the amount of the attorney's lien. *Higgins* v. *Scott*, 9 Law J. K.B. 162, s. c. 2 B. & Ad. 413.

Continuances on the roll from the first to the last return of a term were allowed to be entered, in order to answer a plea of the Statute of Limitations; although the application for leave to enter them was not made until after the cause had advanced as far as the argument of a special case. And the Court afterwards refused to exonerate the bail; although they complained that they had become bail in the belief that the plaintiff would fail upon the ground of the Statute of Limitations, and they had lost the power of rendering the defendant. But, as the declaration went beyond the affidavit of debt, their liability was limited to so much of the judgment as corresponded with the affidavit of debt. *Taylor* v. *Gregory*, 9 Law J. K.B. 326, s. c. 2 B. & Ad. 257.

It is no answer to a plea of the Statute of Limitations, that the contract, upon which the plaintiff sues, was made in a foreign country; and that, by the law of that country, the plaintiff's proceeding to enforce the contract, would be in time to save the operation of that part of the foreign law, which is analogous to the Statute of Limitations in this country. *The British Linen Company* v. *Drummond*, 9 Law J. K.B. 213.

By a local paving act it was provided that all actions for anything done in pursuance of the act should be brought within six months after the doing or committing thereof. The defendants, in digging a sewer under the powers of that act, injured the foundation and cracked the walls of the plaintiff's house, and to prevent further mischief supported the house with shores. The sewer was completed, and consequently the damage done to the house more than six months before the commencement of the suit; but the shores remained up within that time:—Held, that the plaintiff's right of action for the actual injury was barred by the lapse of time, and that the permitting of the shores to remain (a cause of action which the declaration was not framed to meet) was not a continuance of the damage. *Lloyd* v. *Wigney, Wilds, and two others*, 8 Law J. C.P. 161, s. c. 6 Bing. 489, s. c. 4 M. & P. 222.

Where an act of parliament authorises certain things to be done, and in a particular clause limits the time for bringing an action for anything done "*in pursuance*" of the act:—Held, that this clause applies to an action at the suit of a person who has sustained damage by the negligence of the persons who were doing that which, if done properly, would have been done "*in pursuance*" of the act. *Smith* v. *Shaw*, 8 Law J. K.B. 111, s. c. 10 B. & C. 277.

(*b*) *In Equity.*

A, who was entitled by act of parliament to all the surplus water, and such as was not necessary for the purpose of a canal, brought an action against the canal company for an illegal abstraction of water, and alleged in his declaration continuing acts of commission and omission from an antecedent period, by which he was deprived of the water for nine weeks in the year 1825, and for seventeen weeks in the year 1826:—Held, that the company were within the protection of the limitation clause of the statute 30 Geo. 3. c. 32. s. 79, which enacts that any action for anything done in pursuance of the act, shall be brought within six calendar months next after the fact committed, unless there be a continuation of the damage; and also that there was no continuation of damage, inasmuch as there was a cessation of injury, though the cause from which the injury proceeded was continuing.

*Quære*, whether acts of omission would be within the limitation clause. *Blakemore* v. *Glamorganshire Canal Company*, 3 Y. & J. 60.

A testator gave his estate of T calling it *freehold*, to trustees, to pay his debts, if his personal estate was deficient, and then over. The estate was *leasehold*:—Held, that the trust would prevent the operation of the Statute of Limitations. *Jones* v. *Scott*, 9 Law J. Chanc. 252.

A debt is not taken out of the Statute of Limitations by an advertisement published by the administratrix, requesting all persons, having claims on the estate, to send in statements of their demand to A B, in order to their being approved and paid, or rejected, if such latter course be deemed expedient:—Held, by the Lord Chancellor, (overruling the judgment of the Master of the Rolls,) that, if a testator bequeath personalty to trustees, on trust, among other things, to pay his debts, the operation of the Statute of Limitations is thereby excluded. *Jones* v. *Scott*, 8 Law J. Chanc. 83, s. c. 1 Russ. & M. 253.

Where a suit was instituted before the passing of 9 Geo. 4. c. 14, but not brought to a hearing, until that act came into operation:—Held, that the act applies, and that a bill will be dismissed, and the plaintiff ordered to pay the costs of the suit, incurred since the time when the act came into operation. *Lockley* v. *Mansel*, 9 Law J. Chanc. 248.

The Statute of Limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration. *Mac Gregor* v. *East India Company*, 2 Sim. 452.

(B) Computation of Time.

*Semble*—that the Statute of Limitations does not begin to run against an attorney's bill on his client for costs in a cause, until the termination of the cause. But, where the action is not brought until after six years from the termination of the cause, a few items, arising out of the cause, and within six years, will not serve to take the demand out of the statute. *Rothery* v. *Munnings*, 8 Law J. K.B. 386, s. c. 1 B. & Ad. 15.

To an action for goods sold and delivered, the plea of the Statute of Limitations is no answer, unless the plaintiff could have maintained his action in that form, more than six years before the commencement of the suit. Accordingly, where goods were sold at six months' credit, to be paid for by bill, at two or three months, at the option of the buyer,—Held, by Lord Tenterden, Mr. Justice Littledale, and Mr. Justice Patteson, that the action for goods sold and delivered, brought within six months from the expiration of the nine months, was in time: *Dubitante* Mr. Justice Parke, who inclined to the opinion, that the action might have been brought at the end of the six months, if no bill were then given. *Helps* v. *Winterbottom*, 9 Law J. K.B. 258, s. c. 2 B. & Ad. 431.

The assignee in possession of an equitable life-

estate from tenant for life, without impeachment of waste, holds over after the death of the tenant for life, against the trustee holding the legal estate both for tenant for life and remainder-men: his adverse possession, as against the trustee, does not commence till the death of the tenant for life, and till then the Statute of Limitations does not begin to run. *Fauset* v. *Carpenter*, 2 Dow. & Cl. A.C. 232.

C. Promise or Acknowledgment.

The statute 9 Geo. 4. c. 14. enacts, that no acknowledgment or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take a case out of the Statute of Limitations, unless the promise be in writing, and signed by the party. The act came into operation on the 1st January 1829:—Held, that an action commenced in Hilary term, 1829, could not be maintained upon a written promise made before the passing of the act. Tanner v. Chaverton, 8 Law J. C.P. 30, s. c. 6 Bing. 258, s. c. 3 M. & P. 618.

Evidence of a parol promise, will not take a case out of the Statute of Limitations, in a cause tried after Jan. 1, 1829, though at issue before that day. Somers v. Lewis, 1 M. & M. 297. [Tenterden]

A letter sent by a debtor to a creditor, respecting a debt which contains in the introductory part these words, "which is not to be used in prejudice of my rights now, or in any future arrangement that may be made or instituted," cannot be given in evidence in an action for the debt, for the purpose of taking the case out of the Statute of Limitations. Cory v. Freeman, 4 C. & P. 462. [Tindal]

Parol evidence may be given of a written promise to take a case out of the Statute of Limitations, where the writing is lost, notwithstanding the 9 Geo. 4. c. 14. Where a promise relied upon to take a case out of the Statute of Limitations is conditional, "to pay when of ability," the plaintiff must prove the defendant's ability.—Quære, whether such promise should be declared on specially, where made after the expiration of the six years? *Hayden* v. *Williams*, 9 Law J. C.P. 10, s. c. 4 M. & P. 811, s. c. 7 Bing. 163.

On the defendant's being applied to for payment of a debt, barred by the Statute of Limitations, he said that he "would help the plaintiff to 5*l.* if he could."—Held, that this was a conditional promise only, and that it was incumbent on the plaintiff to show that the defendant was of ability to pay. Gowan v. Shorey, 7 Law J. C.P. 117, s. c. 2 M. & P. 351.

The defendant wrote to a third person as follows: "I shall feel indebted to Mr. Fearn (the plaintiff) to wind up his authority, and as soon as my situation will allow, Mr. Fearn's claim, with that of others, shall receive that attention which, as an honest man, I consider them to deserve, and it has been and is my intention to pay them. I must be allowed time to manage my affairs; and, if I am prosecuted against, any exertion of mine will be rendered abortive."—Held, that this was not such an unconditional acknowledgment as to warrant the jury in implying a promise to pay, to avoid the Statute of Limitations. Fearn v. *Lewis*, 8 Law J. C.P. 33, 4 C. & P. 175, s. c. 6 Bing. 349, s. c. 4 M. & P. 1.

A. having become bankrupt in August 1819, wrote in November 1820, a letter to B, in which he spoke of a debt of 98*l.* 15*s.*, due from him to B, and said, *inter alia* as follows: "By the end of next month I shall have my bankers' account here, and I shall remit the sum due to you in a draft to them:"—Held, in *subsitatus assumpsit* by B against A for the sum mentioned, that the letter contained a sufficient promise to answer a plea of the Statute of Limitations, and a plea of bankruptcy, and also, that to render the plea of bankruptcy applicable to the case, it must be shewn that the debt existed prior to the bankruptcy. *Lang* v. *Mackenzie*, 4 C. & P. 463. [Tindal]

An administratrix sued for a debt due to the intestate. It appeared that the debt accrued more than six years before the commencement of the action; but that, within six years, the defendant and the agent of the administratrix went through the account together, and struck a balance, which the defendant promised to pay as soon as he could:—Held, that the administratrix was entitled to recover on a count upon an account stated with her, and that the Statute of Limitations was no bar. *Smith, administratrix of Smith*, v. *Forty*, 4 C. & P. 126. [Vaughan]

A verbal acknowledgment of the payment of part of a debt within six years is not sufficient within the stat. 9 Geo. 4. c. 14, to take the case out of the Statute of Limitations. *Willis* v. *Newham*, 3 Y. & J. 518.

A payment of interest within six years by one of the makers of a joint and several promissory note, more than six years old, will take the case out of the Statute of Limitations, as against the other maker of the note; and the stat. 9 Geo. 4. c. 14. has not altered the law in this respect. And if this interest was one of the items in an account of which the party paid the balance, that is a sufficient payment of interest. *Chippendale* v. *Thurston*, 4 C. & P. 98, s. c. 1 M. & M. 411. [Parke]

Where a note is joint and several, and one of the makers dies, payment by his executor is not sufficient to take the case out of the Statute of Limitations, in an action against the survivor. *Slater* v. *Lawson*, 9 Law J. K.B. 4, s. c. 1 B. & Ad. 396.

Payment on account of a debt by one joint-contractor will bind the other, so as to deprive him of the benefit of the Statute of Limitations, although he may have no notice of such payment. But where an acknowledgment of a debt by one joint-contractor is relied upon to charge the other, and the terms of the acknowledgment are such as to leave it doubtful, whether it applies to the joint or to some other debt—*semble*, that the *onus* of shewing to what debt it applies, will lie upon the plaintiff. *Manderston* v. *Robertson*, 7 Law J. K.B. 251, s. c. 4 M. & R. 440.

Several persons joined in a note payable to a banking house, or order on demand. The object was to open an account for one of them on the credit of the note. The account went on for several years; the debtor paying interest in account, but the amount of the note never charged:—Held, that the persons who joined in the note as sureties were liable by reason of the payment of the interest; although the Statute of Limitations had intervened; and although the balance on the account was at one time in favour of the debtor.

A change took place in the members of the banking firm; some of those composing it, when the note was given, going out, and new members coming in. More than six years elapsed between the coming in

of the new members and the bringing of the action: —Held, that the action might be maintained in the name of the members of the old firm for the benefit of the new firm; and that the payment of interest to the new firm prevented the Statute of Limitations from barring the remedy by action. *Pease* v. *Hirst*, 8 Law J. K.B. 94, s. c. 10 B. & C. 122, s. c. 5 M. & R. 88.

(D) PLEADINGS.

[*Pratt* v. *Swaine*, 2 M. & R. 350, Dig. Law J. 334.]

The Statute of Limitations must be replied specially to a plea of set-off, and cannot be taken advantage of under the general replication of *nil debet*. *Chapple* v. *Darston*, 1 C. & J. 1.

If an action was commenced before a bill was filed, the plea to the bill must aver that the cause of action did not accrue within six years before the action was brought. A plea of the Statute of Limitations to a bill need not deny the usual allegation that the defendants have books, &c. in their custody, unless it is alleged that those books, &c. would shew that a promise had been made within six years. *Mac Gregor* v. *East India Company*, 2 Sim. 454.

## LORD'S DAY.

[See BILL OF EXCHANGE.]

## LUNATIC.

[See ASSAULT.]

(A) PRIVILEGES.
(B) COMMISSION.
(C) COMMITTEE.
(D) PROPERTY.

(A) PRIVILEGES.

To justify the acquittal of a prisoner indicted for murder, on the ground of insanity, the jury must be satisfied that he was incapable of judging between right and wrong, and at the time of committing the act did not consider that it was an offence against the laws of God and nature. *Rex* v. *Offord*, 5 C. & P. 168. [Lyndhurst]

(B) COMMISSION.

[10 Geo. 4. c. 18. amends and explains 9 Geo. 4. 7 Law J. Stat. 30.]

The Lord Chancellor cannot act under the 9 Geo. 4. c. 41. s. 39 & 42, upon petition. *In re Knight*, 9 Law J. Chanc. 230.

Under a commission of lunacy, the jury found, "that the party is not a lunatic, but that, partly from paralysis, and partly from old age, his memory is so much impaired as to render him incompetent to the management of his affairs, and consequently of unsound mind, and that he has been so for the term of two years last past:"—The inquisition was quashed, and a new commission was ordered to issue. *In re Holmes*, 4 Russ. 182.

(C) COMMITTEE.

A committee of the person and estate of a lunatic appointed without a reference, where the property was small. *Ex parte Farrow*, in *re Adams*, 1 Russ. & M. 112.

A committee should have the previous sanction of the Court for not passing his accounts annually. *Anon.* 1 Russ. & M. 113.

(D) PROPERTY.

[Property of Lunatic, see 1 Will. 4. c. 65, 8 Law J. Stat. 134.]

The Court will protect the property of a supposed lunatic in the interval between the presenting of a petition for a commission of lunacy, and the finding of the jury; but it will at the same time, take care, that ample means for resisting the commission be furnished to those who act, in the inquiry, on the alleged lunatic's behalf. *In re Holmes*. 4 Russ. 186.

An abatement in the rent paid by the tenant of a lunatic's estate, directed without a reference under the circumstances, on the application of the committee. *In re Fitch*, 1 Russ. & M. 354.

Will of a testator subsequently found a lunatic, directed to be deposited in the custody of the Master. 1 Russ. & M. 355.

A mother, whose only daughter, a lunatic, was entitled to a large real and personal estate under her father's will, bequeathed the residue of her estate and effects to trustees, upon trust to apply the interest, amounting to about 1,600*l.* a-year, towards the maintenance and support of her daughter, and otherwise for her comfort and advantage, as they should think proper, without being liable to account; and after her decease to pay the principal, and also such interest as should not have been actually so applied, to the testatrix's nieces:—Held, that the allowance of the lunatic ought to be borne exclusively by the maternal estate, as that arrangement, in the event of her recovery, would be most beneficial for her. *In re Ashley*, 1 Russ. & M. 371.

## MACHINERY.

If a person has had a threshing-machine taken to pieces, he expecting a mob to come and destroy it, and the mob come and destroy the different parts of the machine when thus separated—this is a felony within the stat. 7 & 8 Geo. 4. c. 30. s. 4. *Rex* v. *Mackerel*, 4 C. & P. 448. [Park]

A had a threshing-machine worked by water, the water-wheel having been put up for the sole purpose of working this machine, and never having been used for anything else. A, fearing the destruction of the machine by a mob, took it down, leaving the water-wheel standing. The prisoners broke the water-wheel:—Held to be felony under the stat. 7 & 8 Geo. 4. c. 30. s. 4; and the fact that A sometimes worked the threshing machine by horses, will make no difference. *Rex* v. *Fidler*, 4 C. & P. 449. [Park]

On an indictment on the stat. 7 & 8 Geo. 4. c. 30. s. 4, for breaking a threshing-machine, the Judge allowed a witness to be asked whether the mob by whom the machine was broken did not compel persons to go with them, and then compel each person to give one blow to the machine; and also whether, at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob, the first opportunity. *Rex* v. *Crutchley*, 5 C. & P. 133. [Patteson]

## MALICIOUS AND VEXATIOUS ARREST.

(A) Action for.
(B) Costs.

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### (A) Action for.

An action for a malicious arrest cannot be maintained where the former cause was terminated by a *stet processus* by the consent of the parties. *Wilkinson* v. *Howel*, 1 M. & M. 495. [Tenterden]

Where a cause (in which the defendant had been arrested) is referred to arbitration, and the award is given in favour of the defendant, he cannot on that ground maintain an action against the plaintiff for a malicious arrest. *Habershon* v. *Troby*, Peo. A.C. 181. [Kenyon]

The plaintiff was arrested by the indorsee of a bill of exchange, purporting to be drawn on him, and accepted. In fact the acceptance by him was not his. This is not sufficient to support an action for a malicious arrest, the defendants having acted under mistake, without malice. *Spencer* v. *Jacob*, 2 M. & M. 180. [Tenterden]

In an action on the case for a malicious arrest, evidence that the plaintiff in the action in which the arrest was made suffered a judgment of *non pros.* is not, of itself, *primâ facie* evidence of the want of probable cause.

*Aliter*, if the plaintiff in that action discontinue by rule of court.

An allegation by the plaintiff in his declaration in such an action, that the plaintiff in the action complained of "did not promote his suit, but therein wholly failed, and made default, and thereupon it was considered that he should take nothing by his bill, &c. as by the record, &c. appears," is not proved by the production of a rule to discontinue, taken out by the plaintiff, together with proof that the plaintiff paid the costs.

*Semble*—That even had there been no reference to the record, the termination of the suit as alleged would not have been proved by the evidence adduced.

The reference to the record mentioned in the last paragraph, held to be essential in the statement as there made; and therefore, that it could not be rejected as surplusage.

Such a variance in setting out the termination of the suit, held to be not such a variance as to admit of amendment at Nisi Prius under the 9 Geo. 4. c. 15. *Webb* v. *Hill*, 7 Law J. K.B. 244, s. c. 2 M. & M. 253, s. c. 3 C. & P. 485.

*Semble*, that, in an action on the case for having maliciously arrested the plaintiff, and caused him to be taken in execution after his discharge under the Insolvent Debtors Act, the defendant cannot discharge his liability, by shewing that he was ignorant of the proceedings of his attorney. *Jones* v. *Nicholls*, 7 Law J. C.P. 167, s. c. 3 M. & P. 12.

In an action for arresting a party, and holding him to bail without a reasonable or probable cause, whatever was admissible in evidence to defeat the action on which the arrest took place, is also admissible on the question of the right of the party arrested to recover for the injury sustained. *Hadden* v. *Mills*, 4 C. & P. 486. [Tindal]

By a cognovit, A confessed the action, and that B had sustained damage to the amount of 3,000*l.*, and that in case A should make default in payment of 259*l.* on the 7th of May, B should be at liberty to enter up judgment for 3,000*l.*, and sue out execution for 295*l.* and costs, which would have left a principal sum of 1,650*l.* due to B. A not having paid the 259*l.* on the 7th of May, B entered up judgment, and sued out execution for 3,011*l.*, indorsed with a direction to the sheriff, requiring him to levy 1,267*l.*, and A was arrested, and detained in prison for that sum:—Held, that A might maintain an action against B for having caused him to be arrested and imprisoned for a larger sum than he ought. *Westwood* v. *Bullen*, 9 Law J. K.B. 33, s. c. 9 B. & C. 640.

### (B) Costs.

A defendant who removes into one of the superior courts a cause commenced in an inferior court, is not entitled to the remedy given by the 43 Geo. 3. c. 46. s. 3. when it appears the plaintiff has arrested him without probable cause for a larger sum than he has recovered. *Hawtley* v. *Levy*, 7 Law J. K.B. 90, s. c. 8 B. & C. 637, s. c. 3 M. & R. 57.

In order to entitle the defendant to his costs, under the 43 Geo. 3. c. 46. s. 3, where the plaintiff has been arrested for a larger sum than he recovers, it is sufficient for the defendant to shew that there was no reasonable or probable cause for arresting for so much. It is not necessary (as in the case of an action for the malicious arrest,) to shew malice, as well as the want of probable cause. *Denton* v. *Brett*, 8 Law J. K.B. 94, s. c. 10 B. & C. 117, s. c. 5 M. & R. 29.

The plaintiffs held the defendant to bail for 1,125*l.*, holding in their hands at the same time a sum of 407*l.* for which they ought to have given him credit:—Held, that the defendant was entitled to costs under the 43 Geo. 3. c. 46. s. 3. *Foster* v. *Weston*, 8 Law J. C.P. 210, s. c. 6 Bing. 709, s. c. 4 M. & P. 589.

Where a sum of money, less than sufficient to justify an arrest, paid into court after perfecting bail and pleading the general issue, had been taken out in the usual manner by the plaintiff:—Held, that it was not a case for costs within the 43 Geo. 3. c. 46.

The Court, under the circumstances disclosed by the affidavits, discharged the rule without costs.

Held, on the authority of the cases, that the word "recover" in the act, implies by verdict.

Where malice can be shewn, the party may proceed at common law. *Weaver* v. *Birdsall*, 11 Price, 734.

The defendant was arrested for 100*l.*; he paid 10*l.* into court, and at the trial a verdict was entered for the plaintiffs, subject to an award, and the costs were to abide the event. The arbitrator awarded 40*l.* only to be due. The Court refused to allow the defendant his costs under the stat. 43 Geo. 3. c. 46. s. 3, it appearing before the arbitrator, that there was a complicated account between the parties, and that the defendant was entitled to claim certain deductions from the plaintiff's original demand. *Turner* v. *Prince*, 7 Law J. C.P. 75, s. c. 5 Bing. 191, s. c. 2 M. & P. 305.

The defendant tendered to the plaintiff 250*l.* in the balance of an account of 3,174*l.* The plaintiff refused to accept the sum tendered, and arrested and held the defendant to bail for 327*l.* The cause was

referred, and the arbitrator found 250l. only to be due to the plaintiff:—Held, that there was nothing to shew that the proceeding of the plaintiff was malicious, or without reasonable or probable cause; and, consequently, that the defendant was not entitled to costs under the 43 Geo. 3. c. 46. s. 3. *Sherwood* v. *Taylor*, 8 Law J. C.P. 60, s. c. 6 Bing. 280, s. c. 3 M. & P. 641.

A plaintiff had sold goods to defendant, to be paid for half in ready money and half by bill at three months. The defendant having refused to pay the half in ready money or to give the bill, the plaintiff arrested him for the full price of the goods:—Held, that he had no reasonable or probable cause for so doing, and that defendant was entitled to his costs, pursuant to 43 Geo. 3. c. 46. *Day* v. *Picton*, 10 B. & C. 120, s. c. 5 M. & R. 31.

## MALICIOUS INJURY.

[See 10 Geo. 4. c. 38, for the more effectual punishment of attempts to murder, &c. in Scotland, 7 Law J. Stat. 74.]

If a pistol be loaded with gunpowder and balls, but its touch-hole be plugged, so that it cannot by possibility be fired, this is not "loaded arms" within the stat. 9 Geo. 4. c. 31. ss. 11, 12. *Rex* v. *Harris*, 5 C. & P. 159. [Patteson]

If an indictment for shooting another with intent to murder, &c. in all the counts aver that the pistol was loaded with powder and a leaden bullet, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal. *Rex* v. *Hughes*, 5 C. & P. 126. [Bolland]

Inflicting a wound on a person by throwing a sledge-hammer at him, is a wounding within the stat. 9 Geo. 4. c. 31. ss. 11, 12, although the sledge-hammer, from being blunt, was not an instrument calculated to inflict a wound. *Rex* v. *Withers*, 4 C. & P. 446. [Vaughan & Alderson]

If a person strike another with a bludgeon, and break the skin and draw blood, this is a sufficient wounding to be within the stat. 7 & 8 Geo. 4. c. 31. s. 11 & 12. Under that stat. it is not at all material what the instrument is, with which the party is wounded. *Rex* v. *Payne*, 4 C. & P. 558. [Patteson]

Breaking a person's collar-bone, and bruising him, is not a wounding within the stat. 9 Geo. 4. c. 31. s. 12. *Rex* v. *Wood*, 4 C. & P. 381. [Park]

Two private watchmen, seeing the prisoner and another person with two carts laden with apples, went up to them, intending, as soon as they could get assistance, to secure them; one of the watchmen walked beside the prisoner, and the other watchman beside the other person, at some distance from the other prisoner. The other person wounded the watchman who was near him:—Held, that the prisoner could not be convicted of this wounding, unless the jury should be satisfied that the prisoner and the other person had not only gone out with a common purpose of stealing apples, but also had the common purpose of resisting with extreme violence, any person who might attempt to apprehend them. *Rex* v. *Collinson*, 4 C. & P. 565. [Garrow]

An indictment on the stat. 7 & 8 Geo. 4. c. 30. s. 10, for damaging a vessel, need not state that the damage was done "otherwise than by fire," if it state how it was done. Whether a small pleasure-boat eighteen feet long, is a vessel within the meaning of that stat.—*quære:* semble, that it is. *Rex* v. *Bowyer*, 4 C. & P. 559. [Patteson]

An indictment for setting fire to a barge, the property of another, ought to contain an averment that it was done with intent to injure the owner. *Rex* v. *Smith*, 4 C. & P. 569. [Alderson]

The malicious damage contemplated by the statute 7 & 8 Geo. 4. c. 30. s. 20. is, that which is committed for "mischief's sake"; and therefore any injury arising from the exercise of a supposed right is not within its provisions. *Rex* v. *Jenner*, 7 Law J. M.C. 79.

In 7 & 8 Geo. 4. c. 29. s. 38, the words "adjoining any dwelling-house," import actual contact; and therefore, ground separated from a house by a narrow walk and paling with a gate in it, is not within their meaning.

Whether ground be properly described as a "garden," within the same section, is a question for the jury. The words "plant" and "vegetable production," in s. 42, do not apply to young fruit trees. *Rex* v. *Hodges*, 1 M. & M. 341. [Parke]

To justify the apprehension of an offender under the Malicious Injury Act, 7 & 8 Geo. 4. c. 30, the offender must be taken in the fact, or on a quick pursuit. *Hanway* v. *Boultbee*, 4 C. & P. 350, s. c. 2 M. & M. 15. [Tindal]

## MALICIOUS PROSECUTION.

Whether a party indicted and acquitted is entitled as of right to a copy of the indictment, or whether the Judge who tries the defendant has the power legally to grant or withhold the copy — *quære.* *Browne* v. *Cumming*, 8 Law J. K.B. 89, s. c. 10 B. & C. 70, s. c. 5 M. & R. 118.

If C be intrusted to receive money for A, with a written direction for its application, and C write a letter to A stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C, under the statute 7 & 8 Geo. 4. c. 29. s. 49, not malicious. *Eagar* v. *Dyott*, 5 C. & P. 4. [Tenterden]

In an action on the case against parish officers for maliciously taking the plaintiff before a magistrate, and procuring him to be convicted of an act of vagrancy, and imprisoned and kept to hard labour, the conviction being afterwards quashed, it is not necessary that the convicting magistrate should be made a party defendant, under the 24 Geo. 2. c. 44. *Simpkin* v. *French*, 12 Price, 394.

In an action for a malicious prosecution against A and B, if it appear that both A and B entered into a joint recognizance to prosecute and give evidence, but if it also appear that A only employed the attorney, and that B attended before the magistrate and the Grand Jury, at the request of the attorney, the Judge will direct the acquittal of B. *Eagar* v. *Dyott*, 5 C. & P. 4. [Tenterden]

In an action on the case for a malicious prosecution, where the circumstances of the case out of which the action arises were within the knowledge of the defendant, very slight *primâ facie* evidence given on the part of the plaintiff, will throw on the defendant the onus of shewing that he had probable

[illegible] in the trial. [illegible] v. Hall, 9 Law J. [illegible] 1 B. & Ad. 395.

A [illegible] to maintain cause for suing out a [illegible] is a question for the Judge alone, if the [illegible] cause to maintain cause [illegible]

[illegible] suing out a commission [illegible] against the plaintiff without probable [illegible] the plaintiff prevent the facts of his [illegible] commissioned against the commissioner [illegible] action against the defendant, and of [illegible] having afterwards caused the commission [illegible] commencement.—Held, that this was not [illegible] of the want of probable [illegible] for an action, [illegible] 2 L. R. 346, s. c. 1 B. & [illegible]

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## [illegible] TRESPASS.

[See TRESPASS.]

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## [illegible]

[illegible] 9 Law J. Stat. 22.]

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## MANDAMUS.

[illegible] WRIT.

[illegible]

[illegible]

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### A. WRIT.

[illegible] writ of mandamus, improved [illegible] v. [illegible] 21, 9 Law J. Stat. 20.]

[illegible] given to certain persons [illegible] and requires them to [illegible] purposes, the Court in its [illegible] will [illegible] means to exercise it, although [illegible] for the act for its exercise may [illegible] v. [illegible], where an act gave [illegible] a number of persons [illegible] to be guardians of the [illegible] to take place at a [illegible] the commissioners, who had allowed that [illegible] proceeding to the election, were [illegible] mandamus so to do, lest [illegible] should be frustrated [illegible] neglecting their duty. *Rex* v. [illegible] *and Commonalty of the* [illegible], 3 Law J. K. B. 359, s. c. 1 B. & [illegible]

The Court will grant a mandamus to the inhabitants of a parish [illegible] to contribute to the church rate, [illegible] assemble together with the minister, [illegible] churchwardens. *Rex* v. *the Inhabitants* [illegible] 2 B. & Ad. 157.

### (B) RETURN.

[See VESTRY.]

On a mandamus to the commissary, commanding him to admit and swear in a person "duly elected" as churchwarden, he returned, that the person was "not duly elected." The return was *held* to be good, as the applicant had his remedy by action if the return was false; the use of the word "duly"

being considered, not as an assumption of a right to decide the validity of the election, but only as the traverse of a material allegation, upon which the mandamus was founded. *Rex* v. *Williams*, 7 Law J. K.B. 48, s. c. 8 B. & C. 681.

The return to a mandamus to elect churchwardens, stated an immemorial custom in the parish to have no churchwardens, and that the duties appertaining by law to the office of churchwardens had been, from time out of mind, discharged by the overseer of the poor:—Held, that inasmuch as overseers had not existed time out of mind, and as there were necessary duties appertaining to churchwardens, and there must have been some persons bound by law to discharge those duties, the custom set out in the return was bad. *Rex* v. *the Inhabitants of Wix*, 2 B. & Ad. 197.

To a mandamus to the Lord Mayor and Aldermen of London, to admit and swear in A B to the office of alderman, they returned certain proceedings towards an election at a wardmote court, when A B was declared to be elected, and a return thereof made to the Court of Lord Mayor and Aldermen, and that that Court has had from time immemorial cognizance and jurisdiction to inquire into and adjudicate upon all elections at wardmote courts to city offices, upon the petition of any party interested; that petitions, by several parties interested, were presented against the return of A B; that the merits were inquired into, and the election declared null and void by the said Court of Lord Mayor and Aldermen; and that A B was not duly elected, wherefore, &c. Traverse of the allegation, that A B was not duly elected. At the trial of the issue, it appeared, that at first the Lord Mayor appointed three clerks to take the poll, but on the second day he dismissed two of them. After the number of voters was declared, a scrutiny was demanded and granted, and then the Lord Mayor dismissed the suitors at the wardmote, "to meet again upon a fresh summons." After this, the Lord Mayor went out of office, and his successor issued a fresh summons for holding a wardmote, and there took the scrutiny, and declared A B duly elected, which was returned to the Court of Lord Mayor and Aldermen, who, upon petitions being presented, declared the election void, as stated in the return. Upon a special case, stating these facts, it was held, first, that the return was good in form; secondly, that the custom set out, for the Lord Mayor and Aldermen to inquire into and adjudicate upon elections, did not oust the jurisdiction of this Court; thirdly, that the election was not invalid, on account of the dismissal of two of the poll-clerks, or the change of the presiding officer; lastly, that the wardmote court was not dissolved, but only adjourned, by the dismissal of the suitors, to meet again on a fresh summons. *Rex* v. *the Mayor and Aldermen of the City of London*, 9 B. & C. 1, s. c. 4 M. & R. 36.

### (C) Costs.

The operation of the statute 1 Will. 4. c. 21. s. 6, (authorizing the Court, at their discretion, to grant the costs of applications for mandamus, and of the writ, if issued and obeyed,) is confined to cases where the application was originally made before the act came in force. *Rex* v. *the Inhabitants of Wix*, 2 B. & Ad. 197.

## MANOR.

[See Copyhold.]

The plaintiff claimed a right to a slip of land, lying between the highway and the land of a stranger. The defendant claimed it as lord of the manor, and proved acts of ownership over similar slips adjoining his own land, and then proposed to give evidence of the exercise of like acts of ownership over other slips of waste in other parts of the manor, adjacent to the inclosures of other persons. This evidence was rejected:—Held, that it ought to have been received. *Doe* d. *Barrett* v. *Kemp*, 9 Law J. C.P. 102, s. c. 7 Bing. 332, s. c. 5 M. & P. 173.

Upon a question as to the right of the lord of a manor to minerals, under lands held by a peculiar customary tenure, and denominated "conventionary tenements," it is competent to the lord to prove the existence of customary estates bearing the same denomination in other manors. *Rowe* v. *Brenton*, 3 M. & R. 143.

Upon a question as to the right to minerals, between the lord of the manor and his tenants, holding by a peculiar customary tenure pervading a district which embraces several manors, held for many centuries by the same lord *in capite*, and during that time governed and administered by persons acting under a commission issued by the lord at stated intervals, and extending to the whole district, acts of ownership exercised over the minerals in a customary tenement in another manner within the district, are admissible in evidence, although within time of legal memory the manors may have been held by different lords, and under a subject. *Rowe* v. *Brenton*, 3 M. & R. 230.

## MANSE.

Finally decided, that the minister of a parish, partly burghal and partly landward, is *de jure* entitled to a manse under the act, 1663. *Auld* v. *Hamilton*, 1 Dow. & Cl. A.C. 43.

## MANSLAUGHTER.

[See Murder and Manslaughter.]

## MARRIAGE.

[See Baron and Feme and Divorce.]

(A) Validity.
(B) Breach of Promise of.
(C) Evidence of.

### (A) Validity.

[Marriages solemnized in certain churches and chapels rendered valid, 11 Geo. 4. c. 18, 8 Law J. Stat. 30.]

The *lex loci contractûs* as to marriage, will not prevail, when either of the contracting parties is under a legal incapacity by the law of domicile, and therefore a second marriage, had in Scotland, on a Scotch divorce (*à vinculo*) from an English marriage between parties domiciled in England at the times

of such marriage and divorce, is null. *Quære*, whether such divorce would be invalid, if the parties were then *bonâ fide* domiciled in Scotland; still more, if the first marriage took place during a mere casual visit to England, both parties being at all domiciled in Scotland. *Conway* v. *Beazley*, 3 Hag. Ec. 639.

A marriage *de facto*, solemnized under circumstances of clandestinity, inferring fraud and circumvention between a person of weak and deranged mind, and the daughter of his trustee and solicitor, (who had great influence over him, and by whom he was clearly considered and treated as of unsound mind,) pronounced null and void; and the pretended wife condemned in costs. *Countess of Portsmouth* v. *Earl of Portsmouth*, 1 Hag. Ec. 356.

Lapse of time offers no bar to a suit for nullity of marriage, by licence, by reason of minority and want of consent of the father. *Duins* v. *Donovan*, 3 Hag. Ec. 301.

A marriage, which would be void by reason of its being by licence, without the consent of the parent of the woman, and which, by the terms of 3 Geo. 4. c. 75. s. 2, was rendered valid, does not afterwards become invalid by reason of the woman marrying again during the lifetime of her husband; the 3rd section of the above act being, for that purpose, retrospective only. *Rex* v. *the Inhabitants of St. John Delpike*, 9 Law J. M.C. 79, s. c. 2 B. & Ad. 226.

A marriage by banns, where, by the consent of both parties, one of the christian names of the man (a minor) was omitted for the purpose of concealment, is null and void under stat. 4 Geo. 4. c. 76. ss. 7, 22. *Quære*—if only one of the parties knew of the false publication. *Wiltshire* v. *Prince*, 3 Hag. Ec. 352.

On a publication of banns of marriage the woman was married by a name which had been entered by mistake in the register-book of baptisms when she was baptized; but which was not her name, nor had she ever been known by it. The mistake in such entry was not discovered, until search was made in order to have the banns published. No fraud was intended. Held, nevertheless, that the publication of the banns was void; and, consequently, the marriage invalid. *Rex* v. *the Inhabitants of Tibshelf*, 8 Law J. M.C. 120, s. c. 1 B. & Ad. 190.

A citation issuing as "in a suit of nullity of marriage, by reason of a former marriage," will not found a sentence of separation, "by reason of an undue publication of banns," the woman being therein described as spinster, the first husband having died subsequent to the publication of banns, but prior to the marriage. *Wright* v. *Ellwood*, 2 Hag. Ec. 598.

To found a sentence of nullity by reason of impotency, the impediment must be sworn to have existed at the marriage, and to be incurable—impediment not proved incurable. *Semble*, that an impediment not natural, but supervening, is no ground of nullity. *Brown* v. *Brown*, 1 Hag. Ec. 523.

In a suit of nullity, by reason of the impotency of the man, a certificate (twelve years after marriage,) that the woman was *virgo intacta viro*, coupled with two several confessions by the man of his incapacity to two medical witnesses, and with proof that the woman's health had suffered, though the man had not given in his answers, had removed into France, and refused to undergo surgical examination: Held sufficient. *Pollard* v. *Wyburn*, 1 Hag. Ec. 725.

In May 1816, a marriage ceremony between M and G (according to the evidence of one witness, who spoke positively to the performance of the ceremony, and the indentity of the parties, confirmed by another witness, who spoke with less firmness as to the indentity,) was performed by a minister of the church of Scotland, upon the production of an instrument, purporting and proved to be a certificate of a proclamation of banns, which proclamation, from the date of the certificate, as compared with a registrate of the marriage and the evidence of the witnesses, could not possibly have been made. But it was proved to be the usual certificate, and that, according to the practice in Scotland at the time, banns were in fact scarcely ever proclaimed, when such certificate was given. The minister who performed the ceremony had afterwards been banished for forgery and collusion in effecting a marriage, and became incompetent to give evidence; but a book kept by him, in which the marriage in question appeared to be regularly entered, was produced, and proved by the wife and daughter of the minister, who also proved the performance of the ceremony.

M, who had afterwards married another husband, upon a suit to establish the first marriage, in her defence admitted, that one evening in May 1816, by means of threats, and particularly of personal injury to a rival suitor, who afterwards became the second husband, she was induced to go, and went, with G to the house of the minister before mentioned, but, from the agitation of her mind, that she was incapable of paying attention to what then passed, and was convinced that she did not consent to the marriage. She also admitted, that after the ceremony she returned with G to her father's house, but denied the consummation.

It was in evidence that M was in the habit of calling upon G at his printing-office, late in the evening and alone; and that after the ceremony of marriage, in speaking of it, she said "it was not binding: what could two or three words of an outlawed man do?" It was also in evidence, that on two occasions, in the presence of her father, she was addressed, and her health drunk by the name of Mrs. G, which salutation was in one instance returned, and in another received without observation, by her or her father. It was also in evidence, that upon two occasions, I, the second husband, after his marriage, came to the house of M, when G was there, and went secretly to an upper room, where he remained alone.

The marriage with G, as alleged, took place in May 1816. In June 1816, a marriage was regularly solemnized between M and I. It was proved that G before his alleged marriage with M, had admitted that I was a more favoured suitor; that upon the marriage between M and I, he had accepted a present of a pair of gloves; that he had been frequently present in social parties with I and M, to whom he drank by the name of Mrs. I; that he slept in the same room where M and I were in bed together as man and wife, and in all his intercourse with them, which was very frequent, recognized them as such.

Two years after the marriage of M and I, and their cohabitation, G raised an action in the Commissaries Court against M, of declarator of marriage and adherence. There was issue of the marriage between M and I; but neither the children nor I were made parties:—Held, (reversing the judgment below) that if a celebration of the ceremony of marriage took place between M and G, it was to be presumed, under the circumstances before stated, that there was no real consent to marry. Whether it is necessary that the second husband and the children should be parties to the suit—*quære.*

*Semble*—that according to the practice of the ecclesiastical court, it is only necessary to make the principal a party; but that the other parties interested may intervene, if they think fit, at any stage of the suit.

Supposing that the evidence had been deemed sufficient to warrant a declarator of marriage between M and G, whether a sentence of adherence ought also to have been pronounced—*quære.*

Upon a summons which alleges an irregular marriage, followed by consummation, and a regular marriage celebrated with a view to complete the irregular marriage, whether proof of the latter marriage, no proof being given of the former, would be a sufficient proof of marriage—*quære.*

Whether, after judgment upon such a summons, and proof negativing the alleged regular marriage, a new action could be brought to establish the regular marriage—*quære.*

Whether, according to the law of Scotland, entries made in a book kept by a minister of the Church of Scotland, in the manner above described, are admissible in evidence to prove a marriage; and how marriages are to be proved, supposing the minister and witnesses to be dead or incompetent—*quære.*

Whether, the admissions of a woman, who may be claimed as a wife by two persons, under such alleged ceremonies of marriage, and circumstances as above stated, are admissible in evidence, as proof of the first marriage—*quære.*

Whether a marriage celebrated by a minister of the Church of Scotland, upon such certificate as above mentioned, without actual publication of banns, is to be deemed, according to the practice, a regular marriage in Scotland—*quære.*

Assuming it to be an irregular marriage, previous and subsequent conduct of the parties is admissible evidence upon the question of consent. *Macneill* v. *Macgregor*, 2 Bligh, N.S. 393, s. c. 1 D. & Cl. A.C. 208.

### (B) Breach of Promise of.

Declaration on a promise of marriage need not state the settlement of the fortune. *Atchinson* v. *Baker*, Pea. A.C. 124. [Kenyon]

A general promise to marry, is a promise to marry on request; and, therefore, evidence of a promise to marry after a future uncertain event, will not support a declaration stating a general promise.

Bodily infirmity, arising after the contract, is a good reason for either party to break it off. *Atchinson* v. *Baker*, Pea. A.C. 103. [Kenyon]

### (C) Evidence of.

In an action for crim. con. at the suit of a Quaker, proof of a marriage according to the forms of that society is sufficient to sustain the action. *Deane* v. *Thomas*, 1 M. & M. 361. [Tenterden]

An entry of baptism in 1820, (the marriage taking place in 1813,) reciting that the party was "said to be born in 1795," is not admissible, either as proof of the non-age, or in order to prevent a suspicion of suppression of evidence. A letter from the father, two months after the marriage, expressive of his anger at the marriage, is admissible as part of the *res gestæ*; and a subsequent *de facto* marriage of the woman with another man is pleadable, to shew that the parties did not live together as husband and wife. *Duins* v. *Donovan*, 3 Hag. Ec. 301.

In a suit for a declarator of marriage, founded on a promise *subsequente copulæ*, there was no direct evidence of the promise; but, from facts and circumstances, and chiefly from letters written by the defender to the pursuer, (the defender having destroyed the letters written by the pursuer to him,) the Commissary Court and Court of Session thought that there was sufficient to warrant the inference that a promise of marriage had been given and accepted previous to the *concubitus*, and declare for the marriage. The judgment affirmed by the Lords. *Honyman* v. *Campbell*, 2 D. & Cl. 266.

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## MARRIAGE ARTICLES AND SETTLEMENTS.

[See Settlement.]

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## MASTER AND SERVANT.

[See Infant.]

(A) Liability of Master.
(B) Contracts between.

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### (A) Liability of Master.

A acted as the owner of premises, and made a contract with a water company to supply the premises with water at a certain height. In his absence his men, to the injury of the company, fixed the pipe at a higher level. After it was done, A knew of it. A was not, in fact, the owner of the premises:—Held, that he was liable in an action on the case, brought by the company. *West Middlesex Waterworks Company* v. *Suwerkrop*, 4 C. & P. 87, s. c. 1 M. & M. 408. [Tenterden]

A had several of his children residing in a house distant from his own, in the charge of B, a servant:—Held, that if an accident happened to one of the children, A was liable to pay for its cure, although he did not know the surgeon who was called in, and although the accident might have arisen from the carelessness of the servant. Held, also, that if B, the servant, becoming ill in consequence of the service, call in C, a surgeon, and after this A send his own surgeon, and the wife of A know of C's attendance, and expresses no disapprobation, A is liable to pay C for this attendance.

A servant, who hurt her foot in getting over a gate, called in a surgeon, who was not the regular medical attendant of the family, without the knowledge of her master or mistress:—Held, that the

master was not liable to pay the surgeon's bill. *Cooper* v. *Phillips*, 4 C. & P. 581. [Tenterden]

A master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care: and therefore, where a master ordered a servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall:—Held, that the master was liable in trespass. *Gregory* v. *Piper*, 9 B. & C. 591, s. c. 4 M. & R. 510.

Where a trader harbours and conceals smuggled goods, he is liable in penalties for the illegal act of a servant, done in the conduct of the business, with a view to protect the smuggled goods, though the master be absent at the time, and the act be done by the servant upon the exigency of the occasion, when the goods are discovered. *Attorney General* v. *Seddon*, 9 Law J. Exch. 6, s. c. 1 C. & J. 220, s. c. 1 Tyrw. 41.

### (B) Contracts between.

[Acts prohibiting payment of wages in goods repealed, 1 & 2 Will. 4. c. 36, 9 Law J. Stat. 65; but payment in certain trades in goods prohibited by 1 & 2 Will. 4. c. 37, 9 Law J. Stat. 66.]

To justify a master in dismissing a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect. *Callo* v. *Brounsker*, 4 C. & P. 518. [J. Parke]

A clerk and traveller, hired by the year, assaulted his employer's maid servant, with intent to ravish her:—Held, to be good cause for his dismissal without any notice.

*Semble*, that a person dismissed under such circumstances is not entitled to wages, even for the time during which he has served. *Atkin* v. *Acton*, 4 C. & P. 208. [Tenterden]

A servant, being engaged for a year at thirty guineas and a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year:—Held, that he could not maintain trover for the clothes, that not being the proper form of the action. *Crocker* v. *Molyneux*, 3 C. & P. 470. [Tenterden]

If a servant has left his service for a considerable time, the presumption is, that all his wages have been paid. It seems that a master is not bound to provide a menial servant with medical attendance and medicines during sickness; but if a servant fall ill, and the master call in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there be a special contract between the master and servant that he should do so. *Sellon* v. *Norman*, 4 C. & P. 80. [Gaselee]

*Quære*—Whether a silk-weaver is within the statute 4 Geo. 4. c. 34.

To bring a person within the jurisdiction of a Magistrate, under the 4th section of that statute, he must have contracted to serve under a written contract, or must actually have entered the complainant's service before the time of the complaint made, and in such a manner as will create the relationship of master and servant.

Therefore, a silk-weaver, who had agreed to wind up, at his own house, certain materials for a manufacturer,—held to have been improperly convicted under the above act. *Hardy* v. *Ryle*, 7 Law J. M.C. 118, s. c. 9 B. & C. 603, s. c. 4 M. & R. 235.

A Magistrate has no jurisdiction under the 4 Geo. 4. c. 34, or any of the acts the powers of which are thereby enlarged, unless the relation of master and servant subsist between the parties to the subject matter of his proceeding.

Accordingly, where a person contracted with another to do some work on a road for a specific sum,—Held, that this was not a case in which the Magistrate had jurisdiction.

The merely describing the person, who is proceeded against under the above act, as a "labourer," will not give jurisdiction to the Magistrate.

A conviction under sec. 3. of the above-mentioned act, ought not to adjudge that the servant be dismissed from his service, and be also imprisoned,—the act authorizing a punishment of this nature in the alternative only. *Lancaster* v. *Greaves*, 7 Law J. M.C. 116, s. c. 9 B. & C. 628.

## MEASURES.

[See Weights and Measures.]

## MESNE PROFITS.

The costs of an ejectment may be recovered in an action for mesne profits, though the defendant has appeared and pleaded in the ejectment, and no costs have been taxed. *Symonds* v. *Page*, 1 C. & J. 29.

Although a judgment in ejectment is conclusive in an action for mesne profits of the title of the lessor of the plaintiff, from the day laid in the demise, such judgment is no evidence in such an action as to the time for which the defendant occupied the premises. Consequently, it is no objection to the right of a plaintiff in ejectment, that the day of the demise is carried back to a time before the defendant entered into possession; provided the plaintiff, at the time he has himself chosen to lay the demise, had the title. *Doe* d. *Fildes* v. *Ferne*, 8 Law J. K.B. 174.

## MISDEMEANOR.

A woman was delivered of a child, whose dead body was found at her father's house, in a bed, among the feathers. There was no evidence to shew who placed it there; but, it being proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes,—the learned Judge directed an acquittal on the charge of endeavouring to conceal the birth. *Rex* v. *Higley*, 4 C. & P. 366. [Park]

An indictment charged an assault with intent to commit a felony, and a common assault. The verdict found the defendant guilty of the misdemeanor and offence charged in manner and form as by the indictment was alleged. The judgment was, that the defendant should be imprisoned and kept to hard labour; the latter part of the judgment not being warranted, unless the verdict could be under-

ood as affirming the first count:—Held, that the ord "misdemeanor" might properly be understood a *nomen collectivum*; that the finding of the jury pplied to the whole of the indictment; and consequently, that the judgment was warranted by the erdict.

Where a misdemeanor at common law is punishble by statute, by a punishment not warranted by ommon law, it is not necessary, in order to warrant he statute punishment, that the indictment should e founded upon the statute, or in any manner rer to it. *Rex* v. *Powell*, 9 Law J. M.C. 71, a. c. B. & Ad. 75.

By statute 9 Geo. 4. c. 31. s. 27, two Justices may onviet summarily of a common assault, and convicion or acquittal before them bars further proceedigs. Section 29. precludes them from exercising heir jurisdiction, if they find the assault to have een accompanied by any attempt to commit felony. wo Justices convicted summarily, as of a common ssault, where it appeared by the deposition that the efendant had laid hands upon the prosecutor in an ndecent manner, but without violence. A *certiorari* ving moved for, on the ground that the offence, if ommitted, was accompanied by a felonious attempt, nd therefore within s. 29,—the Court refused to nterfere, inasmuch as no excess of jurisdiction ppeared on the face of the conviction, and the vidence (of which the Magistrates were the judges) id not clearly shew an intention to commit felony.

And, *semble*, that although this had appeared by he deposition, and the conviction had been consequently illegal, the Court of King's Bench would not ave interposed by *certiorari*. *Anon.* 1 B. & Ad. 382.

## MISNOMER.

[See ABATEMENT, BAIL, and PRACTICE.]

## MONEY COUNTS.

(A) MONEY HAD AND RECEIVED.
(B) MONEY PAID.

### (A) MONEY HAD AND RECEIVED.

A gave a sum of money into the hands of B, to y to C; B had not paid it over to C:—Held, that C had not consented to receive this sum of B, A ght countermand the authority, and recover it back om B. *Owen* v. *Bowen*, 4 C. & P. 93. [Tenterden]

If A agrees to sell an estate to B, and is afterards disabled from doing so, B may recover back s money deposited, in an action for money had and eived, although the contract for sale be under seal. *ssille* v. *Da Costa*, Peo. A.C. 113. [Kenyon]

A remitted to B a bank bill indorsed, "Pay to order of B, under provision for my note in favour C, payable at the house of B, 1st January 1830." received the proceeds of the bill, and refused to y them over to C; in an action for money had and eived by C,—Held, that B was not liable to C, cause B had never assented to hold the bill or ney to the use of C. *Wedlake* v. *Hurley*, 1 C. & 33.

The plaintiff entered into an agreement with the endant to let him certain land on a building lease, and to lend him 4,000*l.* for the purpose of erecting twenty houses; the money to be repaid on the 24th of June 1828: and the defendant agreed to build the houses, and to convey them to the plaintiff, as a security for the sum to be advanced. The plaintiff advanced the defendant 1,168*l.*, and the latter built *six* houses, and then, at the request of the plaintiff, discontinued the building:—Held, that, at the expiration of the time stipulated for re-payment of the money advanced, the plaintiff might recover the 1,168*l.* on the common money counts. *James* v. *Cotton*, 9 Law J. C.P. 55, a. c. 7 Bing. 266, a. c. 5 M. & P. 26.

The defendants entered into an agreement with one J C, appointing him their agent, for purchasing and working mines in Peru, for which he was to receive a certain salary, and a fifth of the profits. J C proceeded accordingly to South America, furnished with a letter of instructions, a letter of credit empowering him to draw upon them for 10,000*l.*, and also a general power of attorney to enter into, transact, complete, and execute contracts for obtaining a *grant* or lease of any mine, or for the purchase of ore, &c., or of the right to open, dig, or work any mine; and also to enter into, make and execute any deeds, conveyances, &c.; and generally to do all such acts, &c., as the defendants themselves could do if personally present and acting therein. The 10,000*l.* having already been raised on the letter of credit, the plaintiffs (in ignorance of that fact) made further advances to J C on bills drawn by him upon the defendants. The letter of credit and power of attorney were not shewn to the plaintiffs when they advanced the money, nor did it appear that they asked for them. The bills being refused acceptance:—The Court held, that the plaintiffs were entitled to recover the amount as money had and received. *Withington* v. *Herring*, 7 Law J. C.P. 172, a. c. 5 Bing. 442, a. c. 3 M. & P. 30.

A was indebted to B in a sum of 868*l.*, for which he was arrested. C, who was clerk to B's attorney, directed him to be discharged on paying 700*l.* only. B threatened to complain to C's employers, to prevent which C advanced 100*l.*, B agreeing that it should be repaid whenever the balance of 168*l.* should be recovered from A. After the death of B and C, the balance was recovered:—Held, that the representatives of C might recover the 100*l.* from the representatives of B, on a count for money had and received to their use, and that there was no necessity to declare specially. *Platts, Administratrix of Mantle*, v. *Lean*, 3 C. & P. 561. [Tenterden]

If an attorney sue out a writ against A at the suit of B, without any authority, expressed or implied, from B, for so doing, and A pay the costs of such writ to the attorney, A may recover back the amount of those costs, by bringing an action for money had and received against the attorney; but if the attorney had any authority either express or implied, from B, to sue out the writ, such a count for money had and received will not lie against the attorney, even though B had no cause of action against A. *Dupen* v. *Keeling*, 4 C. & P. 102. [Parke]

The defendants received money to the use of A and B, assignees of a bankrupt. B afterwards removed, and A became the sole assignee, the money still remaining in the hands of the defendants. He may well declare as for money had and received to

his own use as assignee, without mentioning B at all. *Steward* v. *Lee*, 1 M. & M. 158. [Tenterden]

In an action by the indorsee against the acceptor of a bill of exchange, the bill is not admissible as evidence of money had and received. *Eales* v. *Dicker*, 1 M. & M. 324. [Littledale]

(B) MONEY PAID.

An action for money paid to the use of the defendant may be maintained by a sheriff's officer who has paid the debt and costs on an attachment against the sheriff, bail above not having been put in through the misconduct of the defendant in imposing insufficient bail on the sheriff, and the defendant having promised to indemnify the officer, both before and after the payment: but the officer cannot recover beyond the debt. *White* v. *Leroux*, 1 M. & M. 347. [Tenterden]

The plaintiff accepted a bill for the accommodation of H, who deposited it with the defendant as a security for goods bought of him. H afterwards paid for the goods; but, he being further indebted to the defendant, the latter refused to restore the bill, and subsequently indorsed it for value to a third person, who sued the plaintiff thereon, and recovered from him the amount with costs:—Held, that the plaintiff might sue the defendant for the amount of the bill, as for money paid to his use. *Bleaden* v. *Charles*, 9 Law J. C.P. 82, s. c. 7 Bing. 246, s. c. 5 M. & P. 14.

## MONEY, PAYMENT OF.

[See PAYMENT.]

## MORTMAIN.

[See LEGACY.]

## MORTGAGE.

[See SURRENDER.]

(A) WHAT CONSTITUTES A MORTGAGE.
(B) RIGHTS OF THE MORTGAGOR.
(C) RIGHTS, INTERESTS AND LIABILITIES OF THE MORTGAGEE.
(D) REDEMPTION.
(E) FORECLOSURE.
(F) ACCOUNTS.
(G) COSTS.

(A) WHAT CONSTITUTES A MORTGAGE.

A mere deposit of deeds, even without a word, may constitute an equitable mortgage, but it can only occur as against strangers, in cases where the possession of the title deeds can be accounted for in no other manner, except from their having been deposited by way of equitable mortgage, or the holder being otherwise a stranger to the title and to the lands. *Bozon* v. *Williams*, 3 Y. & J. 150.

(B) RIGHTS OF THE MORTGAGOR.

The mere circumstance of a person being the mortgagor in possession does not create such a tenancy between the mortgagor and mortgagee as to entitle the former to a notice to quit, or even to a demand of possession, before ejectment be brought against him at the suit of the latter. *Doe* d. *Griffith* v. *Mayo*, 7 Law J. K.B. 84.

(C) RIGHTS, INTERESTS, AND LIABILITIES OF THE MORTGAGEE.

By a mortgage deed, the mortgagor covenanted, that, if the principal sum advanced was not repaid, with interest, on a given day, the mortgagee might enter and sell the premises without the assent or concurrence of the mortgagor; the mortgagor having remained in possession, and the principal sum not having been repaid on the day mentioned in the deed:—Held, that the mortgagee might maintain ejectment without a notice to quit, or a previous demand of possession. *Doe* d. *Fisher* v. *Giles*, 7 Law J. C.P. 134, s. c. 5 Bing. 421, s. c. 2 M. & P. 749.

A mortgagee is entitled either to affirm or disaffirm a tenancy created subsequent to the mortgage, between the mortgagor and his tenant. If he affirm it, he is entitled to all rent which may become due after he gives notice of his affirming the tenancy.

Whether, in case of his affirming it, the tenant be justified in paying him not only the rent which may become due subsequent to the notice, but also rent which had become due before the notice, but had not been paid—*quære*. *Semble*, that he would; but at all events he would, if the mortgagee added a threat to proceed in case of non-payment. The tenant, being liable to ejectment, and to payment of the amount of such rent as mesne profits, is not bound to incur the expense of an ejectment. *Pope* v. *Biggs*, 7 Law J. K.B. 246, s. c. 9 B. & C. 245, s. c. 4 M. & R. 173.

A mortgagee has no title to the rents of the mortgaged premises, which have been paid into court by a receiver, appointed in a suit for establishing the will of the mortgagor, notwithstanding that, after the appointment of a receiver, he gave notice to the tenants to pay the rents to him. He ought to have followed up that notice by moving to discharge the receiver. *Thomas* v. *Brigstocke*, 4 Russ. 64.

Where a tenant, having mortgaged his lease, has neglected to pay rent and costs, or file his bill, according to the provisions of the tenancy acts, within six months from the time of execution executed, on an ejectment brought by the landlord, the mortgagee has a further period of three months within which he may, by payment of rent and costs, or filing his bill and lodging the money in court, save the lease from forfeiture. *O'Reilly* v. *Featherston*, 2 D. & Cl. 39.

A, having the fee simple of an estate, on his marriage settles it to the use of self for life, remainder to trustees for 100 years to secure wife's jointure; remainder to other trustees for 500 years, for raising portions; remainder to the use of first and other sons of the marriage in tail male; remainder to first and other sons in tail male of any other marriage; remainder to the use of divers persons for life, &c.; with ultimate remainder to A, his heirs and assigns for ever.

A, having no issue, executed a mortgage of part of the estate to B, and created a term of 500 years for securing the money lent; A died without ever having had any lawful issue; and B filed his bill to have the limitations, subsequent to those for the

benefit of A's issue, declared voluntary as against him:—The Court made a decree in favour of the security. *Gray* v. *Legard*, 9 Law J. Chanc. 80.

A mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt in a suit for the administration of the assets of the deceased mortgagor:—Held, that he could prove only for so much of his debt as might remain unpaid by the produce of the mortgaged estate. *Greenwood* v. *Taylor*, 1 Russ. & M. 185.

A mortgagee of a term is liable to the ground rent, though he does not take possession. If the original lessee is obliged to pay ground rent, he may recover it from the assignee in possession. *Stone* v. *Evans*, Peo. A.C. 94. [Kenyon]

A mortgagee having refused to reconvey and deliver up the title deeds, though the amount of the mortgage money and interest was tendered to him on the day on which the mortgage was redeemable, a decree was made against him, with costs; and the money having been paid into court, no interest was allowed to him subsequent to the tender. *Roberts* v. *Jefferys*, 8 Law J. Chanc. 136.

(D) Redemption.

N, being entitled to certain lands as issue in tail, conveys them in 1749, by lease and release to a mortgagee, in fee, to secure 800*l.* borrowed, and levies a fine of the lands pursuant to covenant, for the purpose of perfecting the security. In 1762, N borrows 450*l.*, and charges it upon the same lands by deed-poll. N died in 1764, leaving the charge upon the lands of the aggregate sum of 1,250*l.*, with an arrear of interest, and he by his will devised all his lands to M, his wife. In 1766, M having married A B, they, by lease and release, reciting the mortgage, and that A B had paid the interest, grant and confirm the mortgaged lands to the mortgagee, reserving the equity of redemption to A B, his heirs, &c. By a deed in 1789, 300*l.*, an arrear of interest, is added to the principal, and the aggregate sum of 1,550*l.*, is charged on the lands, subject to redemption, as by the former deed. M died in 1794, leaving R H, a son by the first husband, her heir-at-law. In 1797, A B sold part of the mortgaged lands, and in consideration of 200*l.*, principal and interest, paid to the mortgagee, and 600*l.* paid to A B, he and the mortgagee conveyed such part of the lands to R R, the purchaser. The rest of the lands was conveyed by the mortgagee to A B, who died in 1799. Under these circumstances the heir-at-law of M filed a bill in the Exchequer to redeem the lands, and the Court decreed that he was entitled to redeem on payment of the principal money due upon the mortgage, and interest calculated from the death of A B. Upon appeal to the House of Lords from this decree, it was declared that R H, as heir-at-law of M, was entitled, notwithstanding the proviso for redemption reserved to A B, by the deed made between him and the mortgagee, to redeem the lands, "on payment of the principal money and interest, due at the death of M, on the aggregate sum of 1,250*l.*—such interest to be computed according to the proviso in the indenture of release and mortgage." A B, being entitled in equity to have the interest due at the death of his wife added to the principal, and considered as an aggregate sum with the principal, A B and M his wife not being bound to keep down the interest during her life, for the benefit of her heir-at-law, &c., and that an account should be taken of what was due for principal and interest on the mortgage at the death of M. The decree of the Exchequer being varied, according to this order, it was referred to the Master to take the accounts so directed; and it appeared in evidence before him, that A B and M his wife, during her life, paid to the mortgagee, on account of interest, 1,500*l.*; but the Master, in his report did not include this sum; but reported, that there was due upon this account for principal 1,250*l.*, and for interest at the death of M, 286*l.* 9*s.* 2*d.* On this ground exceptions were taken to the report, which being in this respect confirmed, and decree made upon further directions accordingly, a further appeal was presented to the House of Lords. But the decree was affirmed, the House being of opinion that the representative of the husband was not entitled, as against the heir of the wife, to an allowance of interest actually paid by the husband during the life of his wife; and that the former order of the House, directing the account of interest due on the mortgage, at the death of M, meant interest actually due. *Ruscombe* v. *Hare*, 2 Bligh, N.S. 192.

A having deposited leases with B, to secure monies borrowed at different times, from 1805 to 1813, in the latter year signed an agreement, giving up all his interest to the mortgagee; it was proved that the sum due to the mortgagee was a very inadequate consideration on a bill to redeem, and that the agreement should stand only as a security:—Held, that the plaintiff was not entitled to relief in equity, and bill dismissed. *Purdie* v. *Millett*, 1 Tam. 28.

To a bill for the redemption of a mortgage term, all the *cestui que trusts* interested in the produce of the term, as residuary legatees, under the mortgagee's will, are necessary parties, although they are numerous and the property small, and although the trustees have power to give a discharge to purchasers. *Osbourn* v. *Fallows*, 1 Russ. & M. 741.

(E) Foreclosure.

[*Nenny* v. *Edwards*, 4 Russ. 124, Dig. Law J. 351.]

An insolvent mortgagor, even where his assignees disclaim all interest in the equity of redemption, ought not to be made a party to a suit for foreclosing the mortgage. *Collins* v. *Shirley*, 1 Russ. & M. 638.

(F) Accounts.

A mortgagee is entitled to be allowed, in account against the mortgagor, all expenses properly incurred for the recovery of the mortgage money. *Ellison* v. *Wright*, 3 Russ. 458.

(G) Costs.

Costs of proceedings at law, commenced after the institution of the suit, are proper to be included in the reference to the Master to take the account. *Dawkins* v. *Evans*, 9 Law J. Chanc. 179.

Where, upon a bill of redemption and foreclosure, the mortgagee assigns his mortgage, after a decree for the usual accounts, the mortgagor is not to pay the costs of the supplemental bill, which is necessary to bring the assignee of the mortgagee before the Court. *Barry* v. *Wray*, 3 Russ. 465.

A first incumbrancer having a power of sale, but

having lost the title deeds, institutes a suit to have the estate sold, the subsequent incumbrancers are entitled to be paid their costs, although the proceeds of the sale are not sufficient to pay what is due to the plaintiff. *Wentner* v. *Wright*, 2 Sim. 543.

## MURDER AND MANSLAUGHTER.

A was fighting with his brother; to prevent this B had hold of A, and held him down upon a locker on board the barge in which they were, but struck no blow: A stabbed B:—Held, that if B did nothing more than was sufficient to prevent A from beating his brother, and had died of this stab, the offence of A would have been murder; but that if B did more than was necessary to prevent the beating of A's brother, it would have been manslaughter only. *Rex* v. *Rowse*, 5 C. & P. 120. [J. Parke]

A was charged with suffocating B, by placing both her hands about the neck of B:—Held, that A might be convicted on this indictment, if B was suffocated in any manner, either by A, or by any other person in her presence, she being privy to the commission of the offence. The phrase "about the neck," in an indictment for murder, is good, and is not open to the same objection as "about the breast." *Rex* v. *Culkin*, 5 C. & P. 121. [J. Parke]

In an indictment for murder, committed by a British subject abroad, it must be averred that the prisoner and the deceased were subjects of His Majesty. To prove the allegation that the prisoner was a subject of His Majesty, his own declaration is evidence to go to the jury, and it will be for them to say, whether they are satisfied that he is a British born subject. A bill of indictment for this offence ought not to state it to have been committed "at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary-le-Bow," &c.; and it being so stated, the Court directed the London venue to be struck out, before the bill was found by the grand jury. *Rex* v. *Helsham*, 4 C. & P. 394. [Bayley and Bosanquet]

A was indicted for the murder of H. It was opened that A, having malice against P, hired H to murder him, and that H did so, but that, H being detected, A had murdered H to prevent a discovery of his (A's) guilt, respecting the murder of P. Evidence was given of expressions of malice used by A towards P; and it was held, that the prosecutor might also give evidence to shew that H was, in fact, the person by whom P had been murdered. *Rex* v. *Clewes*, 4 C. & P. 221. [Littledale]

A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient, occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or gross inattention to his patient's safety. On an indictment for manslaughter, whether the death is occasioned by the application of a lotion to the skin, evidence may be given of the effect of the lotion, when applied to other patients. *Rex* v. *Long*, 4 C. & P. 398. [Park]

Where a person, undertaking the cure of a disease (whether he has received a medical education or not,) is guilty of gross negligence in attending his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter. *Rex* v. *Long*, 4 C. & P. 423. [Bayley, Bolland and Bosanquet]

If a person *bonâ fide* and honestly exercising his best skill to cure a patient, perform an operation which causes the patient's death, he is not guilty of manslaughter; and it makes no difference whether such person be a regular surgeon or not, nor whether he has had a regular medical education or not. *Rex* v. *Van Butchell*, 3 C. & P. 629. [Hullock]

An indictment for manslaughter charged, that A gave the deceased divers mortal blows at P, in the county of M, and that the deceased languished and died at D, in the county of K; and that the prisoner was then and there aiding in the commission of the felony:—Held, that the indictment was good, and that the word there referred to P, in the county of M. *Rex* v. *Hargrave*, 5 C. & P. 170. [Patteson]

Although all persons at and sanctioning a prize-fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter. *Rex* v. *Hargrave*, 5 C. & P. 170. [Patteson]

A was indicted for the manslaughter of B, by a blow of a hammer. No proof was given of the striking of any blow, only of a scuffle between the parties. The appearance of the injury was consistent with the supposition, either of a blow with a hammer, or of a push against the lock or key of a door:—Held, that if it was occasioned by a blow with a hammer, or any other hard substance held in the hand, it was sufficient to support the indictment; but otherwise, if it was the result of a push against the door. *Rex* v. *Martin*, 5 C. & P. 128. [J. Parke]

An indictment for manslaughter charged, that the deceased was on horseback, and that the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened, and threw him, giving him a mortal fracture. The evidence was, that the prisoner struck the deceased with a small stick, and that the latter rode away, and the former rode after him; whereupon the deceased spurred his horse, which then winced and threw him, whereby he was killed:—Held, that this evidence sufficiently supported the indictment. *Rex* v. *Hickman*, 5 C. & P. 151. [Park]

## NATIONAL DEBT.

[Amendment of acts regulating the reduction of, 10 Geo. 4. c. 27, 7 Law J. Stat. 65.]

## NAVIGATION LAWS.

[See 11 Geo. 4. c. 22, An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy, 8 Law J. Stat. 32.

Treasurer of the Navy, 1 Will. 4. c. 42, 8 Law J. Stat. 98.]

An American subject cannot trade from England to India. *Wilson* v. *Backhouse*, Peo. A.C. 120.

## NE EXEAT REGNO.

A writ of *ne exeat regno* discharged with costs, where, upon the affidavit of the plaintiff, and the answer of the defendant taken together, there was a strong *primâ facie* case that nothing was due from the defendant to the plaintiff. *Leo* v. *Lambert*, 3 Russ. 417.

## NEGLIGENCE.

[See ACTION and STAGE COACH.]

## NEW TRIAL.

(A) WHERE GRANTED OR REFUSED.
- (a) *In general.*
- (b) *Amount of Damages.*
- (c) *Against Evidence.*
- (d) *Admission and Rejection of Evidence, and Absence of Witnesses.*
- (e) *Surprise.*
- (f) *Terms.*

(B) MOTION FOR.

(C) COSTS.

### (A) WHERE GRANTED OR REFUSED.

#### (a) *In general.*

On a verdict for plaintiff, and motion by defendant for a new trial—*semble*, that the argument, that f the defendant should obtain a verdict, the plaintiff must, by matter on the record, have judgment *non obstante veredicto*, will not induce the Court to efuse a new trial, if in other respects proper to be ranted.

The ground suggested (and undecided) was, that he bye-laws were bad on the face of them, in giving he penalty, or part of it, to a stranger to the corporation, and in giving the power of recovering it o a stranger. *Davies* v. *Morgan*, 9 Law J. Exch. 53, s. c. 1 C. & J. 587, s. c. 1 Tyrw. 457.

Circumstances under which a new trial of an ssue of *devisavit vel non* will be directed.

A third trial of an issue of *devisavit vel non* directd, after two juries had found in favour of the will.

*Quære*, whether, in a question between a devisee nd an heir-at-law, the Court will bind the inheriance by the result of one trial. *Winchelsea* v. *Wauchope—Tod* v. *Winchelsea*, 3 Russ. 441.

The jury at Nisi Prius, intimate that they are atisfied on a particular point; counsel in consequence, elect to keep back further evidence: the erdict being afterwards adverse, affords no ground or a new trial. *Williams* v. *Beaumont*, 9 Law J. Exch. 16.

New trial of an issue directed in a tithe suit, it ppearing that the verdict had been obtained by urprise, and against the opinion of the learned udge who tried it; the verdict being also contrary o the opinion of the equity Judge. *Willis* v. *Farr*, 3 Y. & J. 264.

#### (b) *Amount of Damages.*

The plaintiff importuned the defendant for charity, nd, refusing to quit the premises when desired, he defendant gave him in charge to a constable, who detained him a night, and on the following morning brought him again to the defendant, who, after some altercation, gave him 2*l.* and afterwards 2*s.* 6*d.*, with which the plaintiff went away. In an action for the false imprisonment, the jury gave a verdict for the plaintiff, damages 100*l.* The Court directed a new trial for excessive damages. *Price* v. *Severn*, 9 Law J. C.P. 99, s. c. 7 Bing. 316, s. c. 5 M. & P. 125.

The Court adhere so rigidly to their rule, not to hear a motion for a new trial, on the ground of the verdict being contrary to the facts, where the verdict is under 20*l.*, that they refused to hear such a motion, although it was made upon affidavit, disclosing fraud not discovered by the unsuccessful party until after the trial. *Cannon* v. *Lamb*, 8 Law J. K.B. 501.

Although the Court, it seems, will grant a new trial, where the verdict is perverse, in a cause wherein the matter in dispute is below 20*l.*, they will not grant it if there be evidence on both sides, though greatly disproportionate. *Scott* v. *Watkins*, 8 Law J. C.P. 158, s. c. 4 M. & P. 237.

#### (c) *Against Evidence.*

Where, on an issue in a suit in equity for small tithes, instituted by a lay impropriator, claiming against persons who set up a title by grant in another, also claiming by lay title, to the tithes of the particular lands in their occupation, the jury found a verdict for the defendants, the Court refused to disturb it, on motion for a new trial, made upon the ground that the evidence, chiefly documentary, was wholly with the plaintiffs, and that the learned Judge had misdirected the jury in respect of the legal doctrine of presumption of right, as applied to tithe cases. *Ringrose* v. *Todd*, 12 Price, 650.

#### (d) *Admission and Rejection of Evidence, and Absence of Witnesses.*

The Court refused to direct a new trial on the mere ground that a principal witness in the cause was admitted to give evidence, though he had disobeyed an order made by the Judge for the exclusion of the witnesses during the trial. The admission or rejection of a witness in such a case is in the discretion of the Judge. *Parker* v. *M'William*, 8 Law J. C.P. 276, s. c. 6 Bing. 683, s. c. 4 M. & P. 480.

Where an interested witness is examined, but his evidence is not material, or the facts proved by him are borne out by other witnesses, the solitary fact of interest, no ground for a new trial. *Williams* v. *Beaumont*, 9 Law J. Exch. 16.

The admission of inadmissible evidence on the trial of an issue directed by a court of equity, is not such an objection to a verdict, where there was other evidence given in support of the case of the successful party, as to afford ground for a new trial, if the court of equity, or the Judge who heard the cause, be satisfied with the verdict upon the unobjectionable evidence with reference to the object of the issue. *Pulley* v. *Hilton*, 12 Price, 625.

Where a particular piece of evidence has been improperly admitted, but there is otherwise sufficient to sustain the verdict, independently of that which was so improperly admitted, the Court will not grant a new trial. *Doe* d. *Lord Teynham* v.

*Tyler*, 8 Law J. C.P. 222, s. c. 6 Bing. 561, s. c. 4 M. & P. 377.

*Semble*, that although, on an application for a new trial for rejection of evidence, the Court may be of opinion that such evidence ought to have been received; yet, if it also appears, that from a defect of evidence on the part of the applicant, he would not have been entitled to a verdict, if the rejected evidence had been received, they will refuse the new trial. *Davis* v. *Morgan*, 9 Law J. Exch. 153, s. c. 1 C. & J. 157, s. c. 1 Tyrw. 457.

In an action on a bill of exchange, the Court set aside (on payment of costs,) a nonsuit which was occasioned by the non-attendance of the witnesses subpœnaed for the purpose of proving the handwriting of the defendant, the acceptor. *Shillito* v. *Thee*, 8 Law J. C.P. 293, s. c. 6 Bing. 753, s. c. 4 M. & P. 575.

The Court will not permit a party to move for a new trial, on an objection to the applicability of evidence, unless the objection be taken before the Judge commences his summing up. *Abbott* v. *Parsons*, 7 Bing. 563, s. c. 5 M. & P. 521.

(*e*) *Surprise.*

The Court will not relieve a plaintiff by setting aside a nonsuit on payment of costs, where the nonsuit has been suffered in consequence of his being, by mistake, unprepared on the trial. *Swayne* v. *Ingilby*, 8 Law J. K.B. 121, s. c. 5 M. & R. 125.

The Court refused to grant a new trial, on payment of costs,—where the cause had been suffered to pass as undefended,—on an affidavit that it so passed through the neglect of the clerk who had the management of the cause. *Breach* v. *Casterton*, 9 Law J. C.P. 48, s. c. 7 Bing. 224, s. c. 4 M. & P. 867.

Motion for a new trial on the ground of surprise, refused; it appearing that the defence proposed to be set up was infancy, under circumstances which shewed the merits were against the defendant. *Grimsby* v. *Billing*, 9 Law J. K.B. 260.

Where a defendant omitted to appear at the trial in an action for crim. con. with his sister-in-law, and the jury gave more damages than were laid in the declaration, the defendant assigning no good reason for not appearing to defend; the Court refused to grant a new trial on any terms. *Masters* v. *Barnwell*, 7 Bing. 224, n.

(*f*) *Terms.*

Where, on the first trial, the defendant, under the general issue, set up a particular defence, the Court on granting a new trial, moved for by him, confined him to the same defence. *Thwaites* v. *Sainsbury*, 9 Law J. C.P. 167, s. c. 7 Bing. 437, s. c. 5 M. & P. 321.

Where the plaintiff has died after verdict, the Court may grant a new trial on the application of the defendant, and would in such case impose terms on him to prevent his taking advantage of the plaintiff's death. *Griffith* v. *Williams*, 1 C. & J. 47.

(B) Motion for.

A motion for a new trial must be made before the same jurisdiction as directed the former trial, although the Judge may have resigned. *Footner* v. *Figes*, 2 Sim. 319.

A motion for a new trial cannot be entertained under the 5 Geo. 4. c. 106, until the transcript has been transmitted to the court above. *Davis* v. *Jones*, 8 Law J. K.B. 88.

Where a cause is tried at the sittings in term, a motion may be made for a new trial, at any time within four days after the return of the *distringas*, although more than four days have elapsed since the trial. *Mason* v. *Clarke*, 1 C. & J. 411, s. c. 1 Tyrw. 554.

Where a party wishes to obtain a new trial of an issue, he must first, on an *ex parte* application, satisfy the Judge in equity, that there is a reasonable ground for sending to the Judge who tried the issue for his notes of the trial. *Morris* v. *Davies*, 3 Russ. 318.

(C) Costs.

In an action upon a statute which gives double costs, if a new trial be granted, nothing being said upon the subject of costs, the party who succeeds upon both trials is entitled to double costs of both trials.

By the practice of the Court of Exchequer, where a new trial is granted, the party who succeeds upon both trials is entitled to the costs of both trials, if the rule for the new trial is silent upon the subject of costs. *Loader* v. *Thomas*, 1 C. & J. 54.

On the trial of an action a verdict was found for the defendant. The Court set aside that verdict upon an objection by the plaintiff, that an unstamped paper had been laid before the jury. The plaintiff did not then carry the cause to a second trial; but took out a rule to discontinue on payment of costs. The Master, on taxation, allowed the defendant the costs of the trial; and the Court held that the defendant was entitled to them. *Sweeting* v. *Hales*, 7 Law J. K.B. 339, s. c. 4 M. & R. 544.

Where a *venire de novo* is awarded, the successful party is not entitled to the costs of the first trial. *Edwards* v. *Brown*, 9 Law J. Exch. 84, s. c. 1 C. & J. 307, s. c. 1 Tyrw. 182.

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NONSUIT.

Where the Judge on the trial is of opinion that the plaintiff ought to be nonsuited, but the plaintiff's counsel refuses to be nonsuited, and the jury find a verdict for the plaintiff—*semble*, that the Court cannot order a nonsuit to be entered, but will order a new trial. *Barber* v. *Stokes*, 7 Law J. K.B. 206.

Where some issues are found for the plaintiff and others for the defendant—a nonsuit may be entered by the Court on the whole case, the point being reserved by the Judge. *Shepherd* v. *Bishop of Chester*, 8 Law J. C.P. 141, s. c. 6 Bing. 435, s. c. 4 M. & P. 130.

Where a Judge, in his charge to the jury, leaves to them *two* questions, upon their deciding either of which in a particular way, he tells them they are to find for the defendant, and are to state to him upon which of the questions they decide, and the plaintiff thereupon chooses to be nonsuited;—the Court will not afterwards set aside the nonsuit, although they may think the Judge was wrong upon *one* of the questions. *Vacher* v. *Cooke*, 8 Law J. K.B. 341, s. c. 1 B. & Ad. 148.

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## NOTICE OF ACTION.

[See ACTION and TRESPASS.]

## NUISANCE.

A person whose land is occasionally liable to injury by the overflow of river water, has no right, in his mode of protecting himself against that injury, to produce injury or damage to his neighbours in respect of the course of the same water. *Rex* v. *Trafford*, 9 Law J. M.C. 66, s. c. 1 B. & Ad. 874.

Whether, upon an indictment for nuisance by obstructing a highway, it be a proper question for the jury, whether the general benefit to the public by the obstruction be equivalent or superior to the inconveniences which thereby result to some of the public—*quære*. *Rex* v. *Sir John Morris*, 9 Law J. K.B. 55, s. c. 1 B. & Ad. 441.

A man carrying on a noxious business in a place where it has been long established, is indictable for a nuisance, if the mischief is increased by the manner or extent in which he carries it on; not otherwise, although the business has increased in amount. *Rex* v. *Watts*, 2 M. & M. 281. [Tenterden]

## OCCUPANCY.

A rent-charge *pur autre vie*, where the grantee lies, *cestui que vie* surviving, passes, by operation of the Statute of Frauds, to the executor of the grantee. *Bearpark* v. *Hutchinson*, 9 Law J. C.P. 1, s. c. 7 Bing. 179, s. c. 4 M. & P. 848.

## OFFICE AND OFFICER.

[11 Geo. 4. & 1 Will. 4. c. 58, explained and amended by 1 Will. 4. c. 35, 9 Law J. Stat. 64.

Receipt and appropriation of fees and emoluments of officers of superior courts of common law, regulated by 1 Will. 4. c. 58, 8 Law J. Stat. 117.]

Where a bishop's registrar had a right to appoint a deputy, "to be approved of by the bishop;" and in case no one so appointed was approved and allowed, the bishop was to be at liberty to appoint:—Held, that the bishop, refusing to approve of and allow A B as a deputy, stating, that he so refused "for good and sufficient reasons," was justified in so refusing; and that he was not bound to state his reasons. *Rex* v. *the Bishop of Gloucester*, 9 Law J. K.B. 228, s. c. 2 B. & Ad. 158.

The office of clerk to the deputy registrar in the Prerogative Court, Canterbury, is not an office connected with the administration of justice within the meaning of statute 5 & 6 Edw. 6. c. 16, so as to prevent its being aliened or charged. Nor is an alienation of or charge on the profits of the office, contrary to the policy of the law, restricting the alienation of the income of a public officer. *Aston* v. *Gwinnell*, 3 Y. & J. 136.

The salary of an assistant parliamentary counsel to the Treasury is not assignable, and the Court will not appoint a receiver of it. *Cooper* v. *Reilly*, 2 Sim. 560, s. c. 1 Russ. & M. 569.

## OUTLAWRY.

[See SEQUESTRATION.]

Where to a special *capias utlagatum* the sheriff returns an inquisition, finding that the defendant has benefices, but no lay fee, this Court will award a writ of sequestration upon reading the transcript of the outlawry and inquisition. *Rex* 4. *Hind*, 1 C. & J. 389.

## PALACE COURT.

[See MALICIOUS AND VEXATIOUS ARREST.]

## PARENT AND CHILD.

[See INFANT and GUARDIAN AND WARD.]

Interest at 4*l*. per cent, directed to be computed on advancements made by a father to his children from the time when the father's property was divisible amongst them. *Andrewes* v. *George*, 3 Sim. 393.

Where a father has deserted his children, and is not of ability to maintain them, the Court will make an order, referring it to the Master to approve of a proper person to act in the nature of a guardian, and to inquire whether it will be for the benefit of the infants that a certain sum should be raised out of property to which they are absolutely entitled under a will; and upon the Master's report, that it is for their benefit, and with the consent of the executors of that will, the Court will order the sum to be raised accordingly. *In re Mary England*, 1 Russ. & M. 499.

The Court of Chancery has jurisdiction to appoint a guardian for infants, being wards of the Court, excluding the father: and upon evidence that the father was living in a state of adultery, and had encouraged his children in swearing, keeping low company, &c.; it was held a fit case to exercise the power to exclude him from the guardianship. *Wellesley* v. *Wellesley*, 2 Bligh, N.S. 124, s. c. 1 D. & Cl. 152.

## PARLIAMENT.

[See 10 Geo. 4. c. 7, enabling Roman Catholics to vote at elections, and to sit and vote in parliament, and 10 Geo. 4. c. 8, relative to election of members of parliament in Ireland, and the qualification of voters, 7 Law J. Stat. 13, 19.]

Persons accepting the offices of governor or deputy governor in the East Indies, excluded from being members of the House of Commons, 10 Geo. 4. c. 62, 7 Law J. Stat. 145.

5 Eliz. c. 1 and 7 Jac. 1. c. 6, repealed so far as they require certain oaths to be taken by members of the House of Commons, 1 & 2 Will. 4. c. 9.

The Treating Act, 7 & 8 Will. 3. c. 4. only applies to candidates and their agents. *Hughes* v. *Marshall*, 5 C. & P. 150. [Patteson]

*Semble*, that this Court will not assist a party in getting back an estate conveyed by him for an illegal purpose, as, to enable the grantee to vote at an election, or to sit in parliament, even though it has

not been used for the illegal purpose. *Groves* v. *Groves*, 3 Y. & J. 163.

*Quære*—Whether an action will lie for refusing to take the oath of a voter at an election for members of parliament:—Clearly it will not, unless the defendant has acted wilfully wrong. *Williams* v. *Lewis*, Pea. A.C. 157. [Kenyon]

## PARTIES TO SUITS.

[See COMPANY (C).]

(A) WHO MAY BE.
(B) OBJECTION FOR WANT OF.
(C) WHAT PARTIES NECESSARY.
(D) INTEREST OF.

### (A) WHO MAY BE.

[See EQUITY.]

[*The King of Spain* v. *Machado*, 4 Russ. 225, 360, Dig. Law J. 362.]

A foreign sovereign may sue as a plaintiff in equity. *Hullett* v. *the King of Spain*, 2 Bligh, N.S. 31, s.c. 1 D. & Cl. 160.

### (B) OBJECTION FOR WANT OF.

Where a defendant in a bill thinks he can rely on an objection of want of parties to the bill, he must make that objection in the court below, and will not be allowed to make it for the first time when the case comes before the House of Lords. *Mullins* v. *Townsend*, 2 D. & Cl. 430.

By a treaty between the governments of France and Spain, it is agreed, that France shall pay to the King of Spain, a certain sum of money to be distributed by him among his subjects having claims against the government of France. This sum, by the terms of the treaty, is made payable to an agent to be appointed by the King of Spain. He accordingly appoints an agent, who received the sum stipulated, and afterwards deposits part of it in the hands of merchants in London, in the name of his secretary. But accounts of the money so deposited are rendered by the merchants to the depositor, and not to his secretary.

Upon a bill filed in equity, in the name of the King of Spain as plaintiff, against the depositories and the depositor, stating these facts, and praying a discovery, account, and payment of the money into court, &c. the defendants demurred upon the grounds of a defect of parties, and that a foreign sovereign cannot sue in a court of equity in England:—Held, affirming the order of the Court below, that the demurrer was properly overruled; that a foreign sovereign may sue as plaintiff in equity: and that, under the circumstances of the case, it was not necessary that the *cestui que trusts* (the Spanish claimants) or the nominee of the agent should be parties to the suit. *Hullett* v. *the King of Spain*, 2 Bligh, N.S. 31, s.c. 1 D. & Cl. 109.

### (C) WHAT PARTIES NECESSARY.

One party interested in a debt, cannot file a bill for his share without making all the other parties interested in that debt, parties to the suit—*Contra* as to legatees. *Alexander* v. *Mullins*, 9 Law J. Chanc. 3.

If one of two persons named trustees and executors, disclaims and renounces, and afterwards possesses himself of assets as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate. *Dees* v. *Everard*, 1 Russ. & M. 231, s.c. 1 Tam. 376.

Where a bill was filed against the devisee of the lease, praying that the lease might be declared void, and the defendant insisted that, if the lease was set aside, the plaintiff ought to repay the monies expended by his devisor in the improvement of his premises:—Held, that the executor of the devisor, who had assented to the devise of the lease, was not a necessary party to the suit. *Malpas* v. *Ackland*, 2 Russ. 273.

*Semble*, where the *cestui que trusts* convey their beneficial interest in a portion of the property to the purchaser, the purchaser may file a bill against the trustee for a conveyance of the legal estate, without making the *cestui que trusts*, who sold to him, parties to the suit. *Goodson* v. *Ellisson*, 3 Russ. 583.

Persons having prior incumbrances on freeholds and copyholds, of which a trader, who died intestate, was seised at the time of his death, ought not to be made parties to a bill for payment of his debts out of his real estate. *Parker* v. *Fuller*, 1 Russ. & M. 656.

The mortgagor is a necessary party to a bill by a second mortgagee to redeem the first mortgage, and foreclose the equity of redemption. *Farmer* v. *Curtis*, 2 Sim. 466.

A second mortgagee may file a bill of foreclosure against the mortgagor and third mortgagee, without making a first mortgagee a party. *Ross* v. *Page*, 2 Sim. 471.

In a bill for raising legacies charged on real estates, the annuitants are necessary parties. *Garrett* v. *Hayter*, 9 Law J. Chanc. 197.

To a bill for a commission to ascertain boundaries, all persons having any interest in the property, are necessary parties. *Rayley* v. *Best*, 1 Russ. & M. 659.

### (D) INTEREST OF.

[*Harvey* v. *Cooke*, 4 Russ. 34, Dig. Law J. 364.]

On a bill filed by the King of Spain, against the depositor and depositories of a sum of money, paid by the King of France, to be distributed amongst the subjects of the former, whether, after the money has been brought into court, the parties having an interest in the final distribution could sustain a bill to effectuate their claims—*quære*. *Hullett* v. *the King of Spain*, 2 Bligh, N.S. 31, s.c. 1 D. & Cl. 169.

The Court will not hear a person who is not a party to the suit, though he be materially interested in the subject matter. *Delegal* v. *Naylor*, 9 Law J. C.P. 167, s.c. 7 Bing. 460, s.c. 5 M. & P. 443.

## PARTICULARS OF DEMAND.

[See PRACTICE.]

## PARTNERS.

[See BANKRUPT and COMPANY.]

(A) PARTNERSHIP.
(a) *How constituted.*
(b) *Dissolution.*
(B) PARTNERS.
(a) *Rights and Interests.*
(b) *Liabilities.*
(C) ACTIONS AND SUITS.
(a) *In general.*
(b) *Evidence.*

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### (A) PARTNERSHIP.

#### (a) *How constituted.*

*Nerot* v. *Burnand*, 4 Russ. 247, Dig. Law J. 364, 366.]

*Quære*—Whether an agreement to give an agent yearly salary, and also a certain share of the profits of a particular adventure, will constitute him partner. *Withington* v. *Herring*, 7 Law J. C.P. 72, s. c. 5 Bing. 442, s. c. 3 M. & P. 30.

#### (b) *Dissolution.*

*Pemberton* v. *Oakes*, 4 Russ. 154, Dig. Law J. 336.]

An advertisement of the dissolution of a partnership in the London Gazette, is not *per se* notice to parties having had dealings with the firm, resident abroad; but to fix them with a knowledge of the fact, express notice must be given to them. *Etievant* v. *Lyon*, 8 Law J. C.P. 3.

The plaintiff and defendant held some powder-mills on a lease, which would expire in 1831, the plaintiff filed his bill for a dissolution of the partnership; it was objected by the defendant, that the partnership must last during the lease; but the Court held the partnership dissolved from the time stated in a notice given by the plaintiff to the defendant. *Alcock* v. *Taylor*, 1 Tam. 506.

A person made a contract with one partner alone, not knowing of the other; it was to be a continuing contract, for the hire of a carriage; the partnership was afterwards dissolved, and the partner, with whom the contract was made, left the business, which was continued by the other:—Held, that the person making the contract, was not bound to go on upon it with the other partner. *Robson* v. *Drummond*, 9 Law J. K.B. 187, s. c. 2 B. & Ad. 303.

If A and B, being partners, dissolve their partnership, and in the deed of dissolution it be stipulated that A shall receive all debts due to the firm, and afterwards, C, a debtor of the firm, accept a bill of exchange drawn by B, for the amount of the debt due to the firm:—Held, that this stipulation in the deed of dissolution is no defence to an action by B against C on this bill of exchange.

Either partner, after a dissolution of partnership, may receive debts due to the firm, notwithstanding such a stipulation in the deed of dissolution; and, after a dissolution of partnership, either party may give a release to a debtor of the firm. *King* v. *Smith*, 1 C. & P. 108. [Tenterden]

A general dissolution of partnership between A and B, does not operate to discharge A from his responsibility for the subsequent conduct of B, in respect of the engagements of the partnership with third persons, made prior to the dissolution. *Anet* v. *Goodrich*, 4 Russ. 430.

### (B) PARTNERS.

#### (a) *Rights and Interests.*

[See *post* (C, *a*).]

A and B being in partnership, and A residing in England, and B in America, A may bind B by a bill of exchange drawn in their joint names, though B had no notice of the bill, nor is at all interested in the transaction, provided the holder do not know of the fraud. *Sutton* v. *Gregory*, Pea. A.C. 150. [Kenyon]

One of two partners having, after the dissolution of the partnership, given a cognovit for a partnership debt due before, and for costs as between attorney and client—The Court set aside a judgment and execution thereon. *Rathbone* v. *Drakeford*, 8 Law J. C.P. 117, s. c. 6 Bing. 375, s. c. 4 M. & P. 57.

A deposit of private deeds by one partner, made under a written agreement, to secure payments made for him, will cover payments made on behalf of the firm, if there be evidence that the deposit was really made in respect of the partnership debts. *Chuck* v. *Freen*, 2 M. & M. 259. [Tenterden]

A, having undertaken to negotiate for the purchase of certain property, on behalf of an intended partnership, which was to consist of himself and B and C, and a contract for the purchase of the property having been concluded by A, B, and C, with the vendors, those vendors at the same time agree to give, and they afterwards pay to A, 12,000*l.*, for his private benefit, without the knowledge of B and C:—Held, that A was to be considered as having received that sum for the benefit of the new partnership, and that B and C were entitled each to a third part of it. *Fawcett* v. *Whitehouse*, 8 Law J. Chanc. 50, s. c. 1 Russ. & M. 132.

One of two partners after the dissolution of the partnership, received the rents of a debtor to the partnership, and retained out of them the amount of the debt; and he stated, that he did this on an understanding that the debtor should have credit for the sum so retained, and that he considered the debt to have been satisfied by these monies; but no account had been settled between him and the debtor:—Held, that, as against the other partner, the debt to the partnership was not to be considered as satisfied. *Pritchard* v. *Draper*, 1 Russ. & M. 191, s. c. 1 Tam. 332.

Plaintiff and defendant being partners, and defendant being indebted to plaintiff on a separate account, it was agreed between them, that plaintiff should take 2½*l.* per cent. interest on his separate account for six months, from March the 1st, 1827, and 5*l.* per cent. afterwards; that the partnership accounts should be made up, and the defendant's share of the proceeds go towards the liquidation of his separate debt; that plaintiff should receive sums due to the firm, discharge partnership debts, and apply the balance towards discharging the defendant's separate debts; that the partnership might be dissolved any 1st of January, on six months notice being given; but that, in consequence of the plaintiff's concessions as to interest, it was expected there should be no dissolution on the 1st of January next ensuing:—Held, that this agreement did not

suspend the plaintiff's right to sue the defendant for the separate debt due from him to the plaintiff. *Simpson* v. *Rackham*, 7 Bing. 617, s. c. 5 M. & P. 618.

(b) *Liabilities.*

The subscribers who attend a committee for managing the concerns of an hospital, are liable to the creditors of the hospital. *Burls* v. *Smith*, 7 Bing. 705, s. c. 5 M. & P. 735.

If A and B, as partners, engage in a speculation with C, A is answerable to C, in respect of the dealings of B in the joint speculation. *Ault* v. *Goodrich*, 4 Russ. 430.

Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes, in the course of such management, indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday* v. *Wightwick*, 1 Russ. & M. 45, s. c. 1 Tam. 250.

A secret partner is not liable for contracts made by the firm, after he has retired, with a person who did not know, until after those dealings, that he ever had been a partner. *Carter* v. *Whalley*, 8 Law J. K.B. 340, s. c. 1 B. & Ad. 11.

Where a bill professes by its acceptance to charge a partnership, apparently consisting of two, a third partner, who has recently joined, and is a secret partner, is liable, if the business of the firm continued to be carried on under the name of the two. *Lloyd* v. *Ashby*, 9 Law J. K.B. 144, s. c. 2 B. & Ad. 23.

Where one of several partners receives money in the ordinary course of the partnership business, and misappropriates it, a secret partner, as well as an ostensible partner, is liable for the amount:—Held, that the produce of bills wrongfully indorsed by one of the partners in the name of the firm, discounted by the bankers of the firm in the ordinary course, and misappropriated by the partner who so indorsed the bill, could be recovered against the firm, including a secret partner.

But where a person does not become a partner until a given day, although it is arranged that he shall be considered as having been a partner from a previous day, this arrangement between the partners does not render the new partner liable to the engagements of the others with the rest of the world, incurred between the previous day, and the day of his actually becoming a partner. *Vere* v. *Ashby*, 8 Law J. K.B. 57, s. c. 10 B. & C. 288.

A, B, and C, (separate merchants in Hull,) engaged in a joint speculation to purchase and import corn. They established no joint fund, but were to contribute money, as wanted, in equal thirds. They appointed an agent, who was to purchase, and to draw on A, and the consignments were to be made to A. This was done accordingly. A accepted the bills payable at his bankers' London agents, and he advised his bankers of the acceptances, in the course of his general dealings, as if his individual transactions; always paying them cash, bills and notes, to a similar amount, which were placed to his credit. They caused all his acceptances to be paid, without ever knowing of the joint speculation. Bills, amounting to 626*l.* part of the paper paid in by A, was accommodation paper between A and B, and was dishonoured; and that amount (part of a larger cash balance, due from A) was ascribable to the advances made to honour A's acceptances. C had always duly paid his third share of the current outlay and demands to A and B, who managed the concern, and he knew nothing of the method by which the bills were met. C, by the bankruptcies of A and B, was obliged to answer joint liabilities besides his share. The bankers discovered that C was concerned, and endeavoured to recover from him, as dormant partner, the 626*l.*, as money advanced to the use of the joint concern:—Held, that the action did not lie, C having given no authority, express or implied, to A to obtain such advances, not being actually nor impliedly privy thereto, and in fact, the bankers having advanced on the credit of A alone, and as his agents. *Smith* v. *Craven*, 9 Law J. Exch. 174, s. c. 1 C. & J. 500, s. c. 1 Tyrw. 389.

A carried on business on his own account as a broker and slopseller at X—at which place B & Co. also carried on business as linen-drapers, and arising out of those trades A and B & Co. had transactions together. A, in conjunction with D, a coal-merchant at Y, also carried on business in the coal trade at X, in which latter business B was a secret partner, A having liberty to use the firm of A & Co. for the purposes of that trade. A took bills drawn by him in the partnership firm of A & Co. to B & Co., who were unacquainted with the fact of the secret partnership, for discount. On one occasion B & Co. delivered up to A two separate acceptances of his, which they held on his own private account, as part of the consideration of such discount; and the remainder of the discounts were paid to A, under circumstances not impeaching the *bona fides* of the transaction as to B & Co. The jury at the trial negatived fraud or collusion on the part of B & Co., and the plaintiffs B & Co. abandoning their verdict to the extent of the amount of the two separate acceptances given up by them to A:—Held, that the liability of D extended to the residue of the bills, there being so far no facts to impeach the title of the plaintiffs. The principle regulating the liability of secret partners being, that, where the partnership firm is pledged, the partnership, consist it of whom it may, and whether the partners are named in the firm or not, and whether they are known partners, or whether they are sleeping or secret partners, will be bound, unless the conduct of the person who seeks to charge such partnership can be impeached. *Wintle* v. *Crowther*, 9 Law J. Exch. 65, s. c. 1 C. & J. 316, s. c. 1 Tyrw. 210.

(C) Actions and Suits.

(a) *In general.*

Where A was indebted to B, and afterwards C entered into partnership with B, and A contracted a further debt with both, and then settled an account with both, as well upon what was due to B before his partnership with C, as upon the debt contracted afterwards:—Held, that B and C might join in an action on an account stated. *Moor* v. *Hill*, Pea. A.C. 10. [Kenyon]

Persons trading abroad in such mode as to constitute a partnership here may sue here as partners, for consignments sent to this country, though they cannot sue at the place of trading, by reason of the

particular law of that country. *Shaw* v. *Harvey*, 1 M. & M. 526.

Where one of the partners in a distillery carried on the business of a retailer of spirits within two miles of the distillery, and his name was not inserted in the entries made and Excise licences taken out by the firm, but the duties had been regularly paid; it was held, in a joint action by all the partners, that they were not precluded from recovering in respect of sales made by them as distillers, by reason of a violation of the statutes 4 Geo. 4. c. 94. ss. 131, 2, and 5 Geo. 4. c. 81. s. 71. *Browne* v. *Duncan*, 8 Law J. K.B. 60, s. c. 10 B. & C. 93, s. c. 5 M. & R. 114.

Where the facts of the case are such, that one of several plaintiffs could not recover against the defendant, if the cause of action were considered as accruing to him alone, he cannot sue in conjunction with the other plaintiffs, although they may not have been parties to the facts, which would deprive the other plaintiff from suing alone. Therefore, where a partner in a banking house, for his own accommodation, drew bills upon the defendant, and caused the defendant to accept them, he (the partner) undertaking to provide for them; and afterwards, being indebted to the firm, of which he was a member, he indorsed them for a valuable consideration to the firm:—Held, that an action on the bill could not be maintained by the firm, of which that partner was one. *Sparrow* v. *Chisman*, 7 Law J. K.B. 173, s. c. 9 B. & C. 241, s. c. 4 M. & R. 206.

Money, or other property, belonging to two partners, misapplied by one of them, cannot be recovered back in an action in the names of the two. *Jones* v. *Yates*, 7 Law J. K.B. 217, s. c. 9 B. & C. 532, s. c. 4 M. & R. 613.

Where one of several partners takes from a debtor to the firm a bill of exchange, the latter cannot in the interim be sued by the firm for the original debt. *Tomlins* v. *Lawrence*, 8 Law J. C.P. 29, s. c. 6 Bing. 276, s. c. 3 M. & P. 555.

If a person colludes with one partner in a firm to injure the other partners, those others can maintain a joint action against the person so colluding. *Longman* v. *Pole*, 2 M. & M. 223. [Tenterden]

Where two persons joined in the purchase of a policy of insurance upon a life; and on the dropping of the life, one of them received the whole of the money from the insurance office:—Held, that the other might maintain an action at law against his companion for his half of the money; there being no other transaction in which they had a joint interest. *Bywater* v. *Miller*, 9 Law J. K.B. 64.

Three firms agreed to be jointly interested in a purchase to be made by one of them. That one accordingly made the contract, and that one alone was known to the vendor in the transaction;—but in an action against the vendor,—Held, that the three might join as plaintiffs. *Cothay* v. *Fennell*, 8 Law J. K.B. 302, s. c. 10 B. & C. 671.

Not joining a party, who holds himself out and appears to the world to be a partner, as a plaintiff in the action, is no objection to the plaintiff's recovering: although he might be liable to all the responsibility of being a partner. *Kell* v. *Nainby*, 8 Law J. K.B. 99, s. c. 10 B. & C. 20, s. c. 5 M. & R. 76.

(*b*) *Evidence.*

A person who held himself out to the world as a partner, and who appeared to the defendant and was believed by him to be a partner with the plaintiff, held to be competent in an action by the plaintiff to prove that he was not one. *Kell* v. *Nainby*, 8 Law J. K.B. 99, s. c. 10 B. & C. 20, s. c. 5 M. & R. 76.

In an action brought against one of several partners, either of the partners is a competent witness to prove the liability of the defendant as a partner, although the liability of the witness himself appears by evidence other than his own. *Hall* v. *Curzon*, 7 Law J. K.B. 303, s. c. 9 B. & C. 646, s. c. 4 M. & R. 565.

Where, in an action of assumpsit, the defendant pleads in abatement the non-joinder of other persons, who, he contends, were his partners, and the plaintiff takes issue upon the plea, it is not sufficient for the defendant to shew a partnership in fact between him and those other persons. He must shew that the plaintiff knew, or from the circumstances must have believed, that the defendant had partners. *De Mantort* v. *Saunders*, 9 Law J. K.B. 51, s. c. 1 B. & Ad. 398.

Declarations of one partner, as to the payment, subsequently to a dissolution, of a debt due to the partnership, are admissible against the other partner. *Pritchard* v. *Draper*, 1 Russ. & M. 191, s. c. 1 Tam. 332.

Where one of the defendants in a cause informed a third person of the partnership of the defendants, reports of such information by that person are admissible in evidence, though not made to the plaintiff, or in the presence of a defendant. *Shott* v. *Streatfield*, 2 M. & M. 8. [Tenterden]

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## PATENT.

A patentee is bound to state in his specification any matter which has occurred to him between the date of the patent and the enrolling of the specification, the making known of which will tend to effect the desired object with greater facility. *Crosley* v. *Beverley*, 7 Law J. K.B. 127, s. c. 9 B. & C. 63, s. c. 3 C. & P. 513, s. c. 1 M. & M. 283. [Tenterden]

A patent was granted "for certain improvements in copper and other plate printing:" from the specification, it appeared, that the invention consisted in communicating to paper a glazed surface, by which the fine lines of the engraving were better exhibited:—Held, that the invention was well described in the patent, and that the specification agreed sufficiently with the title. *Sturz* v. *De la Rue*, 7 Law J. Chanc. 47.

A specification of an invention for which a patent had been granted, stated the invention to be an improved apparatus to extract gas from pit-coal, tar, or any other substance, from which gas, capable of being used for illumination, could be extracted by heat:—Held, that the words "other substance" must mean substance *ejusdem generis*, and that oil was not meant to be included in it; it being shewn, that, at the time in question, oil was considered much too expensive to be used for the making of gas for the lighting of streets and buildings, though it was known to afford an inflammable gas. If in the specification of an improved gas apparatus no direction is given respecting a condenser, which is a necessary part of every gas apparatus, this will not invalidate the

patent, if it appear, that every one capable of constructing a gas apparatus must know that a condenser must form a part of it. *Crosley* v. *Beverley*, 3 C. & P. 513, s. c. 1 M. & M. 283. [Tenterden]

The patentees of a shearing machine claimed in their specification four things, among which was a brush for raising the pile of the cloth. It was proved that the brush had only been used once by the patentees themselves, and that they had not sold one with a brush; and, that, as to some cloths, it was entirely useless:—The Court held, that, inasmuch as the brush had not been claimed as essential, the mention of it in the specification did not affect the patent; for that every substantive part of a patent need not be useful, although every part claimed must be new.

The patentees claimed that they were the inventors of a machine for shearing cloth from list to list by means of a rotatory cutter. It was proved that the idea could be extracted from the specification of an older patent—that a specification of it had been received from America, and shewn to several persons—that a model of such a machine had been in England before this patent, and seen by several persons, but no machine had been made from it—and also, that a similar machine had been made and used for a very short period, a long time ago:—The Court held, that these circumstances did not amount to a publication, and consequently that the patent was valid. *Lewis* v. *Marling*, 8 Law J. K.B. 46, s. c. 10 B. & C. 32, s. c. 5 M. & R. 66, s. c. 3 C. & P. 502.

If A, in 1818, take out a patent for "improvements in a machine for which J L took out a patent in 1815," it is necessary for A, on the trial of an action for the infringement of his patent, to put in J L's patent and specification; but it is not material whether a machine made according to the specification of J L would be useful or not, if it be shewn that a machine constructed according to A's specification would be so. *Lewis* v. *Davis*, 3 C. & P. 502. [Tenterden]

A patent was granted for a machine to sharpen knives and scissors, and, in the specification, this was directed to be done, by passing their edges backward and forward in an angle formed by the intersection of two circular files; and in the specification it was also stated, that other materials might be used according to the delicacy of the edge. It was proved that, for scissors, there ought to be one circular file, and a smooth surface, but that two Turkey stones might also succeed:—Held, that the specification was bad, as it neither directed the machines for scissors to be made with Turkey stones, nor to be made with one circular file and a smooth surface. *Felton* v. *Greaves*, 3 C. & P. 611. [Tenterden]

Where two patents have been taken out by different persons, at different times, for the means of effecting the same object, it is no objection to the patent last taken out, that, according to the strict construction of the language used in the specification, the object and the means are the same, and the improvement in the latter patent is given by way of illustration only, if, in substance and meaning, the illustration is a distinct specific improvement. *Hullett* v. *Hague*, 9 Law J. K.B. 212, s. c. 2 B. & Ad. 370.

Injunction granted generally to restrain the sale both before and after the term limited by the patent of machines piratically manufactured while the patent was in force. *Crossley* v. *Beverley*—*Crossley* v. *Derby Gas Light Company*, 1 Russ. & M. 166, n.

The king, by letters patent, granted to B and B, their heirs and assigns, to be his only printers in Scotland for forty-one-years, to use and enjoy with all its profits and privileges, so far as the same were consistent with the articles of the Union, and especially the sole privilege of printing in Scotland, Bibles, (Biblia Sacra,) Testaments, the Psalms, the Book of Common Prayer, Confessions of Faith, the greater and lesser catechisms in the English tongue. The letters prohibited all other persons, subjects and foreigners, to print in or import into Scotland from any parts beyond the seas, any of the said books, without the authority of B and B, their heirs, assigns, and substitutes, under pain of confiscation:—Held, that the patentees had, under this patent, the exclusive right of printing in Scotland, all the books enumerated in the patent, and that the received English translation of the Bible was within the terms of the patent, and could not be sold in Scotland without the authority of the patentees, although the prohibition in terms extended only to importation from parts beyond seas. *Manners* v. *Blair*, 3 Bligh, n. s. 391.

## PAUPER.

[See POOR.]

A party may commence a suit in the Ecclesiastical Court *in formâ pauperis*. *In the Goods of Ann Jones*, 1 Hag. Ec. 81.

A respondent may be admitted as a pauper in the Court of Appeal; and the Court looks at his faculties at the time of his application, not at what he may have been possessed of at a former time. *Taylor* v. *Morse*, 3 Hag. Ec. 179.

In pauper suits, the Court will not compel a solicitor to act for the pauper: but the course is, to assign to him counsel and a six-clerk; and it is the duty of the six-clerk to appoint one of the sixty clerks of his office, to act on the part of the pauper. *Lewis* v. *Kennett*, 3 Russ. 466.

Pauper plaintiffs who had been guilty of vexatious conduct in the suit, ordered to be dispaupered. *Wagner* v. *Mears*, 3 Sim. 127.

## PAVING AND LIGHTING.

[11 Geo. 4. c. 27, 8 Law J. Stat. 58.]

The commissioners under the 57 Geo. 3. c. 29, (the Metropolitan Paving Act) have no power to make a rate for lighting and watching the footpaths on the side of any turnpike road within the operation of the act. *Loveridge* v. *Hodsall*, 2 B. & Ad. 602, s. c. 9 Law J. K.B. 285.

The power of the commissioners under the 57 Geo. 3. c. 29. s. 72, (the Metropolitan Paving Act,) is confined to the removing of such things affixed to houses as project over the public way. *Bennerie* v. *Miles*, 8 Law J. K.B. 338, s. c. 1 B. & Ad. 38.

The limitation clause (s. 136) in the general paving act, 57 Geo. 3. c. 29, overrides those in the various existing local paving acts. The time of commencing actions, therefore, for anything done in pursuance of

ny local paving act, is confined to *three* months from he time of the fact committed. *Burns* v. *Carter*, Law J. C.P. 161, s. c. 5 Bing. 429, s. c. 3 M. & P. 1.

## PAWNBROKER.

A pawnbroker advanced 200*l.* to a needy trader, upon a deposit of goods, entering the transaction in his books as a loan of several sums each under 10*l.*, a order to obtain the larger rate of interest. The rader becoming bankrupt—Held, that the assignee might recover in trover the goods deposited, the ransaction being usurious and void. *Tregoning* v. *Fitzenborough*, 9 Law J. C.P. 28, s. c. 7 Bing. 97, s. c. M. & P. 722.

## PAYMENT.

(A) In general.
(B) Of Money into and out of Court.

### (A) In general.

A, being the creditor of B, and having an account with C, directs B to remit the money to him. B, keeping cash with a banking-house wherein C is a partner, (though he also carried on a separate business,) gives an order to the banking-house to place to the credit of C the money due, so as to make the same as a payment by a bill at a month to A. The banking-house accordingly writes to C, on account of the order; who answers, that on that day month he will credit A, and on the same day writes in the same manner to A. Before the day on which the credit was to be given, and before any credit actually given, C and the banking-house become bankrupt. This is no payment. *Pedder* v. *Watt*, Ses. A.C. 41. [Kenyon]

A tenant who paid rent to certain persons as trustees claiming the legal title, was afterwards evicted by ejectment, and forced to pay again, to persons who had a title paramount to the trustees; and it turned out that they had no title:—Held, that the tenant might recover back from the trustees, in an action for money had and received, the rent he had so paid them; notwithstanding the general rule, that title cannot be tried in that form of action. *Newsome* v. *Graham*, 8 Law J. K.B. 100, s. c. 10 B. & C. 153, s. c. 5 M. & R. 64.

The plaintiff employed the defendant, a sworn broker of the city of London, to purchase goods for him. The defendant made the purchases, but charged the plaintiff a profit beyond the amount of his brokerage. In an action to recover back the surcharges, the declaration alleged that the defendant had charged, and the plaintiff *had paid*, a larger price than the cost price of the goods. To prove the allegation of *payment*, an account current between the parties, containing various entries both on the debit and credit sides, was given in evidence:—Held, that the credits in this account sufficiently proved payment of the debits therein, according to priority of date. *Proctor* v. *Brain*, 7 Law J. C.P. 66, s. c. 2 M. & P. 284.

An allegation that the plaintiff had been forced and obliged to pay, and had paid money, is satisfied by proof that the money was paid for him by his attorney, although he himself did not repay it until after the commencement of the suit. *Adams* v. *Dansey*, 8 Law J. C.P. 165, s. c. 6 Bing. 506, s. c. 4 M. & P. 245.

### (B) Of Money into and out of Court.

[*Furnival* v. *Bogle*, 4 Russ. 142, Dig. Law J. 374.]

[Monies paid into court under acts, afterwards repealed, relating to turnpike roads, canals, bridges, &c., to be appropriated as directed by those acts. 10 Geo. 4. c. 13, 7 Law J. Stat. 27.]

Where the cause of action entitles a plaintiff to interest, and the defendant determines to pay money into court, he must pay in enough to cover interest, not only down to the commencement of the action, but down to the time of paying the money into court. *Kidd* v. *Walker*, 9 Law J. K.B. 303, s. c. 2 B. & Ad. 705.

Where a declaration consists of several counts, and among them one upon an account stated, against which latter count the defendant pays money into court, the plaintiff will not be allowed to recover upon the other counts, unless he prove a demand exceeding the sum paid in upon the specific count. *Churchill* v. *Day*, 7 Law J. K.B. 78, s. c. 3 M. & R. 71.

It is competent to the Court, on the hearing of exceptions, at the same time it allows an exception taken by the defendant, and directs the Master to review his report generally, to order the defendant to pay a sum of money into court, if it is satisfied ultimately that sum will be found due from the defendant. *Brown* v. *De Tastet*, 4 Russ. 126.

A new trial having been granted, on the ground of the absence of a material witness, and upon condition of defendant's paying money into court, the defendant was not permitted to take the money out of court, upon a suggestion that, though the witness was now accessible, the plaintiff had refused to answer, and was in contempt for not answering a bill in Chancery, filed by defendant for a discovery, which would have been an answer to the action. *Jackson* v. *Hopkinson*, 7 Bing. 557, s. c. 5 M. & P. 511.

In an interpleading suit, the Court will order the money, which has been brought in by the plaintiff, to be paid to a person having authority from all the defendants to receive it, though some of the defendants have not appeared; and for that purpose a reference will be directed to the Master, to inquire whether a sufficient authority to receive the money has been given. *Powell* v. *Sonnet*, 3 Russ. 556.

Where an order directing money to be paid out of court is appealed from, the Accountant General is justified in delaying to comply with the order till there has been time for the appellant to make a special application for a stay of proceedings to the Court below. *Ferguson* v. *Tadman*, 1 Russ. & M. 331.

Where a decree was made, directing a fund to be paid out of court to a defendant, and afterwards another defendant to the same suit, who claimed an interest in the fund, moved to stay that fund in court, until his claim could be determined,—the Court refused the motion with costs. *D'Alton* v. *Lord Trimleston*, 9 Law J. Chanc. 202.

## PEER.

The grant of honours is not regulated by the same law as the grant of lands; and therefore, where the Crown granted a peerage to a certain person *et hæredibus suis masculis in perpetuum*, and the grantee died without issue, the title was held to descend to the male heir of a collateral branch of the family. *The Earl of Devon's case*, 2 D. & Cl. 200.

Where three Irish peerages are considered extinct, and a new creation takes place, after which one of these peerages is revived, the new creation is valid under the Act of Union with Ireland; but the Crown's right again to create a new peerage will be suspended till the full number of vacancies has occurred. *Bloomfield Peerage*, 2 D. & Cl. 344.

A peer is privileged from arrest under process from the Ecclesiastical Courts. *Westmeath* v. *Westmeath*, 9 Law J. Chanc. 177.

A lord of parliament having pleaded in abatement, that he ought to be sued by original writ, without swearing that he was not so sued, when in fact he was,—judgment was given notwithstanding plea. *Baldwin* v. *Earl of M—*, 9 Law J. C.P. 227.

Copies of wills are not evidence to support a claim of peerage. The originals must be produced. *Netterville Peerage*, 2 D. & Cl. 342.

## PENALTY.

[See CONTRACT and COSTS.]

## PERJURY.

(A) OFFENCE.
(B) INDICTMENT.
(C) EVIDENCE.

### (A) OFFENCE.

Perjury cannot be assigned on an answer in Chancery denying a promise absolutely void by the Statute of Frauds. *Rex* v. *Benesech*, Pea. A.C. 93. [Kenyon]

A party filing a bill for an injunction, and making an affidavit of matters material to it, is indictable for perjury committed in that affidavit, though no motion is ever made for an injunction. *Rex* v. *White*, 2 M. & M. 271. [Tenterden]

### (B) INDICTMENT.

In an indictment for perjury, the supposed perjury arose upon evidence given in reply to the testimony of one of the defendants on the former trial, who was acquitted, and examined as a witness. The indictment did not state his acquittal, nor did the minute of the verdict produced shew it:—Held, that this was immaterial, parol evidence being given to shew that he was not in fact examined. *Rex* v. *Browne*, 2 M. & M. 315, s. c. 3 C. & P. 572. [Tenterden]

Indictment for perjury. The material question was stated in the indictment to be, "whether Kenworthy had been arrested by Lister; and whether Lister, *on occasion of the said alleged arrest*, had put his arms round Kenworthy, and embraced him." The allegation of perjury was, that the defendant falsely swore, on the trial of the issue, that "Lister put his arms round Kenworthy, and embraced him." But there was no previous allegation that the evidence was given of and concerning the alleged arrest. An innuendo followed in these words: "meaning, that Lister had, *on the occasion to which the said evidence applied*, touched the person of said Kenworthy:"—Held, that the indictment was defective, in not shewing that the occasion to which the evidence applied was the occasion of the alleged arrest. *Rex* v. *Nickole*, 8 Law J. M.C. 112, s. c. 1 B. & Ad. 21.

### (C) EVIDENCE.

To support an indictment for perjury, committed on a trial at the quarter sessions, three witnesses, who heard the party examined, stated what he swore on that trial; and the party was convicted, although neither of the witnesses took down the evidence as it was given, and neither of them professed to state the whole of the evidence that he gave.

To shew that the perjury was wilful and corrupt, evidence may be given of expressions of malice used by the party towards the person against whom he gave the false evidence. *Rex* v. *Munton*, 3 C. & P. 498. [Tenterden]

Perjury was assigned on an answer in Chancery to a bill before it was amended:—Held, that to support the allegations respecting the bill, it was sufficient to put in the amended bill, and prove that the amendments were in the hand-writing of a clerk in the Six Clerks' Office, whose duty it would be to make them; but that it was not necessary to call the person who wrote the amendments. *Rex* v. *Leycock*, 4 C. & P. 326. [Tenterden]

## PHYSICIAN.

The statute of 14 & 15 Hen. 8. c. 5, appointing and regulating the College of Physicians, is a public act. *College of Physicians* v. *Harrison*, 2 M. & M. 191. [Tenterden]

## PLAYERS.

The statute 28 Geo. 3. c. 30. extends to Justices at Sessions, in respect of provincial players, the licensing power which was previously, by the 10 Geo. 2. c. 28. s. 1, in the King and Lord Chamberlain as to players in Westminster and places of royal residence. And a person who has not obtained a licence under the latter act, is liable to the penalty under the former. *Rex* v. *Neville*, 9 Law J. M.C. 107, s. c. 2 B. & Ad. 299.

## PLEADING.

1. *AT LAW.*
   (A) DECLARATION.
   (B) TRAVERSE.
2. *IN EQUITY.*
   (A) BILL.
   (B) ANSWER.
   (C) PLEA.
   (D) IMPERTINENCE AND SCANDAL.
3. *IN THE ECCLESIASTICAL COURTS.*

### 1. *AT LAW.*

#### (A) Declaration.

A plaintiff may, on the trial, abandon any count or counts in his declaration, and rest his case entirely upon other counts, inconsistent with those he has abandoned.

Accordingly, where a tenant, in an action for an excessive distress, had inserted in his declaration two counts, setting out the tenancy, and complaining of an excessive distress, and had added a count in trover, he was allowed, on the trial, to abandon the two first counts, rest his case entirely on the third, and leave the defendant to prove the tenancy. *Spargo* v. *Brown*, 7 Law J. K.B. 16.

A declaration consisted of one special and several general counts. To the special count there were several special pleas; to the general counts, the general issue. The plaintiff entered a *nolle prosequi* on the special count, and joined issue on the others:—Held, that he was entitled to recover on the general counts, though the matters proved might have been given in evidence on the special count and the pleas to it. *Hayward* v. *Kain*, 1 M. & M. 311. [Tenterden]

#### (B) Traverse.

A traverse which is too large, is bad upon general demurrer. *Seymour* v. *Frances*, 7 Law J. K.B. 18.

### 2. *IN EQUITY.*

#### (A) Bill.

[*Dunn* v. *Dunn*, 2 Sim. 329, Dig. Law J. 381.]

A bill filed to restrain an action at law, brought against the plaintiff by a party to an agreement, who had delivered it up to him, to be returned again as an operative instrument (as he alleged) on the occurrence of an event, which had happened, praying a declaration that the contract was void, and an order that it might be delivered up to the plaintiff to be cancelled, and for general relief:—Held, to be demurrable to generally, for want of equity to the relief, the agreement being in the possession of the plaintiff.

Demurrer allowed with costs.

Leave given to amend.

The bill being amended, by striking out a part of the prayer, which sought a declaration that the agreement was void, and ought to be delivered up to be cancelled, without striking out the prayer for further relief,—Held to be still demurrable to. *Mellish* v. *Richardson*, 12 Price, 530.

The plaintiff is entitled, under a prayer for general relief, to such remedy as the statement of his case entitles him to. *Topham* v. *Constantine*, 1 Tam. 135.

A vendor sells certain property, and afterwards, in order to perfect his title, enters into an agreement with B for the release of certain rights which B has over the property: afterwards he files a bill against the purchaser, stating also the agreement with B, and praying that B may be decreed to execute the release:—Held, that such a bill was multifarious. *Reynolds* v. *Johnston*, 7 Law J. Chanc. 45.

A, B, and C, being the next of kin, and B and C the co-heirs of an intestate, file a bill against D for an account of the real and personal estates of the intestate:—The bill is multifarious. *Maud* v. *Acklom*, 2 Sim. 331.

#### (B) Answer.

The original bill sought to set aside an appointment, on the ground of fraud. The plaintiff then amended his bill, and inquired as to the mode in which the appointment was executed and attested:—Held, that the plaintiff's case, being one of legal validity, and equitable invalidity, the inquiries were irrelevant, and therefore need not be answered. *Codrington* v. *Codrington*, 3 Sim. 519.

#### (C) Plea.

[*Makepeace* v. *Haythorne*, 4 Russ. 244, Dig. Law J. 382.]

It is a good plea to a bill, that a defendant, who is stated in it to be out of the jurisdiction, was, at the time of filing the bill, within the jurisdiction. *Bean* v. *Teed*, 8 Law J. Chanc. 34.

A, being tenant for life of an estate unimpeachable of waste, except as to the demesne lands, a bill is filed, alleging that Blackacre is part of the demesne lands, and that he had committed both legal and equitable waste on the demesne lands; and praying relief accordingly. By the decree it was declared, that Blackacre was not part of the demesne lands, and an account of the timber felled on the demesne lands was directed, which account had not yet been taken: afterwards the same plaintiffs filed a bill against A, alleging that he had committed equitable waste on Blackacre, and praying relief accordingly:—Held, that a plea of the pendency of the former suit, was not a good plea to this second bill. *Newdigate* v. *Newdigate*, 8 Law J. Chanc. 35.

To a bill by a party claiming under an equitable assignment of a fund by the Spanish government, it is not a sufficient defence to say, that the fund was furnished by France, in compliance with treaties to which Great Britain was a party, and for specific purposes mentioned in the treaties; that those purposes remain unsatisfied; and that the defendant has no claim under the treaties.

*Semble*, a plea to the whole of a bill, except certain specific portions, is good in form.

Such a form of pleading may, however, often be very inconvenient. *Mendizabal* v. *Machado*, 8 Law J. Chanc. 57.

To part of the discovery sought by a bill, a defendant pleaded clauses of an act of parliament inflicting certain penalties for doing the acts to which the discovery related: but, in the interval between the filing and the arguing of the plea, the period elapsed within which the penalties could be sued for:—The plea was overruled. *The Corporation of Trinity House, Stroud*, v. *Burge*, 7 Law J. Chanc. 44, s.c. 2 Sim. 411.

To a bill filed by persons claiming title to an estate as the co-heirs of A, *ex parte maternâ*, the defendants pleaded that another person was the heir of A, *ex parte paternâ*, but did not set forth the pedigree of that person. *Semble*—that such a plea is good. *Emerson* v. *Harland*, 3 Sim. 490.

A plaintiff, claiming as heiress-at-law of L, who had devised real estates to various persons in tail, reserving the ultimate reversion to his own right heirs, alleged, by her bill, that the several estates

tail had determined by failure of issue; that no valid recovery had been suffered, or, if it had, that the property had been so settled that she was entitled as right heir of L; and, that so it would appear, if the defendant would produce the deeds creating the tenant to the præcipe, and leading or declaring the uses of such recovery:—A plea, which set forth the substance of the deeds making the tenant to the præcipe, and leading the uses of the recovery (under which uses the plaintiff had no title), and of the recovery, was held to be a good defence, though not supported by any answer. *Plunkett* v. *Cavendish*, 1 Russ. & M. 713.

(D) Impertinence and Scandal.

An answer is impertinent in so far as it brings forward a case which can be of no use with respect to the order or decree to be made on the bill to which the answer is put in.

If any part of the matter included in one exception for impertinence, can be shewn to be not impertinent, the whole exception must fail, however impertinent all the rest of the matter included in that exception may be.

Exceptions for impertinence need not set forth the matter complained of; but it is enough to describe the passage included in each exception as extending from such a word in such a folio, to such another word in another folio. *Wagstaff* v. *Bryan*, 8 Law J. Chanc. 41, s. c. 1 Russ. & M. 28.

An affidavit, verifying a short-hand writer's notes of a trial at Nisi Prius, which involved the same question as is raised on a petition in bankruptcy, is wholly impertinent. *Ex parte Palmer*, 4 Russ. 188.

### 3. *IN THE ECCLESIASTICAL COURTS.*

[*Dew* v. *Clarke*, 4 Russ. 511, Dig. Law J. 383.]

In criminal suits, articles must be so specific as to afford a fair opportunity of defence. *Oliver and Tell* v. *Hebart*, 1 Hag. Ec. 43.

In an allegation of faculties, the amount of capital embarked, or the particulars of partnership concerns, are not to be set forth, but only the income. *Higgs* v. *Higgs*, 3 Hag. Ec. 472.

The *præsertim* of articles is construed to set forth the nature of the principal charges; the general words only to include subordinate charges *ejusdem generis*. *Bennett* v. *Bonaker*, 3 Hag. Ec. 25.

In considering the admissibility of pleas, the Court must be cautious not to exclude matter essential to a due decision, nor allow proceedings to extend to an unnecessary length: but if a serious doubt arises as to the ultimate effect of any averment, it should be admitted. *Croft* v. *Croft*, 3 Hag. Ec. 311.

Where fraud is charged, the Court allows greater latitude of pleading than in ordinary cases; but even then, remote facts must not be so minutely stated as those which bear directly on the point at issue. *Marsh* v. *Harding*, 1 Hag. Ec. 133.

In a criminal suit, a defensive plea tending to shew the promoter's motives to be malicious or vindictive, is admissible, as bearing on the credit of his witnesses, and on costs; but it must be specific, and confined to his conduct with reference to the defendant.

A defensive plea in a criminal suit having imputed to the promoter malicious motives, the Court is bound to admit a plea repelling such imputations; and presentments, by the churchwardens and vestry, of the clergyman's misconduct, are admissible for such purpose, though not as matters of charge or proof in the original articles. *Bennett* v. *Bonaker*, 3 Hag. Ec. 17, 19.

An allegation pleading a verdict in ejectment, and the remarks of the Judge thereon, and the names of the witnesses examined,—rejected. *Grindall* v. *Grindall*, 3 Hag. Ec. 259.

A verdict in an action of ejectment cannot be pleaded in a testamentary cause.

On appeals from definitive sentences, matter which could have been pleaded below, and which directly contradicts the plea on which witnesses have been examined below, is not admissible: but matter more generally responsive may, with caution, be received, especially where the cause has not been properly conducted in the court below. *Price* v. *Clark*, 3 Hag. Ec. 265.

A party cannot plead the contents of an instrument, unless it is destroyed, or in the possession of the adverse party. *Morse* v. *Morse*, 2 Hag. Ec. 608.

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## POLICE.

[Establishment of Metropolitan Police, 10 Geo. 4. c. 44, 7 Law J. Stat. 81.]

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## POISONING.

If a servant put poison into a coffee-pot which contains coffee, and when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her (the mistress's) breakfast, and the mistress drink the poisoned coffee: this is a "causing the poison to be taken," within the statute 9 Geo. 4. c. 31. s. 11, and the servant is therefore indictable under the act. *Semble*, that this is also an "administering" within that act; as, to constitute administering, it is not necessary that the poison should be delivered by the hand of the party. *Rex* v. *Harley*, 4 C. & P. 369. [Park]

A prisoner was indicted for mixing sponge with milk, and administering it with intent to poison. The indictment was held insufficient, because it did not aver that the sponge was of a deleterious or poisonous nature. *Rex* v. *Powles*, 4 C. & P. 571. [Alderson]

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## POOR.

[See Churchwardens and Overseers, Rate, and Sessions.]

(A) Relief.
(B) Settlement.
- (a) *By Birth.*
- (b) *By Marriage.*
- (c) *By Hiring and Service.*
  - (1) *Contract.*
  - (2) *Hiring generally.*
  - (3) *Conditional and exceptive Hiring.*
  - (4) *Service.*
- (d) *By Apprenticeship.*
  - (1) *Contract and Indenture.*
  - (2) *Service and Residence.*

(*e*) *By Tenement.*
(1) *In general.*
(2) *What is a sufficient Tenement.*
(3) *Value.*
(4) *Occupation.*
(5) *Payment of Rent.*
(*f*) *By Estate.*
(*g*) *By Payment of Taxes.*
(*h*) *By serving an Office.*
(C) CERTIFICATE.
(D) REMOVAL.

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## (A) RELIEF.

[Provision for relieving parishes from the expense of the wives and families of smugglers, 11 Geo. 4. c. 10, 8 Law J. Stat. 6.

Churchwardens and overseers empowered to provide land to a certain extent, for the employment of the poor, 1 & 2 Will. 4. c. 42, 9 Law J. Stat. 84, and to inclose crown lands for their benefit, 1 & 2 Will. 4. c. 49, 9 Law J. Stat. 107.]

*Semble*—That, under the 43 Eliz. c. 2, Justices have a discretion, whether they will make an order upon the grandfather rather than on the father of a poor impotent person, to contribute towards his support. But, whether they have such a discretion or not, an order which is made upon the grandfather, need not state upon the face of it that the father is dead or unable to support the pauper. *Rex* v. *James Cornish*, 9 Law J. M.C. 86, s. c. 2 B. & Ad. 408.

A local act, for the relief of the poor of the parish, provided for an election in every third year, of trustees, in the room of those who should have died, removed, become disqualified, or relinquished office, so that the number should every third year be filled up to fifty-one, over and besides the vicar, churchwardens, and overseers for the time being, who were to be trustees by virtue of their office:—Held, that where a person was a trustee, and was afterwards chosen churchwarden, his being so did not disqualify him, or render it necessary to elect another in his room, to make up the stipulated number. *Rex* v. *St. Mary Abbotts, Kensington*, 9 Law J. M.C. 129.

Where relief is given under circumstances which do not lead to the inference, that the parish officers knew enough of the facts to form an opinion as to their own liability, such relief is not even *primâ facie* evidence to charge a parish.

Accordingly, an overseer of parish E, at a public-house, on a market-day, seven miles from his own parish, was applied to by a woman for relief. He gave her 3*s*., and said, if she wanted further relief, she must apply to him again at his parish. On a second application, she was refused further relief, and was told she must throw herself on parish M. The Sessions held, that this was *primâ facie* evidence of an admission by the parish of E that the pauper was there settled. The Court were of a different opinion; but confirmed the order of Sessions, as the case was one peculiarly for their decision. *Rex* v. *the Inhabitants of Edwinstowe*, 7 Law J. M.C. 30, s. c. 8 B. & C. 671.

Relief given for any length of time to a pauper while in the relieving parish, is no evidence whatever against that parish upon the question, as to the pauper's settlement.

Nor is the fact of the relieving parish putting out one of the pauper's children as apprentice, while the pauper was in that parish, evidence upon which the Sessions would be warranted in presuming that the pauper was settled in that parish. *Rex* v. *the Inhabitants of Coleorton*, 8 Law J. M.C. 118, s. c. 1 B. & Ad. 25.

Relief administered while the pauper is resident out of the parish which administers it, is a species of evidence exclusively for the Sessions to consider; and though they may, from such evidence, infer a settlement, they are not bound to do so; and the Court confirmed an order of Sessions which did not so infer, though the evidence was very strong. *Rex* v. *the Inhabitants of Yarwell*, 8 Law J. M.C. 8, s. c. 9 B. & C. 894, s. c. 4 M. & R. 684.

## (B) SETTLEMENT.

### (*a*) *By Birth.*

[See BAPTISM.]

A woman pregnant, was removed from P to S. The parish of S appealed, and on the appeal shewed that she was settled at a third parish, M, and the Sessions quashed the order of removal. But before the appeal was heard, she was delivered in the parish of S, to which she had been removed, of a bastard:—Held, that the bastard thus born, was not removable to the parish of M, in which his mother was settled at the time of the removal. *Semble*, that he would be settled in the parish from which she had been removed. *Rex* v. *the Inhabitants of Martlesham*, 8 Law J. M.C. 49, s. c. 5 M. & R. 82, s. c. 10 B. & C. 77.

A single woman pregnant was removed to her place of settlement. Unknown to the parish officers of either parish, she returned to that from which she had been removed; and was there delivered. The time for appealing against the order of removal had not elapsed when the delivery took place:—Held, that this was within the general rule; and that the child was settled in the parish in which it was born, and not in that in which the mother was settled, and to which she had been removed. *Rex* v. *the Inhabitants of Halifax*, 9 Law J. M.C. 131.

Though a parish register is not conclusive evidence of the *place* of birth of the person baptized, it is admissible in evidence to be considered with other facts, upon the question as to the place of birth.

The declaration of a deceased mother as to the time of birth, is admissible in evidence upon a question as to the place of birth of the child, though the father be living. *Rex* v. *the Inhabitants of Birmingham*: called also, *Rex* v. *the Inhabitants of Aston*, 8 Law J. M.C. 41, s. c. 9 B. & C. 225, s. c. 4 M. & R. 691.

### (*b*) *By Marriage.*

A wife was removed to her maiden settlement. It appeared, that the husband was born in a parish in Ipswich, but which parish could not be ascertained:—Held, that the order of removal was wrong; and that the appellant parish discharged themselves by shewing that the husband had a settlement. *Rex* v. *St. Mary, Beverley*, 9 Law J. M.C. 17, s. c. 1 B. & Ad. 20.

### (c) *By Hiring and Service.*

#### (1) *Contract.*

Whether, in case a contract were twofold,—for service, and also for improper intercourse,—service under such a contract would confer a settlement—*quære*. *Rex* v. *the Inhabitants of North Wingfield*, 9 Law J. M.C. 37, s. c. 1 B. & Ad. 712.

Where the question is, whether a contract is a contract of apprenticeship, or a contract of hiring and service, the point to ascertain appears to be, what was the principal and what the subordinate object of the parties; and whether the service was not treated by them, as the means of effecting the purpose of apprenticeship. Upon such a question, the presence or the absence of certain facts usually found only in a contract of apprenticeship, or only in a contract of hiring and service, is not decisive of the question; though such presence or absence is a circumstance to be considered as bearing upon the question.

Accordingly, a contract being entered into, by which a person engaged to serve as an "articled servant" at certain wages; but the father was a party to the agreement, and engaged to provide the intended servant with board, lodging, and necessaries, and the master engaged to teach and instruct the servant in his own business; and it was also provided that the servant should be considered as an out-apprentice; and there were other provisions apparent of the same inconsistent character:—The Court held, that no one of those circumstances was to be taken as of itself decisive of the question, whether this was a contract of apprenticeship, or one of hiring and service; but, the Sessions having on the whole found it to be a defective contract of apprenticeship, the Court confirmed their order. *Rex* v. *the Inhabitants of Tipton*, 8 Law J. M.C. 52, s. c. 9 B. & C. 888, s. c. 4 M. & R. 703.

A cotton-weaver, by agreement with a lad and his father, hired the lad into his service for three years, to labour at the art and mystery of a cotton-weaver. In return, the master was to teach the lad, and give him one-half of his earnings; there were other provisions, usual in contracts of apprenticeship only. Nothing was said about Sundays, and in fact the lad did not do any work for his master on Sundays:—Held, that this was a defective contract of apprenticeship; and the Sessions having held it to be a contract of hiring and service, their order was quashed. *Rex* v. *the Inhabitants of Nether Knutsford*, 9 Law J. M.C. 52, s. c. 1 B. & Ad. 726.

The pauper agreed to learn sawing for a twelvemonth; and was to have 7*s*. 6*d*. out of every 20*s*. he and his master earned. At the end of the year he agreed for another year; to receive 8*s*. out of every 20*s*. earned by his master and himself. Nothing was said about the hours he was to work, or about Sundays. On Sundays he was occasionally absent without permission. The Sessions held this to be a defective contract of apprenticeship; and not a contract of hiring and service; and the Court confirmed their order. *Rex* v. *the Inhabitants of Crediton*, 9 Law J. M.C. 89.

A tailor, on a treaty for taking a lad into his service, said he would not take him as an apprentice, because if he did he should offend the farmers; he would take him on an *agreement* for four years; and terms were afterwards agreed upon, similar to those generally agreed on in cases of apprenticeship; but the name "apprentice" was never used. The Sessions held this to be an imperfect contract of apprenticeship; and the Court held that they were right; the substance of the contract being the proper guide, and not the mere name which the parties, from interested motives, might choose to give to the transaction. *Rex* v. *the Inhabitants of Edingale*, 8 Law J. M.C. 81, s. c. 10 B. & C. 729.

#### (2) *Hiring generally.*

A hiring at weekly wages, with "a month's warning or a month's wages," infers a yearly hiring. *Rex* v. *the Inhabitants of St. Andrew, Pershore*, 7 Law J. M.C. 23, s. c. 8 B. & C. 697.

The pauper's mother went with her son to one Slater, and asked if he wanted a boy? He said "Yes." She then asked, "What wages he would give?" He said "Let him stop what time he will, I will give him satisfaction; if not in money, in clothes."—The Sessions held this not to be a general hiring; and the Court confirmed the order. *Rex* v. *the Inhabitants of Rosliston*, 7 Law J. M.C. 33, s. c. 8 B. & C. 668.

The pauper went with his father to Neale, an inkeeper, and informed him, that he heard he wanted a lad. Neale said he had got one coming in a fortnight; but that the pauper might stop for that fortnight until the other lad came. He was to fill the situation of boots and tap-boy; was to have his board and lodging in the house, and the vails which he might obtain in this employment. At the end of the fortnight, the other lad came, but was not engaged: and the pauper continued in the service (without anything further passing between him and Neale,) for three years and a quarter. At the end of that time, he engaged in another situation without consulting Neale, and went into it on the following day; Neale saying, that "if it was his mind to go, he believed he must:"—Upon these facts, the Sessions found, that there was an implied yearly hiring.

*Mr. Justice Bayley* held, that they were right. *Mr. Justice Littledale* did not concur; but, as it was a conclusion not repugnant to the fact, agreed that the order of Sessions should be confirmed. *Rex* v. *the Inhabitants of St. Martin, Leicester*, 7 Law J. M.C. 81, s. c. 8 B. & C. 674.

To obtain a settlement by hiring and service for a year, where the year consists of 366 days, as in leap-year, such hiring and service must be for that number of days.

Where a pauper was hired for a year, on the 13th of May 1819, and served until the 11th of May 1820, which was leap-year, when, wishing to visit his friends fifteen miles distant, and to attend some statutes on the 12th of May on the way there, and to avoid returning to his master, he obtained his master's permission to go altogether, and was paid his wages up to the 11th, a part being deducted for the time he had to serve; and he slept at his master's house that night, and quitted on the morning of the 12th;—it was held, that he obtained no settlement by virtue of such hiring and service. *Rex* v. *the Inhabitants of Roxby*, 8 Law J. M.C. 51, s. c. 10 B. & C. 51.

The Court will not quash an order of Sessions upon a question of yearly hiring, merely because,

rom the facts stated, they would have drawn a ifferent conclusion. If there be any facts which ay warrant the conclusion, so as not to be repugant to the facts, the Court will confirm the order.

Accordingly, the pauper was hired for a fortnight r three weeks. Afterwards, she was told, by her istress, that she might sleep in the house, and hat when she wanted clothes, she, the mistress, ould find them. She was told by her mistress, wo or three times, while she stayed, that she might rovide a place for herself elsewhere when she could. 'he Sessions held this to be a general hiring; and he Court, for the above reason, confirmed the order. *Rex v. the Inhabitants of St. Andrew the Great*, 7 aw J. M.C. 28, s. c. 8 B. & C. 664.

(3) *Conditional and exceptive Hiring.*

A service for part of a year, not under a yearly iring, may be connected with a service for enough o make up a year, the latter service being under a early hiring defeasible on condition. And this vill be sufficient to gain a settlement, although the ondition take effect, and the service be accordingly letermined, provided there had been a full year's ervice, the preceding part of it under a hiring not early, and the subsequent part under the conditional iring. *Rex v. the Inhabitants of Farleigh Wallop*, 9 Law J. M.C. 9, s. c. 1 B. & Ad. 336.

If, at the time of entering into a contract for a ear's service, a militia-man does not communicate he fact of his being in the militia, the hiring for a ear will not be sufficient for the purpose of conferring a settlement. *Rex v. the Inhabitants of Taunon St. James*, 8 Law J. M.C. 26, s. c. 9 B. & C. 831, . c. 4 M. & R. 698.

A contract for a year's service at yearly wages; ut it was agreed at the time, that when the misress had not work for the servant, he was to work or any one else for his own benefit. He accordngly worked during harvest time for another perion for about a fortnight, and was paid by that perion; but he continued to do the required work in he house of his mistress every day, and slept there very night:—Held, that this was an exceptive contract, the service under which did not confer a settlement. *Rex v. the Inhabitants of South Killingholme*, 8 Law J. M.C. 88, s. c. 10 B. & C. 80.

Service under a yearly hiring, by which the servant was to serve from six in the morning to seven in the evening, and might make as much overwork "*as he chose*":—Held, insufficient to confer a settlement; the servant not being under the controul and coercion of the master during the whole time. *Rex v. the Inhabitants of Atherstone*, 8 Law J. M.C. 44.

A contract by a female pauper, to work in a silk factory for four years, and "to observe and obey all the rules and regulations of the factory, as well with regard to the hours of attendance, and of work, as the mode and other particulars of working, and in all things to conduct herself faithfully, honestly, and diligently, in her said engagement, and as a good and faithful servant ought to do;"—is not a contract for an exceptive hiring, but will be sufficient to entitle the pauper serving under it to a settlement.

*Semble*—That if such a contract be in writing, a parol statement made by the foreman of the factory to the pauper, at the time of its execution, of the usual number of working hours, during the day, is not admissible in evidence, as explanatory of the terms thereof. *Rex v. St. John, Devizes*, 8 Law J. M.C. 24, s. c. 9 B. & C. 896, s. c. 4 M. & R. 680.

Service under a yearly hiring, to work at a certain trade, and for certain hours, insufficient to confer a settlement; the servant not being under the general controul of the master out of those hours. *Rex v. the Inhabitants of Frome Selwood*, 9 Law J. M.C. 7, s. c. 1 B. & Ad. 207.

After a man had agreed with his intended master upon the terms of a yearly hiring, the master said he did not wish the man to get a settlement; and that if he would reserve three days, that would do. The man agreed to this. He had the three days at Willoughby Feast. He went away at the end of the year, and received his whole wages. The Sessions held this to be an exceptive hiring; and the Court confirmed their order. *Rex v. the Inhabitants of Willoughby*, 8 Law J. M.C. 101.

(4) *Service.*

If, at the time of hiring, the fact of being in the militia be communicated, and during the year the militia-man be called out for service in the militia:—*Semble*, that the service for that year will not be sufficient for the purpose of conferring a settlement. *Rex v. the Inhabitants of Taunton St. James*, 8 Law J. M.C. 26, s. c. 9 B. & C. 831, s. c. 4 M. & R. 698.

Service for less than a year, under a hiring not yearly; then a short interval, during which the service continued, but under no contract of hiring at all; then, the service still continuing, hiring for a year, and service, on the whole, for a year:—Held, that these services might be connected, and that they gained a settlement. *Rex v. the Inhabitants of Harbury*, 9 Law J. M.C. 42, s. c. 1 B. & Ad. 360.

(*d*) *By Apprenticeship.*

[See *post*, C.]

(1) *Contract and Indenture.*

An indenture of apprenticeship, or other contract of service with a chimney-sweeper, is altogether void, if it be not made in conformity with the 28 Geo. 3. c. 48. *Rex v. the Inhabitants of Hipswell*, 7 Law J. M.C. 4, s. c. 8 B. & C. 466, s. c. 2 M. & R. 474.

A person who, of his own accord, was about to bind himself as apprentice, applied himself to the parish officers, stating that his intended master objected that he had not sufficient clothes. The parish officers thereupon agreed to give him 2*l.* for clothes on the execution of the indenture, and 2*l.* more for the same purpose at the end of the year:—Held, that this was within the statute 59 Geo. 3. c. 139. s. 11; and that the service under this indenture did not confer a settlement. *Rex v. the Inhabitants of Mattishall*, 7 Law J. M.C. 26, s. c. 8 B. & C. 783.

A subscription was raised to apprentice a poor person, to which the parish officers of another parish were invited to contribute, and they did contribute, denying, however, that the person belonged to their parish, and three other parishes contributed, (the contributions of the latter being paid out of the parish funds,) the remainder of the money being raised by

private subscription. None of the parish officers took any part in the treaty or the agreement for the apprenticeship, or in any way interfered in the transaction:—Held, that this was not a case within 56 Geo. 3. c. 139. s. 11, so as to require that the indenture of apprenticeship should be allowed by two Justices. *Rex* v. *the Inhabitants of St. Peter, Hereford*, 9 Law J. M.C. 58, s. c. 1 B. & Ad. 976.

Where a parish apprentice is bound by indenture, according to the 56 Geo. 3. c. 139. s. 2, to serve in a county different from that from which he is bound, the allowance of the indenture must be by two different Magistrates of each county; and the allowance by the same Magistrates acting for both counties is insufficient. *Rex* v. *Robert Shipton*, 7 Law J. M.C. 21, s.c. 8 B. & C. 772, s. c. 2 M. & R. 217.

Where an apprentice is bound by indenture, to which the parish officers are parties, an allowance by the Justices, under the 56th Geo. 3. c. 139, will be sufficient, if it be under the hands (without the seals) of the Justices. But where an apprentice is bound, and a part of the premium, or any expense in respect of the indenture, comes out of the parish funds, and the parish officers are not parties to the indenture, the allowance, in conformity with the above act, must be under the seals, as well as the hands, of the Justices. *Rex* v. *the Inhabitants of St. Paul, Exeter*, 8 Law J. M.C. 45, s. c. 10 B. & C. 12, s. c. 5 M. & R. 24.

An indenture of apprenticeship was allowed by two Justices, describing themselves as "Justices of the Peace of the said *county*, dwelling in or near the said *parish*." The county last mentioned was a county in respect of which they would not have jurisdiction over the subject-matter; but the parish last mentioned had been described as in a county in respect of which they would have jurisdiction:—Held, that the expression, taken entire, sufficiently referred to the county which gave them jurisdiction; although, according to strict grammatical construction, the word "said" referred to the county last antecedent. *Rex* v. *the Inhabitants of Countesthorpe*, 9 Law J. M.C. 77, s. c. 2 B. & Ad. 487.

A local act, passed in the reign of Will. 3, created a corporation of guardians of the poor for a parish, and gave them power in the workhouse to employ, detain, and keep in their service until the age of sixteen years, any poor child of the parish, *or* the child of any other person that should be willing or desirous to place or put them there; *and*, after they should have attained that age or sooner, they were empowered to bind *such* child or children apprentice for a term not exceeding eight years:—Held, that an indenture, made in pursuance of this power, did not require the allowance of two Justices of the Peace, under the 23 Geo. 3. c. 57, and 56 Geo. 3. c. 139; but, that where a child was brought into the workhouse, to sleep one night previous to being apprenticed, but was never employed by the guardians, the provisions of the act were not complied with, and the indenture of apprenticeship executed by them, professedly in execution of its powers, was void. *Rex* v. *St. Margaret's, Lynn*, 9 Law J. M.C. 14.

A sum was paid to the master upon the execution of an indenture of apprenticeship, but it was agreed by the mother of the apprentice that something more should be given; and only the sum actually paid at the time was inserted in the indenture as the consideration. The mother afterwards paid the master a further sum: but neither her husband nor the apprentice knew the fact of the agreement, nor that of the payment of the additional sum. The stamp affixed would have been sufficient if the additional sum had been mentioned:—Held, that under these circumstances, the indenture was not void for want of the insertion of the true consideration.

Whether, in general, the not inserting the true consideration, although the stamp be sufficient to cover it if inserted, would vitiate the indenture—*quære*. *Rex* v. *the Inhabitants of Beerton-upon-Dunsmore*, 8 Law J. M.C. 29, s. c. 9 B. & C. 872, s. c. 4 M. & R. 631.

The assignment of a parish indenture stated the consideration-money to the new master to have been paid by the old master:—Held, that nevertheless, parol evidence was admissible to shew that the money came out of the parish fund, in order to exempt the instrument from duty under the 55 Geo. 3. c. 184, schedule, part 1, title "Apprentice." *Rex* v. *the Inhabitants of Llangunnor*, 9 Law J. M.C. 99, s. c. 2 B. & Ad. 615.

No indenture of apprenticeship, which is not stamped with the proper duty within the time limited by the 8 Ann. c. 9. can be lawfully stamped afterwards, even on payment of a penalty; and such indenture so stamped afterwards is unavailing, the indenture itself being void by the express provisions of that statute. *Rex* v. *the Inhabitants of Church Hulme*, 9 Law J. M.C. 83.

(2) *Service and Residence.*

The forty days' residence, in order to acquire a settlement by apprenticeship, need not be consecutive; and need not be within the compass of a year. *Rex* v. *the Inhabitants of Alston*, 9 Law J. M.C. 71, s. c. 2 B. & Ad. 207.

A written consent of a master, that his apprentice shall serve another for the remainder of the term, does not require to be stamped, unless the subject-matter of the consent appear *clearly to be of the* value of 20*l.*: such a consent being exempted by the 48 Geo. 3. c. 149, and 55 Geo. 3. c. 184, as an agreement, where the matter thereof was not of the value of 20*l.* *Rex* v. *the Inhabitants of Enderby*, 9 Law J. M.C. 80, s. c. 2 B. & Ad. 207.

(*e*) *By Tenement.*

(1) *In general.*

Where during a tenancy there was an interval, between Michaelmas 1824 and June 1825, (when the 6 Geo. 4. c. 57. came *into operation*) during which interval, the requisites of the statute 59 Geo. 3. c. 50. (then in force) were not complied with:—Held, that the provisions of the 6 Geo. 4. could not be called in aid at the end of the tenancy to confer a settlement under that statute, which tenancy had commenced while the old statute was in operation, and which last-mentioned statute would not have conferred a settlement. *Semble*, that the 6 Geo. 4. c. 57. is prospective only. *Rex* v. *the Inhabitants of Ockley*, 9 Law J. M.C. 123, s. c. 1 B. & Ad. 818.

In 1813, the pauper went into a parish, and agreed to live in a house for nothing, upon trial. If he liked it, was to take it as a tenement. He liked it, and afterwards became tenant, and resided

herein more than forty days. The value exceeded 10*l.*:—Held, that this was a coming *to settle* within the meaning of the statute 13 & 14 Chas. 2. c. 12; that he was irremovable; and that, by the forty days' residence, he gained a settlement. *Rex* v. *the Inhabitants of Halsham*, 9 Law J. M.C. 93, s. c. 2 B. & Ad. 620.

(2) *What is a sufficient Tenement.*

A mill of wood, resting upon a foundation of brick, but not attached to the foundation, held not to be part of a tenement; and, consequently, being rented with a cottage and garden, which, with the mill, were worth 30*l.* a year, but without it less than 10*l.*:—Held, that no settlement was gained by renting the tenement. *Rex* v. *the Inhabitants of Otley*, 9 Law J. K.B. 32, M.C. 11, s. c. 1 B. & Ad. 61.

To gain a settlement by the renting of a tenement in respect of the feed of cattle, it is necessary, not only that they should be pasture fed, but that it was a part of the contract that they should be so fed. *Rex* v. *the Inhabitants of Llangriville*, 8 Law J. M.C. 89, s. c. 10 B. & C. 899.

In 1809 a master agreed to give his servant certain wages, and the right of feeding his cow in his master's pasture. The servant was to serve as waggoner, and it was a part of the agreement that he should board his mate. Subsequently, in 1810, by another agreement, the servant was to have the right of feeding another cow on his master's pasture. The cows were fed alike, under these two agreements, for eighteen months. The value of the feeding exceeded 10*l.* per annum:—Held, that the servant thereby gained a settlement, by renting a "tenement" of the value of 10*l.* a year. *Rex* v. *the Inhabitants of Newington next Hythe*, 7 Law J. M.C. 25.

A gate-keeper, or toll-keeper, or renter of the tolls, residing in the toll-house, is prevented by the 54 Geo. 3. c. 170. s. 5. from thereby gaining a settlement, although the annual value of the house may exceed 10*l.* a year. And *semble*, that the renting of a house and land with an incorporeal hereditament (or other subject-matter not being house and land), at an entire rent, is insufficient for the purpose of a settlement under 6 Geo. 4. c. 57. *Rex* v. *the Inhabitants of St. Andrew the Less*, 8 Law J. M.C. 84, s. c. 10 B. & C. 742.

Where every requisite of 59 Geo. 3. c. 50, or of 6 Geo. 4. c. 57, has been complied with, the circumstance of the landlord agreeing to pay the taxes and rates out of a rent of 10*l.* a year, does not prevent the gaining of a settlement. *Rex* v. *the Inhabitants of Thurmaston*, 9 Law J. M.C. 53, s. c. 1 B. & Ad. 731.

Where a tenement has been taken at an entire rent for a sum exceeding 10*l.* a year, part of the tenement being in one parish and part in another, the tenant has gained a settlement in the parish in which is that part wherein he resided: provided, apportioning the rent, it appears he paid 10*l.* a year for the part which is in that parish. *Rex* v. *the Inhabitants of Pickering*, 9 Law J. M.C. 106, s. c. 2 B. & Ad. 267.

(3) *Value.*

The actual value of the tenement is immaterial, with reference to the act of 59 Geo. 3. c. 50, if the taking, &c. be *bonâ fide*. *Rex* v. *the Inhabitants of Ashfield-cum-Thorpe*, 8 Law J. M.C. 30, s. c. 9 B. & C. 939, s. c. 4 M. & R. 709.

In order to ascertain the value of a tenement taken before the 59 Geo. 3. c. 50. came into operation, improvements contracted by the landlord to be done, and afterwards done upon the premises in pursuance of that contract, may be taken into account; although they be not done until after the actual entry by the tenant. *Rex* v. *the Inhabitants of Huntsham*, 9 Law J. M.C. 88.

(4) *Occupation.*

Whether, in order to gain a settlement by the 6 Geo. 4. c. 57, the house should be entirely occupied by the tenant for the year, or whether an occupation of part, the remainder being occupied by lodgers, is sufficient? Held, by *Mr. Justice Bayley*, that the occupation should be entirely by the tenant. By *Mr. Justice Littledale* and *Mr. Justice Parke*, that an occupation of part, the remainder being occupied by lodgers, is sufficient.

A renting of a tenement for a year, and an occupation for a year, which year began before the 22nd of June 1825, (6 Geo. 4. c. 57.) but ended after that day, will be sufficient to confer a settlement, provided the other requisites of the 6 Geo. 4. be satisfied. *Rex* v. *the Inhabitants of Ditcheat*, 7 Law J. M.C. 110, s. c. 9 B. & C. 176, s. c. 4 M. & R. 151.

In order to gain a settlement under the 6 Geo. 4. c. 57, the house or land need not be entirely *occupied* by the tenant for the year. If he *hold* the whole, and underlet a part, he occupying the remainder, it will be sufficient. *Rex* v. *the Inhabitants of Great Bentley*, 8 Law J. M.C. 55, s. c. 10 B. & C. 520.

(5) *Payment of Rent.*

The Sessions having found that the parish officers of a parish in which a pauper was settled, fraudulently gave him money to enable him to pay his rent, in order that he might, under 6 Geo. 4. c. 57, gain a settlement in another parish:—Held, that no settlement was gained by renting the tenement and the paying of the rent under such circumstances. *Rex* v. *the Inhabitants of St. Sepulchre, Cambridge*, 9 Law J. M.C. 56, s. c. 1 B. & Ad. 924.

Where the question of settlement depends upon the question, whether a transaction is fraudulent or not, the Sessions must themselves affirm or negative the fraud: they cannot obtain the opinion of the Court above on that question by merely stating the facts which raise the question; they must themselves draw the inference.

Where a man, being settled in one parish, was residing in another, and applied for relief to the parish to which he belonged, and the parish officers advanced him money to pay his rent, the effect of which payment would be to cause him to be settled in the parish in which he was then residing:—Held, that this fact would not prevent the gaining of the settlement, unless the transaction was fraudulent; and that the question by which fraud or no fraud was to be tried, was this—"Was the money advanced by the parish officers to assist the man, and enable him to go on; or was it done merely to throw him off one parish to another?" And the

case was sent back to the Sessions for them to dispose of by the application of this principle. *Rex* v. *the Inhabitants of Tillingham*, 9 Law J. M.C. 1, s. c. 1 B. & Ad. 180.

(*f*) *By Estate.*

The interest of a remainder-man, after an estate for life, will not entitle him to a settlement, by reason of forty days' residence during the continuance of the particular estate.

Testator, after devising certain real property to his heir-at-law, devised "to my daughter, E M, all that part of a messuage or tenement, with the appurtenances, which is now in the occupation of H L, situated in Ringstead, adjoining the tenement in the occupation of J M. to hold to her and her assigns, for and during the term of her natural life, if she shall so long continue a widow and unmarried; and, from and after the day of her decease, or day of marriage, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances; and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of J M; and also, all that my close or orchard lying above the said homestead, &c. unto the four children of my late son:"—Held, that these four grandchildren of the testator, under this devise, did not take an immediate vested interest in any part of the premises mentioned therein, but a remainder expectant on the decease or second marriage of E M, and consequently that one of those grand-children, a pauper, did not obtain a settlement by forty days' residence in the parish where those premises were situate during the life and before the second marriage of E M. *Rex* v. *the Inhabitants of Ringstead*, 7 Law J. M.C. 103, s. c. 9 B. & C. 218, s. c. 4 M. & R. 17.

Where a parcel of land, and two unfinished dwelling-houses were conveyed to the use of a pauper's mother for life, or during widowhood, remainder to the use of the pauper in fee, the consideration being a sum of money which the pauper had before settled upon his mother for life or during widowhood, the principal after death to be paid to himself; and the pauper entered upon one of the houses at the time of the execution of the conveyance, and subsequently, by the permission of his mother, obtained possession of the other, and the land, and let them, and received the rent himself, and afterwards sold the premises, his mother being a party to the deed, but he receiving, and not accounting to her for the purchase-money,—it was held, that he obtained no settlement in the parish where the premises were situate, inasmuch as he had no present right of possession, and no freehold interest. *Rex* v. *the Inhabitants of Willoughby-cum-Sloothby*, 8 Law J. M.C. 32, s. c. 10 B. & C. 62, s. c. 5 M. & R. 32.

A residence on an estate at will, of less than 10*l.* a year, is not sufficient to confer a settlement. *Rex* v. *the Inhabitants of Chew Magna*, 8 Law J. M.C. 80, s. c. 10 B. & C. 747.

A freeman of a borough, in that character, was entitled to and received a share of the rents of certain estates, vested in the corporation at large, and the rents of which were reserved to and received by them. The rights of the freemen to these shares were subject to regulations by the corporation, and, in some instances, had been withdrawn:—Held, that the freeman did not gain a settlement by estate in respect of the receipt of the share of the rents. *Rex* v. *the Inhabitants of Belford*, 8 Law J. M.C. 33, s. c. 10 B. & C. 54, s. c. 5 M. & R. 174.

By agreement of reference between the lord, the lessee, and the leaseholders and copyholders of a manor, arbitrators were appointed for allotting the common fields and downs within the manor. The arbitrators awarded an allotment for the shepherd of the common sheep-flock of the place for the time being, in lieu of lands in the common fields, held by custom by the shepherd. The shepherd was appointed by the tenants, and held his situation as a yearly servant. The arbitrators directed that the shepherd should keep the fences in repair. The shepherd for the time being was no party to the agreement to refer:—Held, that a shepherd who was appointed subsequently, and filled the situation under a yearly hiring, did not gain a settlement by estate in respect of his occupation of this allotment. *Rex* v. *the Inhabitants of South Newton*, 8 Law J. M.C. 90, s. c. 10 B. & C. 838, s. c. 5 M. & R. 40.

Where land is taken by encroachment and inclosed, the occasional throwing down of the inclosures will not alter the character of the possession, so as to render it no longer adverse, if in all other respects the possession be adverse. *Rex* v. *the Inhabitants of Wooburn*, 8 Law J. M.C. 93, s. c. 10 B. & C. 40.

W B, about fifty years ago, went, on the invitation of W P, whose daughter he had married, to live in the house of W P. The house was held by W P for a term determinable upon lives. W P died thirty-eight years ago, intestate, leaving a widow, several sons, and a daughter, the wife of W B. No letters of administration to W P were ever taken out; but W B continued in possession of a part of the premises, which he had in the lifetime of W P parted off; the sons taking possession of the other premises; and he and the sons paid the rent in shares, but not bearing the same proportion to that of the shares of the father's property, in case there had been a legal distribution. One of the sons afterwards went away, and W P took possession of his portion, and paid his share of the rent:—Held, first, that this possession was not adverse: secondly, that no grant to W B could be presumed, as there had been no letters of administration; and there was no person who could legally make a grant. Consequently W B gained no settlement by estate. *Rex* v. *the Inhabitants of Okeford Fitzpayne*, 9 Law J. M.C. 12, s. c. 1 B. & Ad. 254.

(*g*) *By Payment of Taxes.*

Land-tax is a "parochial rate," within the meaning of the 6 Geo. 4. c. 57. s. 2, the payment of which will not confer a settlement under the 3 & 4 Will. & Mary, c. 11. s. 6, unless the requisites of the former statute be also complied with. *Rex* v. *the Inhabitants of East Teignmouth*, 9 Law J. M.C. 24, s. c. 1 B. & Ad. 244.

The being rated to and paying ward-rate for the city of London, under the 10 Geo. 2. c. 22. s. 2, held not to confer a settlement under the 3 Will. 3. c. 11. *Rex* v. *the Inhabitants of Christchurch, London*, 7 Law J. M.C. 24, s. c. 8 B. & C. 660.

The relation of landlord and tenant is not necessary, in order to a person acquiring a settlement by payment of rates. Nor does the fact of the landlord

r owner repaying to the occupier the sum paid y the latter, for rates, prevent his gaining a settlenent by such payment. Accordingly, an attorney aving a cottage and land near his residence, allowd his clerk to occupy them, that he might the more onveniently attend to the business, and suffered im to hold them rent free, as an augmentation of is salary; the clerk was rated as occupier, but the ttorney was sometimes called on to pay, and did ay, the rates; and when the clerk paid them, the ttorney reimbursed him:—Held, that the clerk ained a settlement by paying the public parochial axes. *Rex* v. *the Inhabitants of Lower Heyford*, 8 aw J. M.C. 117, s. c. 1 B. & Ad. 75.

### (h) *By serving an Office.*

The office of assistant overseer, under the 59 Geo. . c. 12, is a "public annual" office, the service of hich may confer a settlement.

The appointment to such an office, with a salary, equires a stamp, under the 55 Geo. 3. c. 184, scheule, part 1, title "Grant." *Rex* v. *the Inhabitants f Lew*, 7 Law J. M.C. 18, s. c. 8 B. & C. 247.

The office of town crier for a city consisting of everal parishes, is sufficient to confer a settlement n the parish in which the officer resides.

Provided such an office be served for a year, it s immaterial whether the officer continue to reside n the same parish in the city during the whole ear. He gains a settlement in that parish in the ity in which he resided the last forty days of the ear. *Rex* v. *St. Nicholas, Hereford*, 8 Law J. M.C. 01, s. c. 10 B. & C. 832.

The office of parish clerk is sufficient to gain a ettlement, by reason of its being a freehold. Whether it is an annual office, according to the 3 William & Mary, c. 11. s. 6, and the 9 & 10 Will. 3. c. 11—*uære.*

But where a person performed the duties of the ffice of parish clerk, and received a yearly salary or several years, not having been chosen to the ffice by the vicar, nor appointed in any manner hatever:—Held, that he had not executed the ffice according to the 3 William & Mary, so as to ain a settlement. *Rex* v. *the Inhabitants of Stogurey*, 9 Law J. M.C. 48, s. c. 1 B. & Ad. 795.

In order to the gaining of a settlement by office, nder the 3 & 4 W. & M. c. 11, the person must be egally placed in the office, according to the 9 & 10 Will. 3. c. 11, (although he be not residing in the arish under a certificate,) the two statutes being onsidered as *in pari materiâ.*

A constable or a tithingman may legally execute he duties of his office without being sworn in, alhough he may be liable to punishment for not being o sworn.

Consequently, a tithingman, who was legally appointed, had notice to be sworn in, but never was worn,—yet, having served the office for a year, ras held to have gained a settlement.

A tithingman was appointed on the 5th of October for one year, and his successor was appointed n the 4th of October in the following year:—Held, hat there was a service of the office for a full year, s the tithingman was in office on each of the days, here being for this purpose no fraction of a day. *Rex* v. *the Inhabitants of Corfe Mullen*, 9 Law J. M.C. 19, s. c. 1 B. & Ad. 211.

### (C) Certificate.

A person who is residing in a parish under a certificate, cannot obtain a settlement by the purchase of property in that parish, whatever may be the amount of the purchase-money. He can obtain a settlement there only by one of three modes:—by taking a lease of property there, of the value of 10*l.*; by executing some annual office in the parish, to which he shall be legally appointed; or, by acquiring property there, which shall come to him, not by his own act, but by descent, or other act of law. Consequently, no settlement is gained by a service under an indenture of apprenticeship to a certificateman, who has not acquired a settlement by one or other of the above modes. *Rex* v. *the Inhabitants of Great Driffield*, 7 Law J. M.C. 36, s. c. 8 B. & C. 684.

The son of a certificated person, residing with his father under the certificate, as one of his family, cannot acquire a settlement in the certificated parish by apprenticeship, unless he be of the age of twenty-one at the time of the binding.

Such a person, bound while he was under twenty-one, was removed to the certifying parish; the removal was acquiesced in; the pauper then returned to the certificated parish, and resided there under the indenture:—Held, that this did not cure the original defect in the binding; and that no settlement was gained even by the service after the return from the certifying parish. *Rex* v. *the Inhabitants of Queenborough*, 9 Law J. M.C. 96, s. c. 2 B. & Ad. 219.

Where a certificate nearly eighty years old appeared to have been signed not by a majority of the parish officers for the time being, and the Sessions held it to be void, the Court would not support the certificate by presuming a supposed state of facts which were put in support of the certificate, but the existence of which facts was highly improbable, and was repugnant to the other established facts in the case. *Rex* v. *the Inhabitants of Upton Gray*, 8 Law J. M.C. 82, s. c. 10 B. & C. 807.

### (D) Removal.

[New provisions for the removal of Jersey and Guernsey paupers, 11 Geo. 4. c. 5, 8 Law J. Stat. 5.]

When an unmarried Irishwoman is delivered of a child in England, and becomes chargeable to the parish, she is removable to Ireland, under the 59 Geo. 3. c. 12. s. 33; but her child is not removable with her, even for the purpose of nurture; it being entitled, by its birth in England, to the benefit of the poor laws. *Rex* v. *Bennett and Broughton*, 9 Law J. M.C. 95, s. c. 2 B. & Ad. 71.

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## POPULATION.

[Account of, 11 Geo. 4. c. 30, 8 Law J. Stat. 71.

Provisions of 55 Geo. 3. relative to taking population of Ireland, extended, 1 Will. 4. c. 19, 9 Law J. Stat. 17.]

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## POST OFFICE.

A person employed, at a receiving-house of the general post office, to clean boots, &c., and to assist

in tying up the letter-bag, is not a servant of the post office, within the statute 52 Geo. 3. c. 143. s. 2. A receiving-house is not a post office, within that statute; but it is "a place for the receipt of letters;" and the whole shop is to be considered as the "place for the receipt of letters," and not the mere letter-box; and, therefore, if a person take a letter and put it on the shop counter of the receiving-house, or give it to one of the persons belonging to the shop there, that is putting the letter into the post. In an indictment on this statute, it was alleged that a letter was "to be delivered at T." The letter was addressed T House, which was a house in the parish of T:—Held sufficient.

To constitute the offence of stealing a letter from a place for the receipt of letters under section 3. of this act, it is essential that the letter should be carried out of the shop which was the place for the receipt of letters; and, therefore, if a person take a letter and steal its contents, without taking the letter out of the shop, that is not an offence within this section of the act of parliament. *Rex* v. *Pearson*, 4 C. & P. 572. [Littledale]

S was employed by a post-mistress to carry letters from Dursley to Berkeley, at a weekly salary, paid him by the post-mistress, but which was repaid to her by the post office:—Held, that S was a person employed by the post office, within the statute 52 Geo. 3. c. 143. s. 2.

But a letter sent from Cardiff to Dudley, but which, it was alleged, was mis-sent to Dursley, if stolen by S, would not be a letter which came into his hands "in consequence of his employment."

*Semble*—That the words "whilst employed," in sec. 2. of the stat. 52 Geo. 3. c. 143, relative to stealing letters, merely mean that the party should be then in the employ of the post office; and not that the letter, when stolen, was in the party's hands in the course of his duty. *Rex* v. *Salisbury*, 5 C. & P. 155. [Patteson]

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## POWER.

(A) Construction.
(B) Execution.
  (*a*) *Valid or void.*
  (*b*) *Defective, where aided.*
(C) How extinguished or destroyed.

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### (A) Construction.

A power to "give and bequeath," held to be a power to be exercised by will only, and that, in default of appointment, or in the event of a void execution of the power, those parties alone take who were alive at the time of the decease of the donee of the power. *Walsh* v. *Wallinger*, 9 Law J. Chanc. 7, s. c. 1 Tam. 425.

In a partnership deed it was stipulated, that the testator's interest in the partnership concern after his death, and during the term of the partnership, should go to such persons as he should by will name or appoint; and in default of appointment, that it should devolve to his wife; and in case of her death, to his children in equal shares; and in case of the death of all his children, to his executors or administrators:—Held, that the true construction of this, is not to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will.

The testator made a will, not containing any allusion to the power, by which he gave all his estate and effects to one of his children:—Held, that his interest in the partnership passed by the bequest. *Ponton* v. *Dunn*, 1 Russ. & M. 402.

Testator gave to his widow a life interest in a fund, with a power of appointment amongst all his children living at her death; and, in default of appointment, directed the fund to be divided amongst all such children, with a gift over to the widow, in case all the children died before their shares became payable.

The widow appointed the fund to the two surviving children; one of them died in her lifetime:—Held, that the only surviving child took, upon the widow's death, the whole of the fund. *Bielefeld* v. *Record*, 2 Sim. 354.

Though, generally speaking, an instrument must be construed by the provisions contained in it, and not by anything *dehors*; yet under the circumstances of the case,—Held, that the Court might call the language of a second bond in aid, in construing the effect of the first. *Fowler* v. *Hunter*, 3 Y. & J. 506.

Marriage settlement to the use of M for life; remainder to the use of trustees to preserve; remainder to the use of such one or more of the sons of M on the body of the wife, and for such estates, &c., as M should by deed or will appoint; remainder to use of first son, and other sons of M on the body of the wife in tail; with the ultimate remainder to the use of the heirs of M. The marriage takes place; there are two sons; the wife dies; a commission of bankrupt is issued against M, and the commissioners execute bargain and sale to the assignees, who, with M, by lease and release, convey to P M in fee. Afterwards M, by deed-poll, appoints in favour of his elder son, R M, in fee:—Held, that R M took no estate under the appointment, but took an estate tail under the settlement. *Badham* v. *Mee*, 9 Law J. C.P. 213, s. c. 7 Bing. 695.

### (B) Execution.

#### (*a*) *Valid or void.*

[Illusory appointments rendered valid in equity and at law, 1 Will. 4. c. 46, 8 Law J. Stat. 101.]

[*Reith* v. *Seymour*, 4 Russ. 263, Dig. Law J. 396. *Grant* v. *Lynam*, 4 Russ. 292, Dig. Law J. 396.]

A married woman had a power of disposing of property by deed, "to be by her sealed and delivered in the presence of and attested by two or more credible witnesses thereto," or by her last will: she signed and sealed a deed of appointment, the only attestation to which was in the following words, "Witnesses A B and C D:"—Held, that there was no attestation of the delivery, and, therefore, that the power was not well executed. *Butler* v. *Burt*, 7 Law J. Chanc. 107.

Where a party, who has an estate, and also a power, executes a deed which is defective under the power, but which would be good at common law, the estate will pass, though the party contemplated only an execution of the power.

An appointment directed to be signed, sealed,

and delivered in the presence of two credible witnesses, is not well executed if signed, sealed, and delivered in the presence of two persons, to one of whom an estate is appointed therein by way of remainder. *Doe* v. *Keir*, 4 M. & R. 101.

A will, manifesting on the whole an intention to execute a power, was held to operate as an appointment, notwithstanding that it contained expressions and made dispositions which would not have been used or made in a due exercise of the power.

Although a will does not state that it is made in execution of a power, yet, if it plainly refer to and comprise the subject of the power, it will be deemed a good execution. *Baily* v. *Lloyd*, 7 Law J. Chanc. 98.

A will is deemed a good execution of a power, if it dispose of the subject of the power, although it does not refer to the power.

The subject of the power will pass by the words of "all other my property," if it be plain, from the other expressions in the will, that, under these general words, the donee considered the property under the power to be included. *Walker* v. *Mackie*, 4 Russ. 76.

Testator gave 3,000*l.* to trustees, for C S for life; remainder to such persons as she should appoint. C S, by her will, disposed of all her personal estate, and then gave all sums, messuages, &c., and other interest to which she was entitled under the testator's will:—Held, that the latter gift was a good execution of the power. *Maples* v. *Brown*, 2 Sim. 327.

S S was seised of lands in the county of Surrey, as to one moiety in fee by descent. The other moiety was limited to her for her life, with a power to appoint an estate in fee by deed or will, with remainders over in default of appointment. S S by her will devised all her freehold estates in the county of Surrey to J R for life, on the condition, that out of the rents he should keep them in repair. At his death the lands chargeable with an annuity were by this will devised to the children of J R, with remainders over. S S died, leaving J R surviving; and she, at the respective times of making her will and her death, had no other lands in Surrey but those before stated. Upon the argument of a special verdict, stating these facts, held, in the Court of Common Pleas, that this was a valid execution of the power: but this judgment was reversed in the Court of King's Bench; and the judgment of the King's Bench was affirmed on a writ of error. *Roake* v. *Denn*, 4 Bligh, N.S. 1, s. c. 1 Dow. & Cl. A.C. 437, s. c. 6 Bing. 475.

An estate was devised to a trustee, with power to sell the same, and lay out the proceeds in the purchase of other lands, to be settled to the same uses, and with power, for the purpose of such sale, to revoke the original uses. The trustee revoked such uses, conveyed the *land* to a purchaser, and received the purchase-money for it, and applied it to the purposes of the trust. By the same conveyance, the tenant for life in possession (he being tenant for life without impeachment of waste) conveyed the *timber* growing on such land, and received the purchase-money for it, to his own use:—Held, that a tenant for life requiring an estate to be sold under such a power of sale, having in such case a qualified interest only in the timber, such powers were not well executed, and the uses not well revoked. *Cholmeley* v. *Paxton*, 8 Law J. K.B. 197, s. c. 10 B. & C. 564.

A woman, having a power under her marriage settlement to appoint certain leasehold estates and monies in the funds, in which she had a life interest, made a will, by which she bequeathed the whole of her property, real and personal, to A B; and she had no other property, except some arrears of the rents of the leaseholds and of the dividends of the stock:—Held, that the will was not an execution of the power. *Lovell* v. *Knight*, 8 Law J. Chanc. 44, s. c. 3 Sim. 275.

Where under a power lands are appointed to A, to the use of B, the legal estate remains in A. *Doe* v. *Haddon*, 4 M. & R. 118.

A general devise of all lands of which the testatrix had power to dispose, is not a good execution of a power to appoint monies, which were to arise from the sale of land. *Adams* v. *Austen*, 3 Russ. 461.

A deed by a son, releasing his right to a sum which was the subject of settlement,—held, coupled with expressions in the father's will, to amount to an appointment of the sum to the son. *Holmes* v. *Holmes*, 8 Law J. Chanc. 157, s. c. 1 Russ. & M. 660.

Bonuses on bank stock are capital.—A had a power of appointment over 7,150*l.* stock: certain bonuses accrued thereon, which were laid out upon stock, upon the trusts and subject to the appointment; and after the accretion of these, A exercised his power, but only noticed the original stock and the first bonus, thus—"And also the said sum of 715*l.* five per cent. &c., together with all such further additions, in the nature of profit, to be made to the said bank stock in my lifetime:"—Held, that all the bonuses passed under the appointment. *Carver* v. *Bowles*, 9 Law J. Chanc. 91.

A testator gives the residue of his property to his sister for life, with a power of disposing of it by will: part of the residue consisted of 7,000*l.* bank stock: after his death, there was added to this a bonus of 1,750*l.*; the sister shortly after the grant of the bonus, but before she was aware of it, made her will, whereby, as to all the monies which constituted the residue of her brother's personal estate, and which she had power to dispose of by will, consisting of 7,000*l.* bank stock, &c., she appointed every part thereof to certain persons:—Held, that the bonus of 1,750*l.* passed to the appointees under the sister's will. *Matthews* v. *Maude*, 8 Law J. Chanc. 106, s. c. 1 Russ. & M. 397.

A, having a power to appoint 10,000*l.* amongst his younger children, appoints it to them equally, reserving to himself a power of revocation as to 5,000*l.*, which he afterwards irrevocably appoints to E, one of the children, in consideration of her having agreed to apply part of it in payment of his debts. Afterwards A, by a deed, to which E is also a party, revokes, with her consent, the last appointment, as to 2,500*l.*, and, in pursuance of all powers, appoints that sum to a child by a second marriage, and confirms E's title to the remainder under the former appointment:—Held, that the appointment of the 5,000*l.* being void, the appointment of the 2,500*l.* must also fail. *Farmer* v. *Martin*, 2 Sim. 502.

By a marriage settlement, a fund was vested in trustees, in trust for all and every the child and

children of the marriage, in such shares, at such age or ages, time or times, and subject to such conditions, restrictions, and limitations as the wife, in case she survived her husband, should appoint. There was one child only of the marriage. The wife appointed the fund to that child, for her separate use, for life, and after her decease, to such persons as the child should appoint; and, in default of such appointment, to the executors or administrators of the child:—Held, that the power in the settlement was well exercised. *Bray* v. *Hammersley*, 3 Sim. 513.

A, having power to appoint 700*l.*, which was to be raised under the trusts of a term, by her will appointed that sum to the persons whom she made her executors, in trust; but she did not declare expressly any trust of that sum. She then bequeathed her personal estate to the same persons, in trust, and subject to the payment of her debts and legacies:—Held, in a suit instituted by the legatees, that the 700*l.* ought to be raised and applied in the same manner as the testatrix's personal estate. *Goodere* v. *Lloyd*, 3 Sim. 538.

A testator gave a fund to his wife, trusting that at her decease she would give and bequeath the same to her children by him, as she should appoint. By will the widow appointed to five of her seven daughters:—Held, that the appointment was void, all the children being entitled to the benefit of the fund. *Walsh* v. *Wallinger*, 1 Tam. 425.

A testator, in designating the objects of a power of appointment given to his daughter, used the words "issue," and "child or children," synonymously. In a subsequent part of his will, he gave his son a power of appointment over a different part of his property, and, in pointing out the objects of it, used the words "issue" simply. The son had both children and grandchildren living at his death:—Held, that an exercise of the power in favour of the former only, was void. *Dalzell* v. *Welch*, 2 Sim. 319.

Power to appoint amongst children, or some or one of them, with limitations over for benefit of one or more of such children, or his or their issue. The donee of the power appointed equal shares to his daughters respectively for life, for their separate use; then to their issue, as they (the daughters respectively) should appoint; in default, amongst the issue equally:—Held, that, subject to the life-interest of the wives for their separate use, the shares appointed to the daughters belonged to them and to their husbands in their right. *Carver* v. *Bowles*, 9 Law J. Chanc. 91.

Where there is a general power of appointment among children, and the appointment by any circumstances becomes void, the children take as tenants in common.

A, having been indebted to the estate of B in a sum of money, but from which he had been discharged under a commission of bankrupt, voluntarily executed to C, the widow of B, a bond for the payment of part of such debt, for the use of herself and children, but at her disposal. Two years afterwards, A executed to C another bond, for the payment of the remainder of such debt, for the use and benefit of herself and children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever:—Held, that the widow took a life interest in the money secured by the bonds, and that the principal, after her decease, became payable among the children, in such manner and in such proportions as she should direct; and the widow, having made an exclusive appointment in favour of two of her children,—it was held, that such appointment was void, and that all the children took as tenants in common. *Fowler* v. *Hunter*, 3 Y. & J. 506.

J S M, being entitled to the dividends of 4,300*l.* for life, with a power to appoint by any deed or writing the principal after his death, and in default of appointment, to his next of kin, and being in prison for debt and in great distress, is prevailed upon by H C to enter into an agreement for sale of the principal after his death, in consideration of 1,000*l.* and other sums therein stated to have been previously lent and advanced to him by H C. By a subsequent deed, in consideration of 1,854*l.* therein stated to be due from J S M to H C, and of 1,000*l.* paid by J L M and others, J S M, by the direction of H C, appointed that the principal should, on his death, be transferred to J L M and others, with a proviso, that they should assign the same to H C, on payment of 1,000*l.* and interest, and all further advances. The 1,854*l.*, or any part of it, had not in fact been advanced by H C:—Held, that this was a clear fraud. Held, that the appointment was well executed; the next of kin of J S M had no claim; that H C was a trustee for the personal representatives of J S M, for the excess beyond the money received by J S M; that H C should pay costs. *Miller* v. *Minet*, 1 Tam. 481.

### (*b*) *Defective, where aided.*

*Semble*—A plaintiff ought never to come into a court of equity to have an alleged defect in the execution of a power supplied, without admitting on the record, that, at law, the power has not been well executed. *Cockerell* v. *Cholmeley*, 3 Russ. 565.

A court of equity relieves against a defective execution of a power, only when the defect consists in the want of some circumstance in the manner of execution; and it will reform a deed, where the intention of the parties is mistaken by the drawer, but will not correct an error in an instrument occasioned by the ignorance of the parties in matter of law.

In order to work confirmation, the party said to confirm must know the law as well as the fact.

Where judgment had been given at law, that a power of sale had not been well executed, the defendants at law, claiming under the alleged execution of the power, filed a bill in equity to have the defect in the execution of the power supplied, and the instrument by which it had been executed rectified; and they at the same time prosecuted a writ of error on the judgment. The suit in equity having been brought to a hearing,—Held, that the plaintiffs in equity were bound to elect, either to have the bill dismissed, or to abandon the writ of error.

Lands were devised to a trustee and his heirs, to the use of A for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property, or any part of it, and to lay out the money in the purchase of other lands to be settled to the same uses; and, in the meantime, to invest it in the public funds;

nd, for the purposes of such sale, to revoke the riginal uses, and appoint new uses. A contract was ntered into for the sale of the estate for 13,400*l.*, xclusive of the timber, which was to be taken at a aluation; and, it being conceived that the tenant or life, without impeachment of waste, was entitled o receive for his own benefit the amount of the aluation of the timber, a deed was executed, by hich he, in consideration of 2,448*l.*, conveyed the imber to the purchaser; and the trustee, in consideration of 13,400*l.*, conveyed the land, exclusive f the timber. Many years afterwards, the tenant or life, being advised that he was not entitled to he amount of the valuation of the timber, transerred to the trustee as much three per cent. stock s 2,448*l.* would have produced at the time of the ale. After the death of A, the next remainderan, though he had concurred in proceedings in hich the fund produced by the sale was treated as pplicable to the purposes of the testator's will, rought a writ of formedon, and obtained judgment, n the ground that the power of sale was not exeuted:—Held, that a court of equity could not reeve against that judgment. *Cockerell* v. *Cholmley*, Russ. & M. 418, s. c. 1 Tam. 435.

(C) How extinguished or destroyed.

What powers of appointment are capable of being xtinguished or released. *West* v. *Berney*, 1 Russ. : M. 431.

*Semble*—Where a tenant for life, having a power charge the estate after his death for the benefit f his children, levies a fine,—the power will be xtinguished.

By a marriage settlement, lands were limited to e use of the husband for life, remainder to the ife for life, remainder to trustees for a term of ur hundred years, to commence from the decease f the survivor of the husband and wife, remainder the heirs of the body of the wife begotten by e husband, remainder to the heirs of the husband. he trust of the term was, in case there should be sue of the marriage a son and one or more younger ild or children, who should live to attain his, her, r their age or ages of twenty-one years, to raise ch sum, not exceeding 200*l.* in the whole, as the usband and wife should by any deed or writing ppoint, or, in default thereof, as the survivor should y deed or writing, or his or her last will or testaent, appoint; and, in default of such appointent, or subject thereto, after the monies so appinted should have been raised, and the costs of e trustees paid, the term was to cease, or be asgned in trust to attend the inheritance. There ere younger children of the marriage, who attained enty-one. The wife died without having joined any appointment, and afterwards the husband vied a fine of the premises:—Held, that the power as extinguished by the fine. *Bickley* v. *Guest*, Russ. & M. 440.

## POWER OF ATTORNEY.

A power of attorney authorising a surrender of opyhold premises for the purposes of sale, in order at the person authorized may be satisfied a debt, a power coupled with an interest, and therefore cannot be revoked. *Gaussen* v. *Morton*, 8 Law J. K.B. 313, s. c. 10 B. & C. 731.

## PRACTICE.

1. *AT COMMON LAW.*

[See 1 Will. 4. c. 70, 8 Law J. Stat. 157.]

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- (a) *When to declare.*
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3. *IN THE ECCLESIASTICAL COURTS.*
4. *IN THE HOUSE OF LORDS.*
5. *IN CRIMINAL PROCEEDINGS.*
6. *IN THE COURTS OF ADMIRALTY.*—[See ADMIRALTY.]

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(1) *AT COMMON LAW.*

(A) PROCESS.

(a) *Indorsement.*

An attorney, plaintiff in a cause, is not within the operation of the 7 & 8 Geo. 4. c. 71. s. 8, which requires the writ to be indorsed with the name and place of abode of the attorney, by whom it is issued. *Hamilton* v. *Jones*, 8 Law J. C.P. 279, s. c. 4 M. & P. 523.

(b) *Service.*

Service of a writ directed to the chamberlain of Chester is irregular, without his mandate to the sheriff. *Earl of Shrewsbury* v. *Haycroft*, 6 Bing. 194, s. c. 3 M. & P. 471.

Where the defendant eluded service of process, and it was given to his son, who promised to deliver it to his father—the Court refused to set aside proceedings, on an affidavit by defendant, that he was not served; because the defendant did not produce an affidavit of his son, nor shew what became of the writ, nor swear that he had had no knowledge of the writ. For anything that appeared in his affidavit, the son, by his father's order, might have put the writ into the fire. *Rhodes* v. *Innes*, 9 Law J. C.P. 116, s. c. 7 Bing. 329, s. c. 5 M. & P. 153.

Affidavit to obtain a *distringas* upon a *venire* without personal service, pursuant to 7 & 8 Geo. 4. c. 71. s. 5,—what it must shew. *Pitt* v. *Eldred*, 9 Law J. Exch. 23, s. c. 1 Tyrw. 128, s. c. 1 C. & J. 147.

Where it is sought to compel an appearance by leaving a copy of the *venire facias* at the premises of the defendant, on the ground that the defendant keeps out of the way, the affidavit for the *distringas* must distinctly disclose circumstances from which the Court cannot fail to conclude that the defendant keeps out of the way to avoid personal service. *Winstanley* v. *Edge*, 9 Law J. Exch. 61, s. c. 1 C. & J. 381, s. c. 1 Tyrw. 276.

The date of issuing a writ not indorsed on the copy—Court held the rule M. T. 1 W. 4. in that respect directory, and refused to set aside process. *Miller* v. *Bowden*, 9 Law J. Exch. 192, s. c. 1 C. & J. 563.

The Court will not grant a *distringas*, upon an affidavit of the belief of the deponent, that the defendant keeps out of the way to avoid personal service; but it must also be made to appear, to the satisfaction of the Court, that the defendant keeps out of the way to avoid service, and the grounds for the belief must be stated. *Godkin* v. *Redgate*, 1 C. & J. 401, s. c. 1 Tyrw. 287.

Requisites of affidavits in order to found a *distringas*. *Dobell* v. *King*, 1 Tyrw. 498, n.

Partners residing at Hamburgh had a warehouse in Manchester, where the business was carried on by managing agents. Plaintiffs issued a *venire ad respond.* against them, and served it at the warehouse. Afterwards they issued a *distringas*, on which the sheriff levied 40*l.*, and gave notice as a proceeding under the statute 8 Geo. 4. c. 71. s. 5:—Held, that the service was a nullity and the *distringas* irregular. *Hall* v. *Gumpel*, 9 Law J. Exch. 149. s. c. 1 Tyrw. 490, s. c. 1 C. & J. 539.

The Court will not increase issues upon a *distringas* at common law since the stat. 7 & 8 Geo. 4. c. 71. s. 5. has enacted a course of proceeding by *distringas*. *Pennell* v. *Kingston*, 9 Law J. Exch. 191, s. c. 1 Tyrw. 495, s. c. 1 C. & J. 548.

*Quære*, whether a *distringas* under the statute may issue immediately upon the return of the *venire*. *Semble*—that the time within which a *distringas* may issue, after the return of the *venire*, is in the discretion of the Court. *Thomas* v. *Elder*, 1 C. & J. 517, s. c. 1 Tyrw. 496.

(c) *Return.*

An attachment of privilege made returnable on "Wednesday next after fifteen days of St. Hilary," is irregular. *Adcock* v. *Felton*, 8 Law J. C.P. 146, s. c. 6 Bing. 441.

By 1 Will. 4. c. 3, writs, formerly returnable on general return days may be made returnable on any of the three days before, and on any day within the term, excepting the last three days of the term, the return day not being on a Sunday. *Anonymous*, 9 Law J. C.P. 228.

(d) *Irregularity.*

Where process is amendable of course, it will not be set aside for irregularity. *Popkins* v. *Smith*, 9 Law J. C.P. 173, s. c. 7 Bing. 434, s. c. 5 M. & P. 319.

A bailable bill of Middlesex, with an *ac etiam* clause, stating the cause of action to be "for 120*l.* according to the custom," &c., but without stating what was the nature of the action:—Held, to be irregular. *Ewington* v. *Allen*, 7 Law J. K.B. 87.

A writ tested in this court, "Sir Nicholas Tindal, Knight," instead of "Sir Nicholas Conyngham Tindal, Knight," is irregular, and the Court will set aside the service. *Anonymous*, 8 Law J. C.P. 150.

Subpœna, tested 9th May, to appear 21st of March instant. The Court considered that the defendant could not possibly have been misled, and that the words "of March," might be rejected as repugnant, whereupon the word "instant" would have a correct conclusion. *Page* v. *Carew*, 9 Law J. Exch. 192, s. c. 1 C. & J. 514.

A latitat duly issued, returned, and continued, to save the Statute of Limitations, is well connected with a bill of Middlesex, by which the defendant is ultimately brought into court; the description of process being the same; and the latitat always presupposing a bill of Middlesex. *Page* v. *Newman*, 7 Law J. K.B. 1; s. c. 8 B. & C. 489, s. c. 2 M. & R. 29.

(B) APPEARANCE.

To a subpœna issued at the suit of the Attorney

General, a defendant has a right to appear in person, and to have such appearance recorded in court, without payment of fees to, or the employment of, a clerk in court for such appearance. *The Attorney General* v. *Carpenter*, 9 Law J. Exch. 80, s. c. 1 C. & J. 289, 409, s. c. 1 Tyrw. 280.

(C) Declarations.

(a) *When to declare.*

Where a detainer for debt was lodged against a person in custody on a criminal charge, who was afterwards convicted and sentenced to a year's imprisonment:—Held, that the creditor was not bound to declare during that period. *Altroffe* v. *Lunn*, 9 B. & C. 395.

In a bailable action, the plaintiff may declare conditionally after the time for putting in and perfecting bail has expired, although the defendant has not put in bail. *Windover* v. *Cooper*, 8 Law J. K.B. 209, s. c. 10 B. & C. 614.

In a bailable action, if the plaintiff, on the return of the writ, declare "conditionally, until special bail be put in and perfected;" that expression is understood, "until the defendant be in court;" and where, in such a case, after the plaintiff had so declared, the defendant obtained a rule for cancelling the bail-bond on filing common bail, and did afterwards file common bail—it was held, that the plaintiff might proceed in the cause upon that declaration. *Montgomery* v. *Garrett*, 9 Law J. K.B. 2.

Where the writ was returnable in one term, and the defendants duly appeared, and the declaration was afterwards delivered, entitled of a subsequent term:—Held, by Mr. Justice *Bayley* and Mr. Justice *Littledale*, that this was not an irregularity, though the defendant might apply to have the title of the declaration altered.—Contrà, Mr. Justice *Parke*, who thought it was an irregularity. *Beesten* v. *Beckett*, 7 Law J. K.B. 193.

(b) *By the bye.*

No person can deliver a declaration by the bye in the Court of Exchequer, except the original plaintiff. *Griffith* v. *Humphreys*, 3 Y. & J. 218.

(c) *Form.*

The rule of court which requires a plaintiff to insert in his writ the names of all the defendants in the action, does not prevent his issuing a writ against two, and declaring against one only, in case the other does not appear, and the plaintiff does not appear for him. *Evans* v. *Whitehead*, 7 Law J. K.B. 41, s. c. 2 M. & R. 367.

A *venire* was issued against one defendant, and a *nuo minus* against another—neither process being bailable:—Held, that serviceable process being merely to bring the parties into court, a delaration against both jointly was not irregular. *Pitt* v. *Wilks*, Law J. Chanc. 101, s. c. 1 C. & J. 388, s. c. 1 Tyrw. 303.

Where, of three defendants, two only are brought into court, the plaintiff cannot regularly declare; the irregularity is, however, waived by their pleading. *Hamilton* v. *Jones*, 4 M. & P. 456.

(d) *Notice of.*

A notice of declaration, whether the declaration be filed conditionally or in chief, must express the nature of the action. *Sams* v. *Culham*, 7 Law J. K.B. 171, s. c. 9 B. & C. 380.

*Quære*—Whether notice of declaration, *de bene esse*, can be regularly served on the day on which the process be served and the writ returnable?—*Semble*, that if it may, it is good service if any interval elapse between the delivery of the writ and the notice of declaration. *Nock* v. *Southall*, 13 Price, 800.

(e) *Striking out Counts.*

In an action against coach proprietors, for not conveying the plaintiff and his luggage, the declaration contained several counts, laying the breach of contract in various ways, but not materially altering the one from the other,—the Court would not order any of the counts to be struck out, as the plaintiff might be defeated at the trial, on the ground of a variance between the declaration and proof. *Anonymous*, 7 Law J. C.P. 115.

(D) Pleas.

(a) *Rule to plead.*

After demurrer, and amendment of the declaration, *on payment of costs*, in the vacation succeeding the term of which the declaration is delivered, the defendant is entitled to a new rule to plead. *Addis* v. *Thomas*, 8 Law J. C.P. 29, s. c. 6 Bing. 236, s. c. 3 M. & P. 560.

(b) *In Abatement.*

The plaintiff cannot sign judgment after plea in abatement, because the affidavit to verify the plea was sworn before the defendant's attorney. He should apply to the Court to set aside the plea. Such a plea, filed before common bail has been filed, is warranted by common bail filed on the same day; so that the plaintiff cannot sign judgment on a following day. *Edwards* v. *Minchin*, 7 Law J. K.B. 258.

Where an affidavit verifying a plea in abatement, which refers to a declaration, is sworn before the declaration is delivered, such plea is a nullity; and judgment may be signed by the plaintiff notwithstanding. *Bower* v. *Kemp*, 9 Law J. Exch. 80, s. c. 1 C. & J. 287.

(c) *Special Pleas.*

In assumpsit, the Court will not allow a party to plead specially (with the general issue) that which may be given in evidence under the general issue, unless the plea be simple, and tending to a single issue. *Hammond* v. *Teague*, 7 Law J. C.P. 263, s. c. 6 Bing. 197, s. c. 3 M. & P. 474.

(d) *Puis darrein Continuance.*

Notwithstanding his being under terms to rejoin issuably, a defendant is at liberty to plead *puis darrein continuance*. *Bryant* v. *Perring*, 7 Law J. C.P. 152, s. c. 5 Bing. 414, s. c. 2 M. & P. 760.

A plea *puis darrein continuance* stated, that, since the last continuance, the plaintiff had recovered a judgment for the same cause of action; the affidavit to verify this plea, stated the time at which the judgment was recovered, which by reference to the Nisi Prius record, appeared to be not since the last continuance:—Held, that this affidavit did not

verify the plea, and that the plea could not be received. *Minshall* v. *Evans*, 4 C. & P. 555. [Patteson]

(*e*) *Pleading de novo.*

In an action for an assault and false imprisonment, the defendant pleaded the general issue, and, a verdict having been found for the plaintiff with 100*l.* damages, the defendant obtained a new trial on the ground of their excess, and afterwards obtained a Judge's order to withdraw the general issue, and plead accord and satisfaction. The Court discharged the order. *Price* v. *Severn*, 9 Law J. C.P. 101, s. c. 7 Bing. 402, s. c. 5 M. & P. 250.

(*f*) *Sham Pleas.*

Where a sham plea is so framed as to lead to two modes of trial, *or* is otherwise so out of the usual course, as to put the plaintiff's attorney to unusual delay, or to the necessity of consulting counsel, before he can reply,—the Court will set aside the plea, give leave to the plaintiff to sign judgment, and order the defendant's attorney to pay the costs of the application. *Starling* v. *Pain*, 7 Law J. K.B. 38.

The plaintiff declared on a bill of exchange due on the 5th of December; the defendant pleaded a judgment recovered as of the *preceding* Michaelmas term; the plaintiff treated the plea as a nullity, and signed judgment:—The Court refused to set aside the judgment, the plea being on the face of it false. *Vere* v. *Carden*, 7 Law J. C.P. 152, s. c. 5 Bing. 413, s. c. 2 M. & P. 763.

(*g*) *Striking out.*

The defendant was by mistake arrested under a *ca. sa.* as the bail of one E M, instead of the real bail, a person of the same name. After the defendant (the plaintiff, in the original suit, and his attorney) had been informed of their mistake, they still detained the plaintiff in custody for several days. In trespass for the false imprisonment, the defendants pleaded in bar the recognizance of bail in the former action. The Court refused to strike out the plea, though evidently false within the knowledge of the defendants. *M'Crandle* v. *Barwise*, 8 Law J. C.P. 135, s. c. 6 Bing. 429, s. c. 4 M. & P. 120.

(E) Entering the Issue.

Where a cause has been at issue for more than four terms and no proceedings taken, the defendant must give the plaintiff a term's notice of his intention to proceed before he rules the plaintiff to enter the issue. *Lord* v. *Hillier*, 7 Law J. K.B. 307, s. c. 9 B. & C. 621.

(F) Particulars of Demand.

Where a plaintiff declares specially, as upon a special contract, adding counts for work and labour, and in his particulars does not expressly refer to the counts for work and labour, and on the trial fails upon the special counts, *semble* that he cannot then resort to the counts for work and labour. *Read* v. *Rann*, 8 Law J. K.B. 144, s. c. 10 B. & C. 438.

(G) Trial.

(*a*) *At Bar.*

A suggestion *ore tenus* by the Attorney General, that the Crown is interested in a suit depending between subject and subject, is a sufficient ground for ordering a trial at bar. *Rowe* v. *Brenton*, 5 Law J. K.B. 137, Dig. 406, s.c. 3 M. & R. 133.

In a trial at bar, each of the presiding Judges makes such observations to the jury, upon the whole case, by way of direction, as he considers to be requisite. *Rowe* v. *Brenton*, 3 M. & R. 364.

(*b*) *Order of.*

Application was made on the part of the plaintiff, to have a cause taken out of its turn, in order that it might be tried during the existing sittings, on the ground that the defendant had died since the commencement of such sittings. The application was opposed on the part of defendant's executors, and refused by the Chief Justice of the Common Pleas, after time taken to consider. *Isard* v. *Milner*, 4 C. & P. 285. [Tindal]

(*c*) *Putting off.*

The Court will not put off a trial at the instance of the plaintiff, beyond the present sittings, on account of the smallness of the claim, and the alleged poverty of the plaintiff. *Fendal* v. *Marriott*, 2 M. & M. 1. [Tenterden]

It is not sufficient ground for the postponement of a trial, that a witness, rendered incompetent by bankruptcy, has had his certificate allowed by a number of his creditors, sufficient to enable him to be discharged on a particular future day, and that he is not in expectation of any opposition to its allowance by the Lord Chancellor. *Tennant* v. *Strachan*, 2 M. & M. 377, s. c. 4 C. & P. 31. [Tenterden]

(*d*) *Mode of conducting in Court.*

The plaintiff's counsel has a right to begin and state the facts, although by a rule of court the defendant is under obligation to admit the plaintiff's case. *Thwaites* v. *Sainsbury*, 5 C. & P. 68. [Tindal]

In an ejectment by the heir-at-law, the defendant is not entitled to begin by admitting the heirship and seisin of the ancestor, unless defeated by a conveyance made by the ancestor, under which the defendant claims. To entitle the defendant to begin, the plaintiff's whole *primâ facie* case must be admitted. *Doe* d. *Tucker* v. *Tucker*, 1 M. & M. 536.

In ejectment, where each party claimed as heir-at-law, and the real question was as to the legitimacy of the defendant, who was *clearly heir*, if legitimate, he proposed to admit that, unless he were legitimate the lessor of the plaintiff was the heir-at-law:—Held, that this admission did not give him the right of beginning. *Warren* v. *Bray*, 2 M. & M. 166. [Vaughan]

In trespass for entering plaintiff's dwelling-house, and taking his goods; on a plea, justifying the trespass, by proceedings under a commission of bankruptcy, and replication taking issue on the act of bankruptcy, the defendant is entitled to begin. *Cotton* v. *James*, 2 M. & M. 273, s. c. 3 C. & P. 505. [Tenterden]

In trespass, where there are special pleas of justification, but no plea of the general issue, the defendant is entitled to begin, although the declaration alleges special damage. *Fish* v. *Traters*, 3 C. & P. 578.

If a court of equity directs an action of trover to brought, and orders that the defendant shall lmit the finding and the conversion of the goods. his does not give the defendant the right to begin. *urberville* v. *Patrick*, 4 C. & P. 557. [Bosanquet]

In replevin, if there be any affirmative issue on e plaintiff, he is entitled to begin. Accordingly, an avowry for rent in arrear, plea, that the tenant had let other property to the defendant at a rger rent, and that it was agreed that the two nts should be set off against each other, and that consequence, a larger sum was due to the tenant, an the sum distrained for by the defendant. Replication, denying this agreement:—Held, that on ese pleadings, the defendant was entitled to begin. *urtis* v. *Wheeler*, 4 C. & P. 196, s. c. 1 M. & M. 93. [Tenterden]

In replevin, there was a cognizance for rent in rear. To this there were two pleas, the one stating that a certain agreement had been entered into atween the landlord and tenant, and that the tenant as subsequently induced by the landlord to enter ito another agreement; which second agreement as the demise in the cognizance mentioned; and that his latter agreement had been abandoned by mutual onsent, before any rent became due. The other lea was similar, except that it averred that the nant was induced to enter into the second agreement by fraud. Replication to the one, denying the baudonment, and to the other, denying the fraud: —Held, that on these pleadings, the plaintiff had o right to begin. *Williams, administrator of Williams*, v. *Thomas*, 4 C. & P. 234. [Bolland]

If, in an action for libel, the defendant plead justifications, without pleading the general issue, and he affirmative of the issue be on the defendant, he s entitled to begin, and the plaintiff has not, in uch case, a right to begin, with a view of proving he amount of his damages. *Cooper* v. *Wakley*, 3 C. & P. 474, s. c. 1 M. & M. 248. [Tenterden]

On a plea in abatement to an action on bills of exhange, of the non-joinder of a joint contractor, the lefendant is entitled to begin. *Fowler* v. *Coster*, 2 M. & M. 241, s. c. 3 C. & P. 463. [Tenterden]

In ejectment, where defendants defend in the same ight, but by different counsel, only one counsel an address the jury. They may adduce separate evidence, and both counsel cross-examine the witnesses. *Hogg* v. *Tindal*, 2 M. & M. 314, s. c. 3 C. & P. 565. [Tenterden]

In trover, where two defendants defend by the same attorney, and in the same interest, but one appears by counsel, and the other in person, the counsel only is entitled to address the jury; but both he and the defendant appearing in person may cross-examine the witnesses. *Perring* v. *Tucker*, 2 M. & M. 391, s. c. 4 C. & P. 75. [Tindal]

Where, on the trial of an issue out of the Court of Chancery, a person who is not a party on the record is, by order of that Court, "to be at liberty to attend the trial of such issue;" the counsel of such person has no right to address the jury, or to call witnesses; but he may cross-examine the witnesses called by both parties, and suggest points of law. *Wright* v. *Wright*, 4 C. & P. 389, s. c. 7 Bing. 459, n. [Littledale]

Where, in an action between subjects, the Crown interfered *pro interesse sue*, and undertook the defence of the cause, and witnesses were called on both sides, the plaintiff was allowed the general reply. *Rowe* v. *Brenton*, 3 M. & R. 304.

*Semble*, that it would be a good practice, in the administration of justice, to keep all the witnesses out of court at Nisi Prius, except the person under examination. *Taylor* v. *Lawson*, 3 C. & P. 543. [Best]

The witnesses had all been ordered out of court, but one of them came into court again, and heard the evidence of another witness. The witness who had so come back into court, was allowed to be examined as to such facts only as had not been spoken to by any other witness. *Beamon* v. *Ellice*, 4 C. & P. 585. [Taunton]

A defendant's attorney, who has been subpœnaed on the part of the plaintiff, may, at the desire of his counsel, remain in court during the trial of the cause, although an order has been made for the witnesses on both sides to withdraw. *Everett* v. *Lowdham*, 5 C. & P. 91. [Bosanquet]

Where on the pleadings the affirmative is on the defendant, the plaintiff need give no evidence. *Gray* v. *Atkins*, 8 Law J. C.P. 132.

Where a party tendered evidence *primâ facie* admissible:—Held, that the other party ought not to be allowed to interfere with evidence for the purpose of excluding it, but that it should be received and expunged, if afterwards shewn not to be properly receivable. *Jones* v. *Fort*, 2 M. & M. 196. [Tenterden]

In an action for a malicious arrest, the plaintiff's counsel had closed his case, and the defendant's counsel had begun to address the jury, when the Lord Chief Justice said he would nonsuit, on the ground that there was no evidence of malice. The plaintiff's counsel wished to adduce further evidence, but was not permitted, the Lord Chief Justice observing, that the rule of not permitting a party to adduce fresh evidence, after such party had closed his case, had been already too much relaxed. *George* v. *Radford*, 3 C. & P. 364. [Tenterden]

### (H) Rules and Orders.

In the affidavit of service of a rule to compute, it is not necessary to state that the original rule was shewn to the party. It seems that the original need only be exhibited in cases where it is proposed to bring the party into contempt. *Holmes* v. *Senior*, 9 Law J. C.P. 48, s. c. 7 Bing. 162, s. c. 4 M. & P. 828.

An order was obtained for delivery of particulars of set-off within a fortnight: they were not delivered for five weeks, but after the delivery an order was made, by consent, for the amendment of the declaration. This is a waiver of the irregularity in the delivery of the particulars. *Wallis* v. *Anderson*, 1 M. & M. 291. [Tenterden]

### (I) Proceedings.

#### (a) *Where stayed.*

The plaintiff, an attorney, sued the defendant, his agent, for negligence in the conduct of his business, averring general damage. The cause was referred, under the usual order of Nisi Prius, and the arbitrator awarded a verdict to be entered for the plaintiff. The plaintiff afterwards commenced a second action for special damage arising out of the same matters, viz. the loss of the business of certain per-

same annual. The Court, on motion, refused to stay the proceedings in this second action. *Dicas* v. *Jay*, 8 Law J. C.P. 210, s. c. 6 Bing. 519, s. c. 4 M. & P. 285.

The lessors of the plaintiff brought three ejectments in the Court of King's Bench, for the recovery of the same premises. That Court stayed the proceeding in two of the actions, both parties assenting, and the rule was drawn up accordingly. Another ejectment was afterwards brought in this court, upon a different demise, but substantially for the same cause of action:—The proceedings were ordered to be stayed. *Doe* d. *Carthew* v. *Brenton*, 8 Law J. C.P. 143, s. c. 6 Bing. 469, s. c. 4 M. & P. 148.

Where an heir-at-law brought an ejectment to recover part of the devised premises, and failed, and afterwards brought a second ejectment against other parties, who held other parts of the devised premises, the Court refused to stay the proceedings in the second action, until the costs of the first were paid. *Doe* v. *Harris*, 4 M. & R. 569.

(*b*) *Where set aside.*

A judgment signed after declaration served, and a rule to plead, but before appearance, and without a demand of plea, was set aside, although the defendant had afterwards taken out a summons for time to plead. *Vernon* v. *Blackett*, 8 Law J. C.P. 198.

## 2. *IN EQUITY.*

### (A) Rules of.

In equity, the rules of court in respect of practice are to be strictly observed only where the occasions which rendered them requisite are present, and require their observance. *Vinter* v. *Bickley*, 12 Price, 460.

### (B) Bills.

(*a*) *To perpetuate Testimony.*

A motion to dismiss a bill to perpetuate testimony for want of prosecution, is irregular. The proper application is, that the plaintiff may proceed within a given time, or may pay the defendant his costs. *Wright* v. *Tatham*, 2 Sim. 459.

(*b*) *Of Revivor.*

If a defendant does not plead or demur to a bill of revivor, but answers, the plaintiff has a right immediately to obtain an order of revivor, notwithstanding that his right to revive is contested by the answer. *Lewis* v. *Mallett*, 7 Law J. Chanc. 124.

To prevent a suit from being revived, either a plea or demurrer must be put in the bill of revivor; an answer insisting that the plaintiff has no right to revive, is not sufficient. *Lewis* v. *Bridgman*, 2 Sim. 463.

An alleged defect of parties in the frame of a first bill of revivor, affords no reason for allowing a second bill of revivor to remain on the file. *Livesey* v. *Livesey*, 1 Russ. & M. 10.

(*c*) *Supplemental and of Review.*

A supplemental bill, in the nature of a bill of review, may be filed in respect of new matter, even though the new matter be of such a kind, that it cannot be used as evidence of anything which was before in issue in the cause, but tenders an entirely new issue.

But, except under very particular circumstances, a party will not obtain leave to file a bill of review, or to proceed in it, unless he performs the original decree.

A party, however, may file a bill of review, and proceed in it, though he has not done what the original decree directs to be done, provided the proceedings under the decree are in such a state that the other party could not, at the time of filing the bill and proceeding in it, have brought him into default for non-performance.

In a suit for specific performance by a vendor against a vendee, the only defence set up was, that the plaintiff could not make a good title: that defence failed, and a decree for specific performance was pronounced: in the meantime, the defendant had discovered that the representations of the vendor, as to the quantity of timber, which formed the principal value of the estate, were false: leave was given him to file a supplemental bill in the nature of a bill of review, on the ground of the subsequently discovered falsehood of the vendor's representations.

In such a case, the vendee will not be relieved from paying his purchase-money to the vendor, though the sum be very large.

But he has a right to file his bill without paying the money, if the time for the payment of the purchase-money, in the due course of the execution of the decree, had not arrived.

*Semble*, as soon as the time for the payment of the money arrived, in the course of the due execution of the original decree, the vendee would not be allowed to proceed in his bill of review, without paying the money to the vendor. *Partridge* v. *Usborne*, 7 Law J. Chanc. 49.

A plaintiff must establish, at the hearing, that he had a title to relief at the time of filing his bill; or, if he relies on matter subsequent, he must file a supplemental bill. *Barfield* v. *Kelly*, 4 Russ. 335.

(*d*) *Amended.*

[See Amendment.]

[*Pratt* v. *Barker*, 4 Russ. 507, Dig. Law J. 413.]

Process being prayed against two defendants, who were within the jurisdiction, and against a third defendant, who was stated to be out of the jurisdiction, whenever he should come within the jurisdiction, the two defendants who were within the jurisdiction answered; the third defendant had not appeared; and the plaintiff obtained, as of course, an order to amend after more than six weeks had elapsed from the time when the answer of the only defendants who were within the jurisdiction was to be deemed sufficient:—Held, that the order was irregular. *The King of Spain* v. *Hullett*, 8 Law J. Chanc. 8, s. c. 3 Sim. 338.

If a bill, after being filed, is then amended, it is irregular to put it again upon the file without a fresh signature to the draft, although the amendments have only reduced it to the shape in which it was originally drawn and signed by counsel. *Burch* v. *Rich*, 1 Russ. & M. 156.

(*e*) *Dismissing.*

A party ought not to have his bill put out of court, because he was accidentally too late to have

he replication filed on the proper day. *Anon.* 8 aw J. Chanc. 11.

Upon a motion to dismiss, the delay in prosecuting the suit was satisfactorily accounted for.—'he Court refused to make any order upon the iotion, or to require the plaintiff to undertake to peed. *Vent* v. *Pacey*, 3 Sim. 382.

Where a plaintiff in a bill is abroad on foreign ervice with his regiment, the defendant, who might ave pushed on the proceedings, cannot, on the laintiff's return some years afterwards, discharge ie bill on account of the delay. *House* v. *Townsend*, D. & Cl. 430.

A defendant may dismiss a bill for want of prosecution, pending a notice given by him of a motion dissolve an injunction, which the plaintiff had btained. *Farquharson* v. *Pitcher*, 3 Russ. 383.

Last answer filed 30th November 1829. On the 'th February 1830 defendant gave notice to dismiss. Two days afterwards plaintiff obtained order amend.—Motion to dismiss granted. *Swinfen* v. *sinfen*, 3 Sim. 384.

Amendment of a bill, without serving a subpœna answer the amendments, will not prevent the ifendant from dismissing the bill. *Bramston* v. *irter*, 2 Sim. 458.

If, between the giving of a notice of motion to smiss, and the making of the motion, the plaintiff itains an order to amend, the plaintiff must pay e costs of the motion, but no order will be made on it. *Davenport* v. *Manners*, 2 Sim. 514.

Where a defendant, before replication filed, gives tice, under the sixteenth order, of a motion to smiss the bill for want of prosecution, the plaintiff nnot meet the motion by undertaking to speed s cause with effect, unless his replication be filed or before the day on which his motion to dismiss made. *Willis* v. *Allen*, 8 Law J. Chanc. 10, s. c. Sim. 274.

At the hearing of the cause, a bill will be dissed, if there be no evidence against a defendant, hough, upon a motion for an injunction, a case s made against him, on which an *ex parte* inction was sustained. *Barfield* v. *Kelly*, 4 Russ. 5.

If notice of a motion to dismiss a bill for want of secution is given for too early a day, the defect not cured by the motion being accidentally postned to a day when it might have been regularly de. *De Geneve* v. *Hannam*, 1 Russ. & M. 494.

On the 28th of November plaintiffs filed a replion, and on the 29th a subpœna to rejoin, returne immediately, tested on the 27th, but without aining an order for it. Afterwards the defents obtained an order to dismiss:—Held, that subpœna was irregular, and a motion to discharge order of dismissal was refused. *Brown* v. *Moore*, im. 464.

Where the plaintiff's solicitor had neglected to ve the subpœna to hear judgment, in time, and l set down the cause for hearing, and on motion ler the 17th order the bill had been dismissed h costs, and the defendants moved that the order lismissal be discharged, and the cause retained,—Court refused the application, with costs. *Fowle itanford*, 9 Law J. Chanc. 66.

But a similar motion granted by Lord Lyndhurst. *gnay* v. *Mashiter*, 9 Law J. Chanc. 68.

If a plaintiff omits to produce his witnesses and pass publication within due time after filing the replication, and the defendant, having been thus enabled to dismiss the bill for want of prosecution, does not within a convenient time dismiss it, but permits the plaintiff to incur expense in the prosecution of the suit,—an order of dismissal, subsequently obtained, will be discharged, with costs, for irregularity. *Farnes* v. *Hutchinson*, 8 Law J. Chanc. 11, s. c. 1 Russ. & M. 22.

### (C) Process.

If a defendant, who has been taken on an attachment, still refuses to answer, the plaintiff may, at the same time, proceed to enforce an answer by the process of this Court, and bring an action against him and his sureties, on the bond given to the sheriff under the attachment. *Beddall* v. *Page*, 2 Sim. 224.

### (D) Appearance.

Where a person, not a party to the suit, is interested in a question, and appears by counsel, and submits to be bound by the decision,—the Court will not hear him without the consent of the other parties to the suit. *Bozon* v. *Bolland*, 1 Russ. & M. 69.

### (E) Answer.

#### (a) *Filing.*

A defendant who had taken out three orders for time to answer, and then pleaded,—refused further time, on the plea being overruled. *Mackworth* v. *Marshall*, 3 Sim. 370.

According to the practice of the Court of Exchequer, an answer filed at any time before the sitting of the Court, may be shewn as cause against a motion to extend the common injunction to stay trial. *Swede* v. *Crewdson*, 3 Y. & J. 186.

#### (b) *Sufficiency.*

A defendant cannot avail himself of a matter in defence, which appears only upon his evidence, and was not stated in his answer. But if the plaintiff, upon his own case, is not entitled to the relief prayed, the Court will not assist him. *Stanley* v. *Robinson*, 1 Russ. & M. 527.

#### (c) *Taking off the File.*

[*Pratt* v. *Barker*, 4 Russ. 507, Dig. Law J. 416.]

#### (d) *Reading.*

If a plaintiff reads a passage in an answer, which does not refer to, but is qualified by, a subsequent passage, the defendant may read the latter passage. *Rude* v. *Whitchurch*, 3 Sim. 562.

If the plaintiff read a passage from the defendant's answer, as evidence of a particular fact, the defendant has no right to read subsequent matter connected with it by such words as "but" and "and," unless the subsequent matter be explanatory of the passage read by the plaintiff. *Davis* v. *Spurling*, 1 Russ. & M. 64, s. c. 1 Tam. 199.

### (G) Plea.

When a plea of another suit depending is filed, the proper course is, to refer it to the Master to certify whether the two suits are for the same purpose. *Newdigate* v. *Newdigate*, 8 Law J. Chanc. 35.

### (H) Motions.

A defendant cannot make a motion, if he is in contempt at the time when the motion is made, though he was not in contempt when the notice of motion was given. *The Attorney General* v. *Ellison*, 8 Law J. Chanc. 162.

If a motion, after being refused with costs in the court below, be renewed upon new facts and evidence in the court of appeal, it may be granted with costs, it being substantially an original motion. *In re Joseph & Webster*, 1 Russ. & M. 496.

### (I) Petitions.

[See *post*, R.]

A petition presented by the bankrupt in person, and which he appears in person to support, is not within the order of the 12th August 1809. *In re Bruce*, 4 Russ. 223.

### (J) Orders.

[*Livesey* v. *Livesey*, 3 Russ. 287, Dig. Law J. 418.]

### (K) Examinations.

[*Fereday* v. *Wightwick*, 4 Russ. 114, Dig. Law J. 418.]

Motion by a defendant, before answer, to examine a witness *de bene esse*, granted. *Bacon* v. *Child*, 3 Sim. 457.

Leave given, before publication, to examine a witness (who had been examined and cross-examined) as to circumstances brought to his recollection, after his examination in chief. *Cockerell* v. *Chomeley*, 3 Sim. 313.

A plaintiff having, by mistake, omitted to file a replication before he examined his witnesses, leave was given to him, notwithstanding publication passed, to re-examine his witnesses on the interrogatories already filed, but not to examine any new witnesses. *Healey* v. *Jagger*, 3 Sim. 494.

Where, on the hearing of a cause, the bill was dismissed because a will was not proved to have been duly executed, and a petition of rehearing is presented, and in the meantime the plaintiff moves that he may exhibit interrogatories to prove the execution of the will,—the Court will allow it, on its being shewn that the plaintiff originally intended to examine witnesses to that fact, but that, by an accidental omission, that evidence was not gone into. *Hood* v. *Pimm*, 9 Law J. Chanc. 63.

The examination of a party may be read on further directions, for the purpose of having inquiries directed, though no foundation for those inquiries appears on the report itself. *Dymock* v. *Ashton*, 7 Law J. Chanc. 120.

In support of a charge brought in under the decree, two witnesses, examined by the plaintiff, to prove the defendant's handwriting, said that they did not believe it to be his handwriting. Leave was given to the plaintiff to examine fresh witnesses to the same point. *Greenwood* v. *Parsons*, 2 Sim. 229.

### (L) Interrogatories.

Permission given to exhibit an interrogatory after publication passed, to prove the antiquity of the handwriting in a book preserved in the British Museum. *Lord Kensington* v. *Pugh*, 3 Y. & J. 378.

### (M) Depositions.

Although there are two suits in the Court of Chancery between parties having the same respective interests, and relating to the same matters, the depositions of such only of the witnesses in the prior suit as are dead, will be allowed to be read in the subsequent suit. *Carrington* v. *Carnock*, 2 Sim. 567.

### (N) Exhibits.

Where the answer of a defendant insists that a covenant was inserted, without his knowledge or consent, in a deed executed by him, and that the deed was not read over to him, and that the covenant is a fraud upon him,—such deed cannot be proved *vivâ voce* against him as an exhibit: but it may be so proved as against another defendant, whose answer does not impeach the validity of the covenant. *Barfield* v. *Kelly*, 4 Russ. 355.

### (O) Publication.

[*Dew* v. *Clarke*, 4 Russ. 511, Dig. Law J. 412.]

Under the 18th of the new orders, publication may be enlarged on affidavit, without notice. *Brown* v. *Brown*, 1 Russ. & M. 77.

Publication enlarged, merely on an affidavit that the party had material witnesses to examine, and meant to examine them forthwith. *Harrison* v. *Courtauld*, 7 Law J. Chanc. 162.

Where the plaintiff's solicitor, merely through ignorance or mistake, has neglected to comply with the exigency of the 17th order, the Court will not relieve the plaintiff, upon terms, from the penal consequences of the neglect, without the consent of the other party. *Walmsley* v. *Froude*, 1 Russ. & M. 334.

Where the cause cannot come on to be heard till after the following term, publication may be further enlarged a second time, on motion, without assigning any special reason, until the first day of the next term. *Vinter* v. *Bickley*, 12 Price, 460.

### (P) Postponement of Trials.

Motion to postpone the new trial of an issue in a tithe suit, from the summer to the spring assizes, on the ground, that the application for the new trial of the issue, and the decision of the Judge granting the new trial, in which he stated the verdict on the first trial to be against the opinion of himself and the learned Judge who tried it, had been published in the newspapers, and was likely to influence the jury, especially as it was to be tried by the same Judge,—refused with costs. *Willis* v. *Farrer*, 5 Y. & J. 381.

### (Q) Subpœna to hear Judgment.

A cause was heard at the Rolls; but, before judgment was pronounced, accidental circumstances render the hearing ineffectual. The plaintiff then set it down before the Lord Chancellor, and obtained an order, of which the defendant had notice, assigning it a particular position in the Lord Chancellor's paper, but did not serve a new subpœna to hear judgment. When it was called on before the Lord Chancellor, the defendant made default, and the plaintiff took a decree *nisi*:—*Held, that it was* not necessary to serve a new subpœna to hear judg-

nent, and that the decree *nisi* was strictly regular. *Jackson* v. *Bourne*, 4 Russ. 484.

(R) DECREES.

Where, on the hearing of the cause, the suit is decreed to be dismissed, it has been the practice in the Court of Exchequer for the decree containing the pleadings to be drawn at full length, whilst, in Chancery, a short order of dismissal is usually drawn up. *Memorandum:* the practice proposed to be altered for the future. *Boson* v. *Williams*, 3 Y. & J. 398.

The Court will, upon motion, with the consent of all parties, vary a decree, so as to rectify an accidental omission. *Collins* v. *Shirley*, 9 Law J. Chanc. 111.

On appeal, the decree was varied by directing an issue to try whether the circumstances relied upon to prove the notice took place prior to a stated day, after which notice would be immaterial. *Earle* v. *Pichin*, 1 Russ. & M. 547.

At the hearing on further directions, the decree is absolute in the first instance against a defendant making default. *Maw* v. *Russell*, 8 Law J. Chanc. 23.

On the death of a defendant, recently before a decree pronounced, when his death was unknown—the suit being revived, the Court refused to make the same decree against his representatives *on petition*. *Wright* v. *Barnes*, 9 Law J. Chanc. 172.

A party permitted to intervene as a defendant in a cause after it had been heard on further directions, he having been out of the jurisdiction during the previous proceedings, and now submitting to be bound by them. *White* v. *Hall*, 1 Russ. & M. 332.

A caveat tendered at the proper office, after a decree has been delivered to the secretary to be inrolled, and to be forwarded to the Lord Chancellor in order to be signed, comes too late to prevent the effect of inrolment, although, in point of fact, the signature was not adhibited till after the caveat was tendered.

The inrolment of a decree will not be vacated merely on the ground of dispatch used by the party inrolling, or of surprise upon the opposite party, where no fraud or deception has been practised.

A party is not bound to communicate to his adversary his intention to inrol the decree, because the latter informs him of his intention to appeal against it. *Barnes* v. *Wilson*, *Tarleton* v. *Dyer*, 1 Russ. & M. 486.

(S) REHEARINGS.

Petition of rehearing dismissed, because it suggested, as the grounds of rehearing, facts not alleged in the pleadings. *Nevinson* v. *Stables*, 4 Russ. 210.

(T) REFERENCES.

(*a*) *Where directed.*

[*Fereday* v. *Wightwick*, 4 Russ. 114, Dig. Law J. 422.]

Where the question in the cause turned upon the fact of notice of a settlement, and the names of the witnesses and the particular facts of notice were not stated in the bill, so that the defendant had no opportunity to meet their testimony, an inquiry as to the fact of notice was directed before the Master. *Earle* v. *Pickin*, 1 Russ. & M. 54.

*Semble*—An order of reference to the Master, on a petition presented under Lord Eldon's Act, ought not to be made, except on a hearing in court, and on the appearance of counsel upon the petition. *Hinde* v. *Metcalfe*, 3 Russ. 416.

(*b*) *Impertinence and Scandal.*

A petition must be referred for impertinence, although the respondent, on a former occasion, succeeded in a formal objection to it. *Ex parte Cunningham*, 7 Law J. Chanc. 139.

The Court will decide, in the first instance, on alleged impertinence in affidavits sworn in bankruptcy, where the impertinence is of such a kind that there would be nothing gained, in point of convenience, by directing a reference to the Master. *Ex parte Palmer*, 4 Russ. 188.

Where a defendant has obtained an order for time to answer, and then files exceptions to the plaintiff's bill for scandal and impertinence as to some part, and as to the other part for impertinence alone—the Court will permit the reference as to scandal and impertinence jointly, but not as to impertinence alone. *Mitford* v. *Mitford*, 9 Law J. Chanc. 29.

By the practice of the Court, the plaintiff is at liberty to refer an answer for impertinence at any time before replication. But, *semble*, that, for the future, this is not to be understood as a general rule. *Thomas* v. *Jones*, 3 Y. & J. 184.

(*c*) *Proceedings.*

Whether the Court will, under special circumstances, direct witnesses, examined in the cause, to be examined to the same points before the Master—*quære*. *Earle* v. *Pickin*, 1 Russ. & M. 547.

(U) EXCEPTIONS.

If the time for referring a further answer for insufficiency upon the old exceptions under the sixth order has expired, it cannot afterwards be revived by referring the answer for impertinence.

*Semble*—it is too late to except to an answer for impertinence, when the time has expired, after which, according to the new orders, the answer is to be deemed sufficient. *Jeffray* v. *M'Cube*, 1 Russ. & M. 739.

If upon a question of title, the Master is satisfied with the evidence produced before him, but, upon the hearing of an exception to the report, the Court thinks the evidence not sufficient, the Court, upon the application of the vendor, will refer it back to the Master to review his report, in order to give the vendor an opportunity of producing further evidence. *Andrew* v. *Andrew*, 3 Sim. 390.

An exception to a report in favour of the title having been on argument allowed, leave was given to the plaintiff, some time afterwards, to go again before the Master for the purpose of bringing evidence to shew that the objection, which the Court had sustained, was in the circumstances immaterial. *Egerton* v. *Jones*, 1 Russ. & M. 694.

Where a Master reported that a bond was voluntary, and a party excepted, on the ground that the Master ought to have reported that the bond was partly for valuable consideration and partly voluntary, and the party, at the argument on the exception, offered to withdraw it, and to have the bond considered as merely voluntary, as reported by the

Master, his Honour the Master of the Rolls was of opinion that the party was bound by the exception to support the bond as partly for valuable consideration, and refused to allow the exception to be withdrawn. *Nicol* v. *Vaughan*, 2 Dow. & Cl. A.C. 480.

Motion for leave to except to the Master's certificate of the taxation of costs refused. The proper course is, to petition that the Master may review his taxation. *Boton* v. *Williams*, 3 Y. & J. 378.

(V) STAYING PROCEEDINGS.

The Court will stay proceedings in an action against its officers, where the question is, how far they have conducted themselves with propriety in the execution of its orders. *Ex parte Clarke*, 1 Russ. & M. 563.

## 3. *IN THE ECCLESIASTICAL COURTS.*

Where the office of the Judge is promoted, the whole transaction should be fairly stated in the articles, in order, first, that the Judge may consider whether he ought to allow his office to be promoted, and, secondly, that the defendant may be enabled without injustice to himself to give an affirmative issue. *Lee* v. *Matthews*, 3 Hag. Ec. 174.

A proxy from a husband in India to institute proceedings in the Court of Exeter, against his wife for adultery:—Held, the wife having changed her residence before the commencement of the suit, into another diocese, that the Court may proceed under letters of request from that latter diocese, without a new proxy from the husband. *Hawkes* v. *Hawkes*, 1 Hag. Ec. 194.

Appearance waives any objection so far as respects the formalities of the proceedings.

Where, on the death of the archdeacon, the proceedings in a criminal suit were moved after the execution of a proxy, but before appearance by the defendant, either in person or by proxy, from the Archdiaconal to the Episcopal Court, and there went on to sentence, the original proctor appearing for him, but without a new proxy: on appeal, the appellant having been cognizant, *de facto*, of the proceedings of the suit, and though his proctor in the court of appeal, having recognized (by some of the formal documents in the cause) that the proctor in the court below was his lawful proctor—the proceedings are valid, nor is it a fatal objection, that the articles were exhibited in the name of the surrogate, and not of the Judge.

Semble that if no proxy at all were given, the proceedings would not be null, unless it were proved that no authority was given, *de facto*, to the proctor, and that the principal was ignorant of them. The proxy is only essential to secure the adverse party and to protect the proctor.

Semble Whether the Archidiaconal and Episcopal Courts being concurrent, it is any irregularity, even in form, on the death of the Archdeacon, to invoke the causes in his Court into the Episcopal Court.

Usages of different dioceses, in respect to the exercise of jurisdiction, if not contrary to the general policy of law and to justice, may be said to constitute the law of the particular diocese in that respect. *Sheele* v. *Steele*, 1 Hag. Ec. 165—189.

A party not giving in his answers on the day of the return of the decree personally served, will be pronounced contumacious—*sindilitèr*, a witness not appearing to a compulsory. *Wylie* v. *Metz*, 1 Hag. Ec. 33.

After publication, on an affidavit that the depositions had not been seen, and that the matter was *noviter perventa*, exhibits may be pleaded. *Jones* v. *Jones*, 1 Hag. Ec. 254.

In suits for adultery the party is not limited to the contents of the libel, but may plead fresh charges, and obtain a sentence on facts not existing at the commencement of the suit; but publication is a bar to further pleadings as of right.

Before a party can plead after publication, he must shew (generally by affidavit) that the facts came to his knowledge since his former plea: the Court then, in its discretion, will admit a plea of such facts. *Middleton* v. *Middleton*, 2 Hag. Ec. Sup. 134.

The Court will not admit an exceptive plea, that an indictment of witnesses for perjury in their depositions in the cause pending has been preferred, and a true bill found, nor delay the hearing till the indictment is tried. *Maclean* v. *Maclean*, 2 Hag. Ec. 601.

Exceptive allegations, after publication, are *stricti juris*; and their object being the credit of the witness—not the proof of the matters in issue in the principal cause—1st, Facts, which might have been pleaded in contradiction to the plea before publication, cannot be pleaded in contradiction to a witness: 2ndly, There must be a contradiction to the depositions clear and capable of proof, and shewing that the witness has deposed falsely and corruptly: 3rdly, The matter must arise out of the evidence (not out of the general character) of the witness,—allegation rejected. *Burgoyne* v. *Free*, 2 Hag. Ec. 480.

After publication the evidence of an attesting witness may be excepted to by the party who produces him. *Mynn* v. *Robinson*, 2 Hag. Ec. 169.

The admission of an allegation, responsive to an exceptive allegation, reserved to the final hearing, the Court being of opinion that part, if otherwise admissible, was not material, and that the remainder, probably, would not in the event be of sufficient importance to delay the case. *Mynn* v. *Robinson*, 2 Hag. Ec. 175.

The Court will not hear, on an ex parte motion and on affidavits, a case where offences are charged and punishment prayed. *Peddle* v. *Evans*, 1 Hag. Ec. 690.

Length of time, though it may not amount to a bar to a criminal suit, will induce the Court to admit general explanation, instead of requiring a direct contradiction or explanation of each specific fact.

If, in a criminal suit, the charges are clearly proved, unaccompanied by circumstances of reasonable excuse or explanation, the Court, presuming the promoter acts from a sense of duty, will not inquire into his motives:—*Aliter*, if the misconduct be not proved; or, even if proved, be sufficiently accounted for. *Bennet* v. *Bonaker*, 3 Hag. Ec. 26—28.

In criminal suits the Court will sometimes inquire into the motives of the promoter, but it will presume proper motives unless there be strong proof to the contrary. *Jarman* v. *Wise*, 3 Hag. Ec. 362.

If due diligence has been used, the Court will grant an extension of the term probatory, in order

that material witnesses may be examined. *Countess of Portsmouth* v. *Earl of Portsmouth*, 1 Hag. Ec. 1.

The Court will not depart from its regular practice, by directing a list of witnesses to be delivered, some time anterior to their production, to the other party, residing voluntarily in France. *Morse* v. *Morse*, 2 Hag. Ec. 609.

The Court, before granting a prayer to rescind the conclusion, in order to the admission of an allegation, requires an affidavit setting forth facts material as well as "*noviter perventa*;" and it generally also requires that the allegation pleading those facts shall be tendered at the time of making the prayer. *Smith* v. *Blake*, 1 Hag. Ec. 88.

In a suit for separation, by reason of the wife's adultery, the conclusion of the cause may be rescinded generally, if the Court is of opinion, after the argument, that adultery is not sufficiently proved. *Donnellan* v. *Donnellan*, 2 Hag. Ec. Sup. 144.

In a testamentary cause, the Court, after hearing the arguments and delivering its opinion of the insufficiency of the evidence, may rescind the conclusion, in order that the identity of the alleged testator may be pleaded and proved. *Cargill* v. *Spence*, 2 Hag. Ec. Sup. 146.

In a suit for seaman's wages, the Judge may properly rescind the conclusion of the cause for the admission of further evidence. *Henley* v. *Morrison*, 2 Hag Ec. Sup. 149.

In a defamation suit, the defendant having been enjoined penance, and condemned in costs, and, to an appeal from his dismissal without such penance being duly performed, having given an affirmative issue, the Court directed the penance to be performed as originally decreed, and condemned the defendant in further costs.

Though an affirmative issue to a libel of appeal from a definitive sentence be given, the process must be transmitted where the court of appeal has to take any step requiring a knowledge of proceedings, or of the sentence of the court below. *Courtail* v. *Homfray*, 2 Hag. Ec. 1—3.

On an appeal from a definitive sentence, the Court rejected an allegation pleading facts not shewn to be *noviter ad notitiam perventa*. *Fletcher* v. *Le Breton*, 3 Hag. Ec. 365.

Deeds should not be annexed to an allegation, but be deposited in the registry, and the material parts only recited in the plea. *Mynn* v. *Robinson*, 1 Hag. Ec. 69.

Original papers brought into the registry by A, in a suit between A and B as to the will of C, cannot be delivered out to D on an affidavit of D's attorney, that D, as heir-at-law of C, was in possession of certain premises, and that these papers were muniments of title thereto. *In the goods of George Hulme*, 2 Hag. Ec. 82.

### 4. *IN THE HOUSE OF LORDS.*

[See PARTIES TO SUITS.]

The rules of English law are matters of evidence in Scotch courts; but the House of Lords, sitting as a court of appeal from the decision of a Scotch court, is equally an English as a Scotch court, and will act on its own knowledge of English law, and not be bound by the report of that law made by English lawyers to the Scotch courts. *Douglas* v. *Brown*, 2 Dow. & Cl. 171.

*Semble*—That the Lords, although a court of appeal, may, and do, look at evidence which has been rejected below, to see whether, if admitted, it ought to have made any difference in the decree, and that although they should be of opinion that it should have been received below; yet, if they should at the same time be of opinion that, if received, it ought to have made no difference in the decree, they will not remit. *Maccabe* v. *Hussey*, 2 Dow. & Cl. 440.

### 5. *IN CRIMINAL PROCEEDINGS.*

[In all trials for felonies upon record during the sittings or assizes, with certain exceptions, judgments to be pronounced, 1 Will. 4. c. 70. s. 9, 8 Law J. Stat. 157.]

The Court will direct money found upon a prisoner to be restored to him before trial, if it appear, by the depositions, that it is in no way material to the charge on which he is to be tried. *Rex* v. *Barnett*, 3 C. & P. 600. [Park]

If the trial of an indictment for felony is postponed, at the instance of the prisoner, on account of the illness of a witness, the prisoner is never required to pay the costs of the prosecutor.

Where the trial of a case for felony is postponed, the Court will not make any order for the expenses till after the trial has actually taken place. *Rex* v. *Hunter*, 3 C. & P. 591. [Park]

If the trial of a prisoner indicted for felony be postponed, on the ground of the absence of the prosecutor, who is a material witness for the prosecution, the prisoner will not be allowed his costs, but the Judge will discharge him on his own recognizance. *Rex* v. *Crowe*, 4 C. & P. 251. [Littledale]

In opening a case of felony the counsel for the prosecution ought not to state any particular expressions supposed to have been used by the prisoner, nor the precise words of any confession, but he may state the general effect of what the prisoner said. *Rex* v. *Swatkins*, 4 C. & P. 548. [Patteson]

A counsel for the prosecution on opening a case of felony, has, in strictness, a right to state, in his own way, a conversation supposed to have passed between the prisoner and a witness whom he intends to call; but, in correct practice, the statement ought to be confined to the general effect of the conversation.

A person indicted with others for an offence, but against whom the bill has been thrown out, may, if he be in custody at the time of the trial of the others, be placed at the bar to be identified as one who was in their company. *Rex* v. *Deering*, 5 C. & P. 165. [Garrow]

If counsel for the prosecution call a witness, whose name is on the back of the indictment, but do not examine him, and such witness being examined by the prisoner's counsel, any question put by the prosecutor's counsel after this must be considered as a re-examination, and therefore the prosecutor's counsel cannot ask anything that does not arise out of the previous examination by the prisoner's counsel. *Rex* v. *Beezley*, 4 C. & P. 220. [Littledale]

If a prisoner is brought before a magistrate his statement ought not to be taken till the evidence against him is gone through, and he should be then asked if he has anything to say in answer to the charge. *Rex* v. *Fagg*, 4 C. & P. 566. [Garrow]

If a prisoner, in a confession made before a coroner, which is taken down in writing, mention the names of two other persons who are also charged with the same offence, the confession, when read in evidence, must be read with these names in it, just as it is, and the officer of the Court must not say "another person," and "a third person," instead of reading the names. *Rex* v. *Clewes*, 4 C. & P. 221. [Littledale]

If a letter, written by one of several prisoners, be read in evidence, and in this letter the names of the other prisoners be mentioned, these names must not be omitted in the reading of the letter, but the Judge will tell the jury to pay no attention to the letter, except so far as it affects the writer. *Rex* v. *Fletcher*, 4 C. & P. 250. [Littledale]

If a witness give evidence of a conversation with the prisoner, in which that prisoner says something implicating another prisoner, the witness, in giving his evidence, must not omit the name of such other prisoner, and say, "another person," but must give the conversation exactly as it occurred, and the Judge will tell the jury that is not evidence against such other prisoner. *Rex* v. *Hearne*, 4 C. & P. 215. [Littledale]

When the Attorney General or King's counsel appears officially as such, to conduct a prosecution on any indictment for misdemeanour, he is entitled to reply, though the defendant calls no witnesses. *Rex* v. *Marsden*, 1 M. & M. 439. [Tenterden]

## PREROGATIVE.

The Crown may forbid the issuing of a writ of Nisi Prius, in any action in which the King has an interest. *Rowe* v. *Brenton*, 8 B. & C. 737, s. c. 3 M. & R. 133.

## PRESCRIPTION.

[See WATER and WATERCOURSE.]

## PRINCIPAL AND ACCESSARY.

On an indictment against principals and accessaries, the case against the principal was proved by the testimony of an accomplice, who was confirmed as to the accessaries, but not as to the principals; the jury were directed to acquit the prisoners. *Rex* v. *Wells*, 1 M. & M. 326. [Littledale]

## PRINCIPAL AND AGENT.

[See PARTIES TO SUITS, and VENDOR AND PURCHASER.]

(A) PRINCIPAL.
(a) *Rights.*
(b) *Liabilities.*
(B) AGENT.
(a) *Authority.*
(b) *Rights.*
(c) *Liabilities.*
(C) ACCOUNTING.
(D) EVIDENCE.

### (A) PRINCIPAL.

#### (a) *Rights.*

If an agent, employed to purchase an estate, becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees* v. *Nuttall*, 1 Russ. & M. 53, s. c. 1 Tam. 282.

If an agent, employed to sell stock, becomes himself the purchaser of it at the price of the day, and does not at the time communicate to his principal that he is the purchaser, the transaction will not be permitted to stand. An agent, who was also contractor for the Prussian loan, being directed by his principal to buy Prussian bonds, represents that the purchase had been made; advances money to his principal on a deposit of the bonds, and afterwards, the principal having directed them to be sold, gives him credit for the amount at the price of the day: in fact, however, no specific bonds had been selected or were appropriated as the specific bonds belonging to the principal:—Held, that the transaction cannot stand. *Brookman* v. *Rothschild*, 7 Law J. Chanc. 162.

Where a factor sells goods as his own, and fails, the purchaser may set off a debt owing to him from the factor, in an action at the suit of the principal. *George* v. *Claggett*, Peas. A.C. 131. [Kenyon]

A broker bought goods for a party unknown to the seller. The seller gave the broker a document, which enabled the broker to mislead his principal into the belief that the goods were bought under a contract different from that under which they really were. The principal paid the broker for the goods according to the contract represented by him:—Held, that as the seller had enabled the broker to practise the deception, he could not afterwards resort for payment to the seller.

If a broker state to his principal, the buyer, a different contract from that under which the broker bought, and the principal has, *bonâ fide*, adopted the contract stated by the broker, *semble* that the seller cannot afterwards call upon the principal, because the seller must sue upon the contract under which the goods were sold. *Horsfall* v. *Fountleroy*, 8 Law J. K.B. 259, s. c. 10 B. & C. 755.

#### (b) *Liabilities.*

An agent acting for A, and also for B, in obtaining goods on an ostensible purchase for A, to deposit them with B, as security for A's debt—was held so to implicate B as his principal, as to prevent his acquiring any property in the goods thus fraudulently obtained, though B personally was innocent. The questions of agency and of fraud were properly left to the jury. *Irving* v. *Motley*, 9 Law J. C.P. 161, s. c. 7 Bing. 543, s. c. 5 M. & P. 380.

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods:—Held, that the seller might afterwards sue the principals for the price. *Thomson* v. *Davenport*, 9 B. & C. 78, s. c. 4 M. & R. 110.

### (B) AGENT.

#### (a) *Authority.*

A traveller who receives orders for goods from

employer's customer in the country, is authoed to receive payment for them in money, but not other goods. *Howard* v. *Chapman*, 4 C. & P. 8. [Tindal]

Disputes existing between A and his solicitor, ceiver, and confidential agent B, which involved g and intricate matters of account, an authority s given by A to a third person to settle any acunts in which he, A, had an interest, and to comomise any claims which he might have; such an thority will not empower that third person to ake an agreement, without the production or amination of any account, that a gross sum shall paid to B in lieu of all his demands on A. *Jens* v. *Gould*, 3 Russ. 385.

A merchant, being abroad, empowers certain pers in this country to receive monies, adjust claims, d do some other acts. Money being wanted by s firm here, of which he was a partner, these atnies deposit the deeds with the Hope Insurance mpany to secure 12,000*l.*, and covenant that he all execute the mortgage; this 12,000*l.* was also cured by the bonds of sureties in sums correonding to the shares of the partners. The power attorney was not a sufficient authority; but the rchant, on his return to the country, having writ a letter to the Hope Insurance Company, reesting the loan of 6,000*l.*, "to be secured on his sex property, which you now hold, in addition the 12,000*l.* already advanced;" and professing s readiness to execute the mortgage deed:—Held, at this was a confirmation of the security. Some the parties having paid the amount of the sums cured by them:—Held, that they had a lien on e property. One of these sureties being a partner: Held, that the sum paid by him was subjected to e partnership accounts. *Munnings* v. *Bury*, 1 m. 147.

East India Company's warrants are not negotile instruments, within the 6 Geo. 4. c. 94. s. 2, as ey pass by delivery, and not by indorsement.

Where defendants, receiving a pledge from a facr for an antecedent debt, sell it, they cannot under Geo. 4. c. 94. s. 3. hold the proceeds against the al owner, but are liable to him in trover; but in timating the damages they are entitled to credit for e balance, if any, due from the owner to the factor. *ylor* v. *Trueman*, 1 M. & M. 453. [Tenterden]

A party receiving East India warrants from a ctor, in pledge for monies advanced to him, canot retain them under 6 Geo. 4. c. 94, against the e owner, if from the circumstances he must, as a asonable man, have known them not to belong to e factor; although no direct communication of that ct is made to him. *Evans* v. *Trueman*, 2 M. & M. ). [Tenterden]

A wharfinger having received flour in that capaty, and without any authority to sell, disposed of to a purchaser, who had no notice of the want of thority; the wharfinger was in the habit of doing siness as a flour factor:—Held, nevertheless, that e act 6 Geo. 4. c. 94. s. 4, which protects purases innocently and in the ordinary course of busies, from agents intrusted with goods, did not pply to this case, the wharfinger not being an ent within the meaning of the statute. *Monk* v. *Whittenbury*, 2 B. & Ad. 484, s. c. 2 M. & M. 81.

Whether a factor has a right to pledge the goods of his principal, under the 6 Geo. 4. c. 94. s. 5, depends upon the question whether, upon the balance of all accounts between them, the principal is indebted to the factor. Accordingly, a factor, by the desire of his principal, kept separate accounts of sales; in one set of which the principal was solely, and in the other but partly, interested. The factor made a pledge of goods consigned to him on the latter set of goods, for the purpose of meeting a draft drawn by his principal against that account. At the time of the pledge the factor, if the general account were taken, was indebted to his principal in a larger sum than it was necessary to raise by the pledge. If the accounts were taken separately, the principal was indebted to the factor upon the account on which the draft was drawn, and to which account the goods pledged belonged:—Held, that the factor, under those circumstances, had no right to pledge; and that the person to whom they were pledged could not retain them against the principal.

Where the principal in such a case omitted for some time to make any demand, or to make any communication to the person who received the pledge:—Held, that such omission could not be considered as an affirmance of the act of the factor, unless it appeared that the delay had caused an alteration in the situation of the parties—in that of the principal for the better, or in that of the pledgee for the worse. *Robertson* v. *Kensington*, 8 Law J. K.B. 183.

### (*b*) *Rights.*

If an agent effect an illegal contract, he cannot recover from his principal the sum he has paid in effecting it, although he proves an express promise by the principal to pay him. *Bailey* v. *Rawlins*, 7 Law J. K.B. 208.

### (*c*) *Liabilities.*

An agent who acts on the best advice he is able to get, in the affairs of his principal, is not liable to an action for damages arising from that act. *Miles* v. *Bernard*, Pea. A.C. 61. [Kenyon]

In answer to an action for goods sold and delivered, it is not enough for a defendant to prove that he was agent for another person, without shewing that the plaintiff knew, at the time of the sale, that he was so; but it is too narrow a direction to the jury to tell them, that unless the agency was disclosed at the time of the purchase, the purchaser must be taken to be the principal: the proper way of leaving the question being, whether the plaintiff knew at the time of the contract that the purchase was made by defendant merely as agent. *Seaber* v. *Hawkes*, 9 Law J. C.P. 217.

A law agent employed to prepare an heritable bond, states the manner of holding in this way: the grantor is taken bound "to infeft and seise the said Henry Wardrob and his foresaids, on our own expenses, in the lands and others above disponed, to be holden from me, of and under my immediate lawful superiors thereof, in the same manner as I hold the same myself, and for payment of the same feu duties as I pay, or am bound to pay therefore." The agent neglects to procure confirmation from the superior, in consequence of which his employer, the grantee, loses his money:—Held, by the House of Lords, affirming a judgment of the Court of Session, that this was a public holding, and invalid for want

of confirmation; and that the agent, having chosen to depart from the usual practice of introducing the double manner of holding, and having neglected to procure confirmation, was bound to make good the loss. *Secus*, if it had been a mistake in a nice and difficult point of law. *Stevenson* v. *Rowand*, 2 Dow. & Cl. A.C. 104.

(c) *Accounting.*

A large demand established after a lapse of more than twenty years, against the estate of an accounting party, though no evidence could be given as to the particulars of the demand. *Purvis* v. *Rankin*, 7 Law J. Chanc. 141.

By the act 59 Geo. 3. c. 3. navy agents are entitled to make the usual charge for passing accounts before that act, and are also entitled to charge commission on the full amount of pay, without being limited by the money actually passing through their hands. The defendant having received 450*l.* at 2½*l.* per cent. retained premium on 18,000*l.* in 1814, without bringing it to account for many years, alleging that it awaited the final adjustment of average: referred to the Master, to inquire whether he was entitled so to retain it, according to the usage and custom of merchants. *Drury* v. *Atkins*, 1 Tam. 75.

Where a person placed himself under the advice of a dealer in English and foreign funds, and the latter advised purchases and sales of stock, and it afterwards appeared that these purchases and sales were merely nominal transfers and re-transfers of the dealer's own stock, the difference being settled in account; it was held, that the court of equity rightly interfered to compel an account between the parties, and to set aside the transactions that had taken place, on the ground that the dealer stood in a situation of advantage, which equity will not allow to an agent in dealing with his principal. *Rothschild* v. *Brookman*, 7 Law J. Chanc. 162, s. c. 2 Dow. & Cl. 188.

Where notice is given by a party to his agent in a particular adventure, that another person is jointly interested with him in the adventure, this *primâ facie* imposes upon the agent the necessity of accounting with such other person for his share of the adventure.

But this obligation ceases to exist, if the transactions shew that it was the intention of such other person, and of the party originally interested in the adventure, that the agent should account solely with the latter. *Hillerk* v. *Greg*, 4 Russ. 285.

(D) Evidence.

If a person, on being applied to on a particular subject, writes an answer, mentioning another person, and saying on one occasion, "He is in possession of my sentiments," and on another, "I have written to him, and I refer you to him thereon;" such letters are sufficient to constitute the party referred to agent in the business; and what he said at a meeting on the subject, may be given in evidence against the principal. *Hood* v. *Reeve*, 3 C. & P. 532. [Best]

Whether, in an action against a broker by his principal, for charging an increased price in addition to his commission, it is competent to the broker to shew that in some of the transactions he acted as a principal, it being contrary to the duty and oath of a broker so to act—*quære*.

To prove the averment of actual payment by the principal of the overcharges, it is sufficient to shew a running unsettled account between the parties, by which it appears, that, as far as the particular transactions in question are concerned, the principal has paid more than the amount of the overcharges, though on the whole account, continuing to a period long subsequent, the balance is in favour of the broker to more than their amount also. *Pastor* v. *Bevan*, 3 C. & P. 536. [Best]

## PRINCIPAL AND SURETY.

[See Bond, Guarantie, and Witness.]

Where a bond is given by a person, as surety for the fidelity of a collecting clerk, and there is no express provision enabling the surety to determine it, whether he can by notice, withdraw the security—*quære*.

But if a surety in such a case have a power to determine it, he must give a reasonable notice, in point of time, to the employer, so that he may, without inconvenience, provide another person to collect for him. *Calvert* v. *Gordon*, 7 Law J. K.B. 77, s. c. 3 M. & R. 124.

B being hired as a clerk to A & Co., but not for any definite period, C and D joined with him in a bond to secure his duly accounting for his assets; C died, and his executrix gave a written notice to A & Co. that she would no longer remain surety; A & Co. communicated this notice to B, and required from him the bond of another surety; D died, and also the new surety; and four years and a half after the death of C, B died, when deficiencies were found in his accounts, subsequent to the notice:—Held, that the executrix of C had no equity to restrain A & Co. from proceeding at law on the bond. *Gordon* v. *Calvert*, 4 Russ. 581, s. c. 2 Sim. 253.

The defendant joined in a lease, as surety for the performance of the covenants by the lessee. The lessee became bankrupt, and delivered up the lease to the lessor, under the 75th section of the 6 Geo. 4. c. 16:—Held, that although the lessee was thereby *personally discharged* of his liability to the performance of the covenant, *from the date of the commission*, the term was not absolutely extinguished from that period; but that the surety remained liable for breaches occurring prior to the actual delivery up of the lease by the bankrupt to the lessor. *Tuck* v. *Fisher*, 8 Law J. C.P. 10, s. c. 6 Bing. 371, s. c. 3 M. & P. 715.

A surety is not discharged by the creditor's neglecting to sue, or giving time to the principal debtor, even though the principal should in the interim become bankrupt. *Goring* v. *Edmonds*, 7 Law J. C.P. 233, s. c. 6 Bing. 94, s. c. 3 M. & P. 259.

A surety for part of a debt is not entitled to the benefit of a security given by the debtor to the creditor, at a different time, for another part of the debt. *Wade* v. *Coops*, 2 Sim. 154.

A surety who defends an action brought for money deficient in the accounts of his principal, cannot claim contribution from his co-surety for the costs of the action, unless authorised by him to defend.

The surety is bound to apply money recovered from the principal to the damages. *Knight* v. *Hughes*, 6 M. & M. s. c. 3 C. & P. 467. [Tenterden]

A and B were sureties for C, a collector of taxes, who became a defaulter; the obligees sued A and recovered:—Held, that in an action for contribution, brought by A against B, A could only recover half the amount of the verdict against him, and that he could not recover from B either the half of the taxed costs of the obligees, or half of his own costs of defending the action brought by the obligees:—Held also, that if A, after the verdict in the action against him on the bond, obtain a sum of money from C, he must take that in reduction of the amount of the verdict, and cannot apply it either to pay his own costs, or the taxed costs of the obligees. *Knight* v. *Hughes*, 3 C. & P. 467, s. c. 1 M. & M. 147. [Tenterden]

An entry made by a deceased person, in a book kept by him for his own convenience only, wherein he appeared to charge himself with the receipt of money, which it was his duty to receive and pay over:—Held, to be evidence, in an action against one who was his surety for paying over, that the money had been so received by the deceased.

In an action against the surety of a tax collector—Held, that one who had paid taxes to the collector was not a competent witness to prove such payment, on the ground that he would be liable to contribute to a reassessment in case of there being an ultimate deficiency. *Middleton* v. *Melton*, 8 Law J. K.B. 143, s. c. 10 B. & C. 317.

## PRINTER.

[See LIBEL.]

## PRISON.

[See PRISONER.]

## PRISONER.

[See INSOLVENT DEBTOR.]

(A) PRIVILEGES.
(B) ALLOWANCE.
(C) RENEWAL.
(D) DISCHARGE.
(*a*) *In general.*
(*b*) *Under the Lords' Act, and* 48 *Geo.* 3. *c.* 123.

### (A) PRIVILEGES.

A defendant who is in the custody of the marshal may be brought up by *habeas corpus*, and re-committed, charged with a writ *de contumace capiendo* directed to the sheriff of Surrey. Such a writ does not deprive the defendant of the benefit of the rules. *Baillie's case*, 7 Law J. K.B. 164.

### (B) ALLOWANCE.

The turnkey of the prison is the agent of the defendant for the purpose of receiving the weekly allowance under the Lords' Act; and if a payment be duly made to and accepted by him, the Court will not afterwards entertain the question whether the payment was made in good or bad money. *Gainsford* v. *Marshall*, 8 Law J. K.B. 108, s. c. 10 B. & C. 224, s. c. 5 M. & R. 45.

### (C) REMOVAL.

Whether a prisoner charged in execution, in the prison of the court of a county palatine, upon a judgment obtained in that court, can be removed by *habeas corpus*, to be charged with a declaration in an action in either of the courts at Westminster—*quære*. But where the latter court are satisfied that such a removal has been effected by collusion with the prisoner, in order to change his custody, and that there is, substantially, no action depending in their own court, they will remand the prisoner to his former custody. *In the matter of Sutton*, 8 Law J. K.B. 7.

Where a defendant is in custody in the county of A, upon an attachment issuing out of the Court of Exchequer, he may be removed to the county of B to take his trial upon an indictment found in the latter county. *Re Wetten*, 1 C. & J. 459, s. c. 1 Tyrw. 385.

### (D.) DISCHARGE.

#### (*a*) *In general.*

The Court refused to discharge the defendant out of custody, on the ground that he had before been irregularly taken (under colour of a pretended criminal charge) on a *capias* sued out on the same judgment, and discharged from that execution on account of the irregularity of the proceeding—the first execution being a nullity. *Mackie* v. *Warren*, 7 Law J. C.P. 59, s. c. 5 Bing. 176, s. c. 2 M. & P. 279.

Where a party against whom a true bill for perjury had been found, and a warrant for her apprehension granted, was apprehended abroad and brought here in custody, and committed to prison for want of bail; the Court refused to discharge her on the ground that she had been improperly apprehended in the foreign country. *Ex parte Scott*, 9 B. & C. 446, s. c. 4 M. & R. 361.

#### (*b*) *Under the Lords' Act, and* 48 *Geo.* 3. *c.* 123.

Where a prisoner is brought before a Judge sitting in the Bail Court, by a special rule of the Court of King's Bench, after the time limited by the Lords' Act, to be discharged under that act, it is not competent for the opposing party to inquire into the reason of the application having been delayed: an inquiry of this nature, and an objection founded upon it, must be made by motion for a rule to set aside the special rule for bringing up the prisoner. *In re Chalmers*, 8 Law J. K.B. 9.

A creditor, at whose instance an indictment has been preferred, and found against his debtor for not delivering in an account, and making an assignment of his property, pursuant to the provisions of the compulsory clauses of the Lords' Act (32 Geo. 2. c. 28. s. 16 & 17,) which indictment the debtor has removed by *certiorari* into the King's Bench, cannot again bring such debtor before the Court, under a new notice for the same purpose, until the indictment has been disposed of. *In re Bayley*, 8 Law J. K.B. 13, s. c. 9 B. & C. 691, s. c. 4 M. & R. 603.

A motion was made to bring up, under the compulsory clauses of the Lords' Act, a prisoner charged

in execution for a debt under 300*l.* On the day before his appearance in court, he was a second time charged in execution for a debt of 500*l.*:—Held, that the case was within the statute; and as more than sixty days would have elapsed before the next term, when he could be brought up again, the Court remanded him generally, and directed that he should be brought up in the next term, if necessary. *Womersley* v. *Bousfield*, 8 Law J. C.P. 286, s. c. 6 Bing. 801, s. c. 4 M. & P. 538.

The Court has no power to interfere in the case of a prisoner brought up at the assizes under the Lords' Act and remanded by the Judge. *Briggs* v. *Sharpe*, 8 Law J. C.P. 208, s. c. 6 Bing. 517, s. c. 4 M. & P. 269.

The circumstance of a defendant, whose time has expired for delivering in a schedule, and making an assignment of his property, under the compulsory clauses of the Lords' Act, having obtained a rule in the Court for the relief of Insolvent Debtors, to petition for his discharge as an insolvent will not enable the Court of King's Bench to suspend proceedings by the creditor, or to grant an extended time to draw up the schedule, and make the assignment required. *Early* v. *Levy*, 8 Law J. K.B. 13, s. c. 9 B. & C. 928, s. c. 4 M. & R. 687.

A prisoner, having applied for the benefit of the Insolvent Act, was remanded for nine months; and it was ordered by the Insolvent Court, that at the expiration of that time he should be discharged. He afterwards applied to the Court of King's Bench for relief under the Lords' Act; and to prevent his discharge, the plaintiff paid him sixpences:—Held, that nevertheless he was entitled to be discharged at the expiration of the nine months prescribed by the Insolvent Court.

The order of the Insolvent Court for the discharge of a debtor, justifies the gaoler, although that Court may have proceeded without jurisdiction as to the fact of the debtor being within the walls of the prison at the time of filing his petition. *Saffery* v. *Jones*, 9 Law J. K.B. 285, s. c. 2 B. & Ad. 598.

A prisoner in custody under a writ *de contumace capiendo*, is not entitled to be relieved under the 48 Geo. 3. c. 123. *Ex parte Kaye*, 9 Law J. K.B. 99, s. c. 1 B. & Ad. 652.

Whether a plaintiff, who is in custody by reason of a judgment for costs, is entitled to the assistance of the 48 Geo. 3. c. 123—*quære*. *Semble* that he is not.

But if he is at all entitled, he cannot be discharged if the costs of the judgment exceed 20*l.* *Tinmouth* v. *Taylor*, 8 Law J. K.B. 104, s. c. 10 B. & C. 114, s. c. 5 M. & R. 44.

A defendant in ejectment for the nominal damages and the costs, which exceed 20*l.*, is not entitled to his discharge after a year's custody, under the 48 Geo. 3. c. 123. *Doe* v. *Reynolds*, 8 Law J. K.B. 226, s. c. 10 B. & C. 481.

## PRIZE.

[Certain duties in matters of prize, transferred to the Treasurer of the Navy, 10 Geo. 4. c. 26, 7 Law J. Stat. 57.]

The sentence of a foreign Court of Admiralty, condemning a ship as lawful prize, is only conclusive in English courts, where its terms are free from ambiguity, and its premises reasonably warrant the condemnation. Otherwise, the sentence is only evidence of the condemnation itself, and not of its having taken place on sufficient grounds.

A voyage is not illegal by the circumstance that the ship's destination is a port which, according to the latest accounts, was under blockade, if it appear that no violation of it was intended. *Dalgleish* v. *Hodson*, 9 Law J. C.P. 138, s. c. 5 M. & P. 407, s. c. 7 Bing. 495.

The principles of joint capture in prize cases, apply to vessels associated in the capture of ships engaged in the slave trade; therefore, where the actual capture was made by one of two vessels associated for such purpose, the other, which had joined in the chace and rendered subsequent assistance, held entitled to share in the bounty for the slaves, and in the proceeds of the ship, stores, and cargo. *Anna*, 2 Hag. 31.

A vessel which had chased a slave ship into a situation from which she could not escape, and then (being herself forced by a leak to abandon the chace) informed the capturing vessel thereof, held not entitled as a joint captor. *Orestes*, 2 Hag. 58, n.

Booty taken in war belongs to the Crown.

A party has a right to assign his interest in booty or prize-money, though, at the time of such assignment, no grant of it had been made, and the assignment will be supported in a court of equity.

Prize-money is not in the nature of military pay. *Alexander* v. *Duke of Wellington*, 9 Law J. Chanc. 36.

The private adventure of a purser, in a Danish East Indiaman (the ship being condemned as droits of Admiralty at Calcutta), restored. *Prince of Augustenburg*, 2 Hag. 91.

## PRIZE-FIGHT.

Persons who are present at a prize-fight, and who have gone thither for the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants; and it is not at all material which of the combatants struck the first blow. *Rex* v. *Perkins*, 4 C. & P. 537. [Patteson]

## PROBATE.

[See WILL.]

## PROCHEIN AMY.

The residuary legatee in trust, having renounced administration, *cum testamento annexo*, for the purpose of being examined as a witness, the Court, hesitatingly, but as a matter of necessity, appointed a next friend guardian *ad litem* in order to propound, on behalf of the minors, residuary legatees, the paper which their father opposed, but required the guardian to give security for costs. *Copeland* v. *Rivers*, 3 Hag. Ec. 279.

A person being an accounting party in the suit, removed from acting as the next friend of infant plaintiffs. *Hopkinson* v. *Roe*, 9 Law J. Chanc. 7.

The Court of Great Sessions ordered an infant ning by *prochein amy*, to pay costs, and this Court ranted an attachment against the *prochein amy*, for isobeying that order. *Evans* v. *Davis*, 1 C. & J. 460, c. 1 Tyrw. 345.

## PROCTOR.

[See PRACTICE IN THE ECCLESIASTICAL COURTS.]

## PRODUCTION AND INSPECTION OF DEEDS, BOOKS, AND PAPERS.

(A) IN GENERAL.
(B) OF A PRIVATE NATURE.
(C) PARISH BOOKS.
(D) CORPORATION BOOKS.

### (A) IN GENERAL.

On a new trial being granted, one party is entitled to inspect and take copies of such deeds as may have been produced in evidence by the other at the first trial. *Hewitt* v. *Pigott*, 9 Law J. C.P. 120, s. c. Bing. 400, s. c. 5 M. & P. 252.

The sixtieth of the new orders extends to the production of books and papers unless orders or decrees made before the date of the new orders.

The Master is to exercise the discretion given him by the sixtieth order, to determine what books or papers shall be produced, though the order or decree, under which he is proceeding, requires the parties to produce, on oath, all books and papers. *In re Llanrisant*, 1 Russ. & M. 25, conf. 8 Law J. Chanc. 12.

A demand for papers must be made by one duly authorized to give a receipt for them. *In re Dicas*, 9 Law J. Chanc. 183.

A trustee, and one of several partners, were served with diligence as havers, to produce all papers and documents relating to the subject-matter of the cause. The partner had lost some of the papers before being served with the diligence, and the trustee had destroyed one of them after being served with diligence. Petitions were presented by the objectors, praying that the trustee might be censured and that his discharge might be disallowed; but the Court below dismissed the petitions, with all costs to be paid by the petitioners. This judgment was partly reversed by the House of Lords, and the cause remitted, with directions that the partner should not have his costs, and that the trustee should pay costs to the petitioners. *Robertson* v. *Alexander*, 2 D. & Cl. 312.

### (B) OF A PRIVATE NATURE.

A defendant will not be ordered to produce papers containing confidential communications between him and his solicitor, or between his country solicitor and town solicitor, made in the relation of solicitor and client during the progress of the suit, or with reference to it, previous to its commencement. *Hughes* v. *Biddulph*, 4 Russ. 190.

A plaintiff is not entitled to the production of a letter, admitted by the defendant to be in his possession, but which, the defendant states, was written by him to his solicitor, and directed the solicitor to take the opinion of counsel upon the question in dispute between the parties. *Vent* v. *Pacey*, 4 Russ. 193.

An action at common law being brought in the Archbishop's name, by the administrator *de bonis non*, against the executors of the original administrator for the balance of the intestate's effects, the Court will direct the bond, given by the original administrator, to be attended with, on security being given to indemnify the Archbishop against costs. *In the goods of Joseph Hall*, 1 Hag. Ec. 139.

A plaintiff in a tithe suit is not entitled to a production of receipts for moduses and compositions, given to the defendants by the plaintiff and his predecessors, some of those receipts relating to tithes not sued for, and the others being evidence for the defendants and not for the plaintiff. *Tomlinson* v. *Lymer*, 2 Sim. 489.

Order that a plaintiff produce, for inspection, a book exhibited to commissioners for examination of witnesses in a tithe cause, moved for after publication, refused, with costs. *Forester* v. *Helm*, 13 Price, 790.

The plaintiffs and defendants mutually executed an agreement which was deposited in the hands of a trustee. Shortly afterwards the defendant improperly procured it from the trustee, and neglected to return it. The plaintiffs demanded it from the defendant about a fortnight after its execution, for the purpose of getting it stamped; but he refused to restore it. In an action for a breach of the agreement, the plaintiffs obtained a Judge's order, that the defendant should produce the original agreement, or a copy, which copy being read at the trial (if stamped), the defendant should be precluded from setting up the original. On motion to rescind this order, the defendant having sworn that the original was either lost or destroyed, but his attorney admitting that he had a copy—the Court confirmed that part of the order which related to the copy. *Bousfield* v. *Godfrey*, 7 Law J. C.P. 158, s. c. 5 Bing. 418, s. c. 2 M. & P. 771.

Declaration on an agreement to employ the plaintiff, and to take him into partnership at the end of a year—Pleas, the general issue, and no memorandum in writing—Replication, taking issue on the last plea:—Held, that the defendant was entitled to an inspection of the agreement. *Blogg* v. *Kent*, 8 Law J. C.P. 229, s. c. 6 Bing. 614, s. c. 4 M. & P. 433.

The Court refused to allow the defendants (late directors of a company) to inspect the books of the company, with a view to their defence to an action brought against them by the company for improperly conducting its affairs—the affidavits not stating the inspection to be necessary to their defence. *Imperial Gas Company* v. *Clarke*, 9 Law J. C.P. 28, s. c. 7 Bing. 95, s. c. 4 M. & P. 727.

A right of lien upon an instrument in the possession of a witness, (except in the case of an attorney or solicitor,) is not a good objection to the production of the instrument in evidence under a *subpœna duces tecum*. *Hunter* v. *Leake*, 7 Law J. K.B. 321.

An indictment for forgery being presented to the grand jury, a witness declined to produce certain deeds before them:—Held, that, if the deeds form a part of the evidence of the witness's title to his own estate, he is not compellable to produce them; but, that, if they do not, the grand jury may compel

their production. *Rex* v. *Hunter*, 3 C. & P. 591. [Park]

Where a witness is served with a subpœna to produce deeds on the execution of a commission, it is not necessary that there should be a written interrogatory as to the fact of his having them in his possession, and if he then takes upon himself to refuse production, he does so at the peril of costs in the event of his failing to satisfy the Court of his right to withhold them. *Bradshaw* v. *Bradshaw*, 1 Russ. & M. 358.

### (C) Parish Books.

In an action brought to try the validity of a parochial rate, the Court granted the plaintiff leave to inspect and make extracts from the parish books, without costs. *Newell* v. *Simpkin*, 8 Law J. C.P. 228, s. c. 6 Bing. 565, s. c. 4 M. & P. 394.

In a suit for subtraction of church-rate, the Court will not, at the prayer of the defendants, issue monition for the production of parish books, which are not shewn to apply immediately to the question at issue; and on the merits, the rate being pronounced for, the defendants condemned in costs. *Goodall and Gray* v. *Whitmore and Fenn*, 2 Hag. Ec. 369.

### (D) Corporation Books.

A mandamus not permitted for the purpose of an inspection of the corporation books, by some of the corporation body, unless it be necessary with a view to some specific question or dispute actually depending.

Accordingly, a rule being obtained in general terms for an inspection of all the books, records, and papers of a company, by certain members, who suggested general misconduct, misapplication of the funds, undue election; and gave instances, none of which affected themselves personally; and no dispute appeared to be depending upon any of the matters alleged;—such rule was discharged with costs. *Rex* v. *the Merchant Tailors' Company*, 9 Law J. K.B. 146, s. c. 2 B. & Ad. 115.

## PROHIBITION.

Separate contracts between the same plaintiff and defendant, give the right of bringing separate (although concurrent) actions in the same court. The Court of King's Bench, therefore, will not interfere by prohibition with an inferior court, in such cases, on the ground of its being a splitting of actions. *Dealey* v. *Clark*, 9 Law J. K.B. 102.

The stat. 27 Geo. 3. c. 44, entitled "An Act to prevent frivolous and vexatious suits in Ecclesiastical Courts," and reciting in the preamble "that it is expedient to limit the time for the commencement of certain suits in the Ecclesiastical Courts," enacts, (among other things,) "that no suit shall be commenced in any Ecclesiastical Court for fornication or incontinence, after the expiration of eight calendar months from the time when such offence shall have been committed."

Upon a libel in the Ecclesiastical Court against a clergyman, containing various articles charging fornication, &c.; and in the concluding article willing that the offender be duly and canonically punished and corrected according to the exigency of the law, &c., an objection taken to the jurisdiction, on the ground of the stat. 27 Geo. 3. c. 44, was overruled in the Ecclesiastical Court: whereupon a writ of prohibition was obtained in the Court of King's Bench, and, upon declaration in prohibition, demurrer, and argument, it was held that the statute applied only to proceedings against fornicators, &c. whether laymen or clergymen, *pro salute animæ*: but that a proceeding in the Ecclesiastical Court, on the ground of fornication, against a clergyman for the purpose of deprivation, is not prohibited by the statute, and this judgment was affirmed on appeal.

Held, also, that the judgment of the Court of King's Bench being for a prohibition against proceeding on the ground of fornication, *pro salute animæ*, but granting a consultation so far as the case related to the proceeding for deprivation, the statute 8 & 9 Will. 3. c. 11, which gives costs to the party who obtains the judgment in prohibition, did not apply, inasmuch as it was a qualified judgment, which, in substance, was for the defendant in the prohibition; and if it was to be considered as a *casus omissus*, there was no authority in the Court to give costs. *Free* v. *Burgoyne*, 2 Bligh, N.S. 65, s. c. 1 D. & Cl. A.C. 115.

Costs in prohibition not allowed to a plaintiff in prohibition, for any part of the proceedings prior to the rule to declare in prohibition; the defendants consenting before plea pleaded, that the prohibition should issue. *Pewtress* v. *Harvey*, 8 Law J. K.B. 375, s. c. 1 B. & Ad. 151.

## PUBLICAN.

[See Licence and Appropriation.]

If a person sell two sorts of spirits at the same time, to an amount above twenty shillings, he may recover the price, although the amount of each species of spirits be under twenty shillings. *Owens* v. *Porter*, 4 C. & P. 367. [Bosanquet]

## QUARE IMPEDIT.

In *quare impedit*, to compel the defendant's appearance, the plaintiff sued out a *summons*, which being returned *nihil*, an *attachment* issued, reciting that the defendant had been summoned to appear on the morrow of All Souls; the attachment was also returned *nihil*, and a *grand distress* issued into Kent (where the action was brought), and returned (by the plaintiff's direction) *nulla bona*, and then a *testatum grand distress* issued into Middlesex (where the defendant resided), the sheriff being directed to levy thereon 40*s.*:—Held, that the whole process had been irregularly issued and executed; and therefore a judgment signed by the plaintiff for default of defendant's appearance, was set aside. *Tyrell* v. *Jenner*, 8 Law J. C.P. 57, s. c. 6 Bing. 283, s. c. 3 M. & P. 648.

In a *quare impedit*, the declaration stated that R R was seised of the advowson and died intestate; that the advowson descended to his four daughters, Mary the wife of T W, Jane the wife of W S, Prudence the wife of J A, *and Grace the wife of Francis Isaac*; and the church became vacant; that it belonged to T W and Mary his wife, in right of the

aid Mary, to present; and that they accordingly resented: it was then averred that the said Francis saac and Grace his wife died so *seised of the same ne-fourth part* of the said Grace of and in the ad-owson, after whose death it came to Robert Isaac, on and heir of the said Grace:—Held, (on motion in arrest of judgment, on the ground that it was not lleged that Grace was seised of a fourth part be-ore her death, but merely that it descended to the our daughters of R R, that it belonged to T W and Mary his wife to present, and that they did so,) hat the allegation that Grace died seised of one-ourth part, was sufficient. *Gully* v. *the Bishop of Exeter*, 7 Law J. C.P. 52, s. c. 5 Bing. 170, s. c. 1 M. & P. 276.

Where a plaintiff in *quare impedit* claims to pre-ent in the fourth turn in right of one of four co-arceners, it is a sufficient statement of the title to hew a presentation by the ancestor under whom ll the coparceners claimed. And it is sufficient o state that, in the first instance, the coparceners ot agreeing to present, the elder sister presented; nd that on the second turn, J S presented in ight of the second sister; and that on the third urn, J T presented in right of the third sister; for t will not be presumed that such presentations were ther than rightful. *Gully* v. *the Bishop of Exeter*, 1 Law J. K.B. 281, s. c. 10 B. & C. 584.

A count in *quare impedit* alleging a right in cer-ain persons to present to a chapel in virtue of their eing charged with repairs, is not supported by roof that the repairs are paid out of the poor-rate. *Shepherd* v. *the Bishop of Chester*, 8 Law J. C.P. 141, s. c. 4 M. & P. 130, s. c. 6 Bing. 435.

In *quare impedit* to determine the right of presen-ation to the vicarage of K, in the diocese of E, laintiff, to prove the presentation of a clerk by a erson under whom he claimed, and the clerk's ad-nission and institution, gave in evidence a visita-ion book of the diocese of E, which contained the ollowing entry:—"Henricus Compton, in jure ivili Baculareus ac verbi Dei predicator, admissus uit ad inserviendum curæ animarum, in ecclesia arochiali de Kilglasse, per Edwardum, Elphin, Episcopum, sexto Octobris 1622." Throughout a ong list of entries in the same, when the duty was d inserviendum curæ animarum, or ad peragendum fficium curati, the word *admissus* was used as in he above entry; when the admission was in vica-iam, the words used were *admissus et institutus*. The Judges of the Irish Court of Common Pleas, efore whom the action was tried at bar, directed he jury, that the above entry as to the admission of Compton "was in legal construction to be taken to nean that Compton had been admitted and instituted o the vicarage," but exception overruled, and judg-nent for plaintiff. The judgment reversed by the Exchequer Chamber, and the judgment of reversal ffirmed by the Lords, for that the Judges ought ot to have taken the question as to the import and ffect of the entry, out of the hands of the jury; nd having so taken it upon themselves, they had ut a wrong construction on the entry. *Cooke* v. *the Bishop of Elphin*, 2 Dow. & C. A.C. 247.

When a clerk, who is rector *de facto* of a rectory s removed by *quare impedit*; and until the time of ctual deprivation, performs the church duty, he is ot liable, under the 28 Hen. 8. c. 11, to account to the next incumbent for the profits during the time between the presentation of that incumbent and his own actual deprivation. *Hatton* v. *Cove*, 9 Law J. K.B. 74.

## QUO WARRANTO.

An information in the nature of *quo warranto*, against persons for claiming to act as a corporation, must be filed by and in the name of the Attorney General.

Such an information cannot be filed at the instance of an individual against persons, for usurping a franchise of a private nature, not connected with public government. *Rex* v. *Ogden*, 10 B. & C. 230.

Mere co-operation with the person whose corporate title is disputed, does not disqualify the relator upon a motion for a *quo warranto*. Nor the fact of the relator having been present at the election of other persons than the defendant, on which occasions there were the same objections to the title of the persons elected as that raised by the relator against the defendant; unless those objections were brought to his notice as objections. But, in the latter case, where he had at another election voted against the very objection he seeks to raise before the Court—Held, that he becomes disqualified. *Rex* v. *Benney*, 9 Law J. K.B. 104, s. c. 1 B. & Ad. 684, *Rex* v. *Parkyn*, 9 Law J. K.B. 104, s. c. 1 B. & Ad. 690.

The mere circumstance of an applicant for a *quo warranto* being in poor circumstances, and unable to pay costs if unsuccessful, is not a sufficient objection in answer to a *quo warranto*. Where, however, it appeared that the applicant was not only in such circumstances, but there was reason to believe he was merely the nominal applicant, and that the real one was a stranger to the corporation, who was urging the proceeding for electioneering purposes, the Court made it a condition to the granting a *quo warranto*, that security should be given for costs. *Rex* v. *Thomas Wakelin*, 8 Law J. K.B. 366, s. c. 1 B. & Ad. 50.

*Semble*, that where issue is joined in a *quo warranto* information, and the prosecutor does not cause the issue to be tried within one year from its being joined, the defendant is entitled to costs under the 4 & 5 W. & M. c. 18. s. 2. But those costs are not to exceed the amount of the prosecutor's recognizance. *Rex* v. *Hatton*, 9 Law J. K.B. 283.

## RAPE.

Since the stat. 9 Geo. 4. c. 31, the offence of rape is made out by the proof of penetration only, and in such a case a prisoner must be found guilty, although there was no emission, and although he did not withdraw himself merely because his lust was satisfied. *Rex* v. *Jennings*, 4 C. & P. 249. [Hullock]

The 9 Geo. 4. c. 31. s. 18. does not make emission unnecessary to complete the offence of rape. *Rex* v. *Russel*, 2 M. & M. 122. [Taunton]

On the trial of an indictment for a rape, it was held that the prisoner's counsel might ask the prosecutrix the following questions with a view to contradict her, "Were you not on (since the time of

the alleged offence) walking in the High Street at Oxford, to look out for men?" "Were you not on (since the time of the alleged offence) walking in High Street, with a woman reputed to be a common prostitute?" Held also, that evidence might be adduced by the prisoner, to shew the general light character of the prosecutrix, and that general evidence might be given of her being a street walker; but *semble*, that evidence of specific acts of criminality by her would not be admissible. *Rex* v. *Barker*, 3 C. & P. 589. [Park]

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## RATE.

(A) County Rate.
(B) Church Rate.
(C) Highway Rate. (See Highway.)
(D) Paving Rate. (See Paving and Lighting.)
(E) Poor Rate.
(*a*) *How made.*
(*b*) *Inspection.*
(*c*) *Persons rateable.*
(*d*) *Property rateable.*
(*e*) *Where assessed.*
(*f*) *Proportion.*
(*g*) *Rating in aid.*
(*h*) *Appeal.* (See Sessions.)

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### (A) County Rate.

[In Ireland, see 1 Will. 4. c. 61, 8 Law J. Stat. 125.]

Where a borough has Justices by charter, with a clause excluding the county Justices, the borough Justices may legally make a rate upon the borough, in the nature of a county rate, under 55 Geo. 3. c. 51. s. 24. *Mercer* v. *Davis*, 8 Law J. M.C. 94, s. c. 10 B. & C. 617.

The Sessions have power, under the 55 Geo. 3. c. 51, to amend the county rate which has been made in conformity with that statute, by correcting the annual value at which any parish is rated; and consequently, to correct the sum at which that parish is assessed. But where the Sessions, in consequence of the inequality at which two parishes were rated upon their annual value, corrected the amount of the assessment, but did not correct the rate in respect of the annual value, as it appeared on the rate, and thus left an apparent inequality with reference to all the other parishes—the Court quashed the order of Sessions. *Rex* v. *the Inhabitants of Blackawton*, 8 Law J. M.C. 123, s. c. 10 B. & C. 792.

### (B) Church Rate.

Where a select vestry of twenty-six was appointed under the 58 Geo. 3. c. 45. and the 59 Geo. 3. c. 30, for the care and management of a district church, and a number less than fourteen met and made a church rate:—Held, that the rate was bad. *Freeman* v. *Meymott*, *Blacket* v. *Blizard*, 8 Law J. M.C. 103, s. c. 9 B. & C. 851, s. c. 4 M. & R. 641.

A faculty directing the performance upon and repairs of an organ in a parish church, to be paid out of the parish rates, would be legally objectionable; for the ordinary can only bind the parish to expenses for articles absolutely necessary. Even if the vestry is unanimous, a clause binding the parish to defray out of the rates, future expenses for an article not necessary, ought not to be inserted. *Jay* v. *Weber*, 3 Hag. Ec. 8.

Justices have no power, under the 53 Geo. 3. c. 127, to order payment of a church rate, where the validity of the rate is *bonâ fide* disputed. But they should hear the parties, in order to be satisfied that there is a *bonâ fide* dispute. A man who is summoned before them, merely saying he disputes the rate, is not sufficient to prevent their proceeding; they should be satisfied that there is really a dispute, although they cannot themselves decide it. *Rex* v. *Wrottesley*, 9 Law J. M.C. 51, s. c. 1 B. & Ad. 648.

In questions of subtraction of church rate, the Court having jurisdiction on the subject-matter is bound, unless stopped by a prohibition, to proceed to the trial of a select vestry by which the rate was made.

Costs, though in the discretion of the Court, are in its legal discretion, guided by former precedents, and are almost universally decreed in suits for church rates, where the rate is pronounced to be subtracted. *Goodall and Gray* v. *Whitmore and Fenn*, 2 Hag. Ec. 372—4.

Churchwardens and their predecessors, though constantly acting for the whole township consisting of three districts, were uniformly described as churchwardens of A, the principal place in the township, and where the chapel stood. In a suit for subtraction of church rate, the Court reversed, with costs in both instances, a sentence sustaining a protest that the defendant occupying lands in the township, but not in the district in which A was situate, was not legally sued by churchwardens thus described. *James* v. *Keeling*, 3 Hag. Ec. 483.

### (E) Poor Rate.

#### (*a*) *How made.*

Where it appears that the parish officers are without funds for the relief of the poor, and that for want of the concurrence of some of the officers a rate cannot be made, the Court will order a peremptory mandamus in the first instance, commanding them to make a rate. *Rex* v. *the Churchwardens and Overseers of Soham*, 8 Law J. M.C. 73.

Where a rate appears to have been made by a person as churchwarden, and also as one of the overseers, the Court will not presume a merely possible case in order to maintain such a rate, though it has been allowed by two Justices. *Rex* v. *Hewitt*, 7 Law J. M.C. 3.

An assistant overseer appointed under the 59 Geo. 3. c. 12, and having, by virtue of his office, the poor-rate in his custody, is liable to a penalty for refusing to produce it to an inhabitant, when lawfully demanded, according to the 17 Geo. 2. c. 3.

The declaration alleged, that defendant was assistant overseer; that a rate for the relief of the poor was made and duly allowed; and although defendant, as such assistant overseer, had the rate in his possession; and although plaintiff, at a reasonable time, demanded an inspection of it, and tendered one shilling, yet defendant refused to produce it, whereby he forfeited 20*l.*:—Held, on motion in

rrest of judgment, that the count was sufficient, or if the defendant had the rate in his custody, as assistant overseer, it might be presumed that it was his duty to produce it when lawfully demanded. *Edwards* v. *Bennett* (in error), 8 Law J. M.C. 71, s. c. 6 Bing. 230, s. c. 3 M. & P. 749, s. c. 3 Y. & J. 58; *Bennett* v. *Edwards*, 7 Law J. M.C. 49, s. c. 8 B. & C. 702.

(*c*) *Persons rateable.*

The objects of a charitable foundation in the actual occupation of the almshouses for their own benefit, and liable to be removed at the pleasure of the patrons, are rateable in respect of such occupation. *Rex* v. *Green*, 7 Law J. M.C. 94, s. c. 9 B. & C. 203, s. c. 4 M. & R. 164.

In general, where a canal company have authority given them by act of parliament to make a public river navigable, with the usual powers to carry the object into effect, they are not, for the purposes of poor rate, "occupiers" of the land which is the bed of the river. [s. p. next case.]

But where, in pursuance of those powers, they make cuts and locks upon land which has been purchased by them, they are liable to be rated as occupiers, in respect of those cuts and locks. *Rex* v. *Benj. Thomas*, 7 Law J. M.C. 66, s. c. 9 B. & C. 114, s. c. 4 M. & R. 23.

A power to a company to mortgage the "navigation" of the river, does not give them such an interest in the soil of the bed of the river, as to make them occupiers for the purposes of poor-rate. *Rex* v. *the Undertakers of the Ayr and Calder Navigation*, 8 Law J. M.C. 9, s. c. 9 B. & C. 610, s. c. 4 M. & R. 728.

(*d*) *Property rateable.*

Limestone mines are not rateable for the relief of the poor. *Rex* v. *the Inhabitants of Sedgley*, 9 Law J. M.C. 61, s. c. 1 B. & Ad. 65.

(*e*) *Where assessed.*

Where part of the receipts of a canal company was in respect of certain locks in a particular parish:—Held, that the company were rateable for those receipts by the parish in which the locks were; and that those receipts were not to be thrown into the general account of profits, for the purpose of striking an average, or otherwise, as applicable to the other parishes through which, as well as through the parish in question, the canal ran. *Rex* v. *the Inhabitants of Lower Mitton*, 8 Law J. M.C. 57, s. c. 9 B. & C. 810, s. c. 4 M. & R. 711.

The Hammersmith bridge over the Thames belonged to a company. One end of the bridge was in Middlesex; the other in Surrey. The toll-gate was on the Middlesex side; and it was there only that any tolls were taken. There was no toll-house on the Surrey side; but, on that side, the company had purchased land on which they built an abutment of the bridge. They were assessed by the Surrey parish for the land, and in respect of the tolls payable thereon:—Held, that they were beneficial occupiers on both sides of the river; that it was immaterial on which side the tolls were taken; and that the assessment was consequently valid. *Rex* v. *the Inhabitants of Barnes*, 8 Law J. M.C. 115, s. c. 1 B. & Ad. 113.

(*f*) *Proportion.*

The lessee and occupier of coal mines, is rateable upon the improved value thereof, occasioned by steam-engines which he has erected, and which are used for draining the mines and raising the coals to the surface, and for railways laid down by him, and employed for facilitating the carriage of the coals. *Rex* v. *Lord Viscount Granville*, 7 Law J. M.C. 89, s. c. 9 B. & C. 188, s. c. 4 M. & R. 171.

The Court will not disturb a poor-rate on the ground of an alleged inequality, unless that inequality manifestly appear on the face of the rate.

In calculating the annual value of the subject of rate, there is no objection to the allowing for the increased expense attending the repairs and gradual decay of houses, and the gradual exhaustion of coal mines, when compared with the fixed and permanent annual value of land.

Therefore, a rate upon lands, houses, and coal mines, made upon two-thirds of the net annual rent of the lands, and upon only one-half of the net annual rent of the houses and coal mines, was held to be good. *Rex* v. *Tomlinson*, 7 Law J. M.C. 64, s. c. 9 B. & C. 162, s. c. 4 M. & R. 169.

A corn rent, in lieu of tithes, should be rated upon the same principle as that which should be applied to a farm; the criterion being "for how much a year would it let to a tenant?" And, as no one would give the full annual amount if he were to take a corn rent at a letting, but would take into consideration the trouble and expense of collecting, the danger of loss by insolvency, &c., an allowance should be made for these, in fixing the annual value of the corn rent for the purpose of rating.

The ecclesiastical dues, payable by the incumbent to the bishop, should be deducted as outgoings from the annual value of the corn rent.

But no allowance is to be made for the expense of providing for the performance of the church duties. *Rex* v. *Joddrell*, 9 Law J. M.C. 26, s. c. 1 B. & Ad. 403.

Where a poor-rate is assessed in proportion to the rent paid by occupiers of lands, the owners and occupiers of a canal must be rated, not in respect of the full amount of all the profits of their occupation as owners, but according to the rent at which the canal might be let to a tenant. *Rex* v. *the Trustees of the Duke of Bridgewater*, 7 Law J. M.C. 81, s. c. 9 B. & C. 68, s. c. 4 M. & R. 143.

By the provisions of the act of parliament under which the Oxford canal was established, the proprietors of the Coventry canal were authorized to receive the tonnage dues in respect of all coals which should be carried upon the first two miles of the Oxford canal from its junction with the Coventry canal at Longford, in the parish of Foleshill, (of which two miles, one mile and nine hundred and sixty-three yards were situate in Foleshill,) and the proprietors of the Oxford canal were authorized to receive certain tonnage dues in respect of all merchandize (except coals) passing out of the Oxford canal, along the Coventry canal, within three miles and a half from the junction of the said canals at Longford, towards Coventry, (of which three miles and a half, two miles and a quarter were situate in Foleshill). On the establishment of the Grand Junction canal, which joins the Oxford canal

at Braunston, provisions were made, under which one class of tonnage dues were given to the proprietors of the Oxford canal, in respect of general merchandize, (except lime, &c.) and another class of tonnage dues in respect of all coals passing out of the Oxford canal into the Grand Junction canal, by way of and as an indemnification against any injury they might sustain by the forming of the line of the Grand Junction canal.

In a rate made for the relief of the poor of the parish of Foleshill, the Oxford Canal Company were rated for certain proportionate amounts in such rate stated, in respect as well of dues arising from merchandize carried along so much of the three miles and a half of the Coventry canal as lay in that parish, as also in respect of the two classes of compensation or indemnification dues payable to them for merchandize and coals passing out of the Oxford canal into the Grand Junction canal at Braunston; and upon appeal—Held, that the proprietors of the Oxford Canal Company were properly rated:—First, as to the dues arising from merchandize carried on the Coventry canal, and as to the proportion of the compensation or indemnification dues for merchandize passing out of the Oxford into the Grand Junction canal, on the ground that the land of the parish of Foleshill contributed to earn those dues. Secondly, as to the proportion of the compensation or indemnification dues for coals, on the same ground; and notwithstanding that the Oxford Canal Company had no profitable user of the one mile and nine hundred and sixty-three yards of their canal lying in the parish of Foleshill in respect of coals, and consequently could sustain no injury there, to indemnify against which such compensation dues were granted.

The criterion by which the amount of canal tolls is to be ascertained for the purpose of rating, depends upon the question—what they would let for to a tenant. For the purpose of determining this question, the following allowances, in addition to a proper allowance for his own remuneration, should be made to the supposed tenant:—1st, Poor rates. 2nd, Expense of collection. 3rd, Repairs. 4th, Expense of works in keeping up and renewing the supply of water. *Rex* v. *Lower Mitton*, 8 Law J. M.C. 57, s. c. 9 B. & C. 810, s. c. 4 M. & R. 711.

By a canal act, the proprietors of the Oxford canal were empowered to take a mileage tonnage for coals and other merchandizes, excepting that they were not to take a tonnage upon coals for a distance of two miles measured from L to B. As to those two miles, it was enacted that the proprietors of the Coventry canal should take all the rates and duties payable by virtue of that act for all coals carried from any part of the Oxford canal within those two miles; and the proprietors of the Oxford canal were to take all the rates, payable by an act for making the Coventry canal, for all goods, except coals, conveyed upon any part of the Oxford canal, and afterwards upon the Coventry canal, within three miles and a half of the junction of the two canals. The point of junction of the Oxford and Coventry canals was in the parish of F. That parish contains one mile and nine hundred and sixty-three yards of the Oxford canal, being part of the two miles above mentioned; and also two miles and a quarter of the Coventry canal, being part of the three miles and a half above mentioned.

By an act, 33 Geo. 3. c. 80, for making the Grand Junction canal, (reciting that it was apprehended the intended canal would be injurious to the company of proprietors of the Oxford canal,) it was agreed that the compensation thereinafter mentioned should be made to them as an indemnification against such injury. It then authorized the proprietors of the Oxford canal to take for all coals that should pass from the Oxford canal into and upon the Grand Junction canal the sum of 2s. 9d. per ton, without regard to the distance the same should pass on the Oxford canal; and for all other goods which should pass from any navigable canal into or upon the Oxford canal, and from thence into or upon the Grand Junction canal, or from the Grand Junction canal into or upon the Oxford canal, and from thence into or upon any other canal, the sum of 4s. 4d. per ton, without any regard to the distance the same should pass on the Oxford canal:—

Held—first, that the proprietors of the Oxford canal were rateable to the poor in the parish of F, for the mile tonnage for merchandize, not being coals, passing along the Oxford canal in that parish.

Secondly, that they were rateable in that parish for the mile tonnage payable to them in respect of tolls collected on the Coventry canal, in the proportion which one mile nine hundred and sixty-three yards bears to two miles.

Thirdly, that they were rateable in that parish for such a proportion of the compensation tonnage payable to the Oxford canal company under the Grand Junction canal act, for merchandize, not being coals, passing from the Coventry canal along the Oxford canal to the Grand Junction canal, and *vice versâ*, and consequently through the parish of F, as one mile nine hundred and sixty-three yards bears to thirty-four miles and seven-eighths, the distance between the points at which the Oxford canal joins the Coventry and Grand Junction canals.

Fourthly, that they were rateable in that parish for the same proportion of the compensation tonnage for coals passing along the same portion of the Oxford canal from the Coventry canal into the Grand Junction canal.

Held, further, that in fixing the amount of the rate, the sum paid by the proprietors for the poor-rate, the expense of collecting the tolls, of repairing the banks of the canal, and of supplying it with water, ought to be deducted from the gross profits. *Rex* v. *the Oxford Canal Company*, 8 Law J. M.C. 62, s. c. 10 B. & C. 163, s. c. 5 M. & R. 100.

Where a canal was let under the authority of an act of parliament, for an annual sum equivalent to the annual interest of a sum borrowed to make it:—Held, that such annual sum should be taken as rent for the purpose of rating the lessee to the relief of the poor; and that the rent should be apportioned in the different parishes through which the canal ran, according to the length in each parish. *Rex* v. *Chaplin*, 9 Law J. M.C. 121, s. c. 1 B. & Ad. 926.

A canal act provided that the company should be rated for any lands taken or buildings erected in pursuance of that act, *in the same proportion* as other lands and buildings adjoining to or lying near the same were rated:—Held, that they were to be rated according to the actual value of the lands and

uildings which the company had in the particular arish; and not according to their actual productive alue to the company. *Rex* v. *the Chelmer and Blackater Navigation Company*, 9 Law J. M.C. 125, s. c. B. & Ad. 14.

(g) *Rating in aid.*

The inhabitants of a particular part of a parish ntered, in the year 1714, into an agreement with he rest of the parish to maintain their own poor, nd accordingly maintained them ever afterwards. From that time, that part was treated as distinct rom the parish. In 1753 separate overseers were hosen for that part; from that time, that part, by is distinct name, appealed and resisted appeals gainst orders of removal; made and received such rders; and, among them, orders to and from the arish of which it had been part. In 1775, and fterwards, poor-rates were made in the usual form nder the statute of Elizabeth, and were allowed by he Justices; and in 1800 a constable for the place then called a vill) was appointed by the Quarter Sessions:—Held, that these facts did not shew a egal separation from the original parish, so as to ntitle the place to obtain a rate in aid upon another, not the original, parish. *Rex* v. *the Inhabitants of East Church*, 8 Law J. M.C. 76.

## RECEIVER.

(A) Appointment.
(B) Liabilities.
(C) Practice.

### (A) Appointment.

Where property is vested in trustees for the benefit of A,—on a bill filed for the purpose of establishing securities given by A, the Court will not direct any accounts against him in his absence, nor appoint a receiver. *Brown* v. *Blount*, 9 Law J. Chanc. 74.

A receiver will not be appointed at the instance of a party claiming as devisee under a will, the validity of which is to be determined by an issue, unless the claimant satisfies the Court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir-at-law. *Clark* v. *Dew*, 1 Russ. & M. 103.

In a suit for the specific performance of a contract for the sale of an estate in the West Indies, against a purchaser who resided there, and had got into possession without paying the purchase money, and to which the consignees of the estate were also defendants,—an application also for a receiver of the proceeds of the consignments was refused, the principal defendant, the purchaser, having never been served with a subpœna. *Stratton* v. *Davidson*, 1 Russ. & M. 484.

### (B) Liabilities.

A receiver appointed by the Court is not answerable for a loss of monies by the failure of a banker, if they are not mixed with his own monies, and are *bonâ fide* deposited for security only, under circumstances in which they could not have been properly paid into court. *Salway* v. *Salway*, 9 Law J. Chanc. 152, s. c. 4 Russ. 60.

### (C) Practice.

Course of proceeding to compel a defendant to deliver possession of estates to a receiver. *Green* v. *Green*, 2 Sim. 430.

*Quære*, whether, upon a petition objecting to a Master's report of a receiver's accounts, the Court will enter into a consideration of the particular items of the accounts.

Even where there is reason to doubt whether, as to some points, the conduct of a receiver has been strictly correct,—further inquiry will not be ordered, where the attention of the parties has been previously directed to the subject, and ample opportunity of investigation afforded to them. *Shewell* v. *Jones*, 3 Russ. 522.

## RECEIVER OF STOLEN GOODS.

A and B were indicted; A for stealing six bank notes of 100*l.* each, and B for receiving "the said notes," knowing them to have been stolen. A stole the six 100*l.* notes, and got them changed into 20*l.* notes, some of which B received:—Held, that B could not be convicted on this indictment. *Rex* v. *Walkley*, 4 C. & P. 132. [Taddy, Serj.]

If an indictment against a receiver state the principal felony to have been committed by A B, whatever would have been evidence of the principal felony to convict A B, is receivable to prove this allegation on the trial of the receiver, but is not conclusive. Therefore, if A B confessed the principal felony, that confession is admissible on the trial of the receiver, to prove the commission of the principal felony. *Rex* v. *Blick*, 4 C. & P. 377. [Bosanquet]

## RECOGNIZANCE.

The condition of a recognizance, returned, filed, and inrolled as a record, cannot be varied by a rule of court. *Rex* v. *Bingham*, 3 Y. & J. 101.

The condition of a recognizance to abide the award of D, cannot be varied by a rule of court, substituting M for D. *Rex* v. *Bingham*, 1 C. & J. 245.

## RECORD.

To prove an allegation that a cause was carried down to trial, it is necessary to produce the Nisi Prius record, though it is not alleged that the cause was in fact tried. *Parry* v. *Collis*, Peu. A.C. 47. [Kenyon]

## RECOVERY.

(A) Acknowledgment.
(B) Passing.
(C) Amendment.

### (A) Acknowledgment.

Acknowledgments of fines or recoveries may be taken in Wales by attornies of the Great Sessions. *Evans, vouchee*, 9 Law J. C.P. 41, s. c. 7 Bing. 149.

If the affidavit of acknowledgment of the warrant of attorney, in a recovery, omits to state that the commissioners are not concerned for any of the parties, the Court will not in future grant leave to reswear it. *Re Sandy's recovery*, 9 Law J. C.P. 226.

Although the notarial seal affixed to the acknowledgment of a warrant of attorney taken abroad, was broken to pieces and destroyed, the Court allowed the recovery to pass, on an affidavit that the seal was duly affixed at the time the oath was administered. *Carew, demandant; White, tenant*, 7 Law J. C.P. 114, s.c. 2 M. & P. 558.

The Court refused to allow a recovery to pass, where the christian name of the vouchee had been written on an erasure in the affidavit of the commissioners of the acknowledgment of the warrant of attorney. *Murray, vouchee*, 7 Law J. C.P. 194.

In a recovery, the word "received" having been substituted for "acknowledged," at the foot of the præcipe and warrant of attorney, the Court would not allow the recovery to pass. *Ockley, demandant; Furber, tenant; Ward, vouchee*, 5 M. & P. 249.

(B) Passing.

The Court allowed a recovery to pass, notwithstanding the warrants of attorney of the vouchees were taken, some on one piece of parchment, and some on another. *Sawbridge, demandant; Jayes, tenant; Parsons and four others, vouchees*, 8 Law J. C.P. 135, s.c. 6 Bing. 426, s.c. 4 M. & P. 119.

The Court refused to allow a recovery to pass, as to one of two vouchees who had executed the warrant of attorney two years ago, but had since become insane. *Ex parte Crooke*, 7 Law J. C.P. 15, s.c. 5 Bing. 176, s.c. 2 M. & P. 264.

Where a part of the proceedings in a recovery taken in France were written on *paper* and in the French language, and a copy thereof ingrossed on parchment, in English, and certified by a notary to be "a faithful translation"—the Court refused to allow the recovery to pass, and said that the notary must also make affidavit that he "understood the French language;" and that the proceedings must be retaken on parchment. *Nicholas and three others, vouchees*, 7 Law J. C.P. 169, s.c. 3 M. & P. 28.

The Court refused to allow a recovery to be recorded as of an antecedent term, wherein every step had been duly taken, but, by mistake, the tenant had omitted to appear at the bar. *Anonymous*, 8 Law J. C.P. 110.

The Court permitted the appearance of the tenant in a recovery to be recorded as of the preceding term, on an affidavit that he had been prevented by illness from attending at the proper time. *Anonymous*, 8 Law J. C.P. 286.

(C) Amendment.

To amend the writ of entry, application must be made to the Master of the Rolls. *Hunter's recovery*, 9 Law J. C.P. 41.

The Court will permit the amendment of a mistake in putting the names of the vouchees instead of that of the tenant in the præcipe at the beginning of the writ of entry. *Anonymous*, 8 Law J. C.P. 193.

Amendment of a recovery refused where the party was always known by the name which had been inserted, though it was not correctly his baptismal name. *Addis, demandant; Norris, tenant; Power, vouchee*, 9 Law J. C.P. 166, s.c. 7 Bing. 455, s.c. 5 M. & P. 379.

The Court refused to allow a recovery to pass, the words "*calleth* to warranty" being inserted instead of "*voucheth* to warranty." *Anonymous*, 8 Law J. C.P. 197.

Description of premises in a recovery amended. *Anonymous*, 9 Law J. C.P. 225.

In the deed to lead the uses of a recovery, the premises were described as a moiety or halfendeal of a messuage and three hundred acres of meadow; in the recovery, the words "or halfendeal" were omitted:—the Court allowed the recovery to be amended, by the insertion of those words after the word "moiety." *Manners, vouchee*, 5 M. & P. 372.

## REGISTRY.

[See Deeds.]

## RELEASE.

The Court will not permit an action to be defeated by a fraudulent release by a co-plaintiff. *Lloyd v. Meeking*, 9 Law J. C.P. 50.

## REMAINDER.

[See Devise.]

A devise, which at the death of a testator operated as an executory devise, may, by a change of circumstances after his death, become a contingent remainder.

Accordingly, a testator devised to his daughter for life, remainder to John, her son, his heirs and assigns, for ever. But in case John should die before the daughter, and she should have no other child living at her death, she was to devise the premises to such person as she should think proper. John, the daughter's son, was living when the testator died; but died shortly afterwards. Subsequent to the death of John, the daughter had another son; the daughter, after the birth of that other son, levied a fine:—Held, that, although, until the death of the grandson John, the power to the daughter to devise to such person as she should think proper, could operate only as an executory devise, yet, upon the death of John, the limitation became a contingent remainder, was barred by the fine, and her other son could not recover in ejectment. *Doe d. Harris v. Howell*, 8 Law J. K.B. 123, s.c. 10 B. & C. 191, s.c. 5 M. & R. 24.

A has a contingent remainder in fee, and conveys it to B as a security. The contingent remainder is afterwards barred by A's mother, who acquires the fee, and, by her will, devises her real estates to trustees, upon trust to sell, and invest the money, and pay two-thirds of the dividends to or for the benefit of A, for his life, with a similar trust as to two-thirds of the rents of the estates not sold:—Held, that the interest of A is bound by the security given to B. *Brown v. Blount*, 9 Law J. Chanc. 74.

A fine levied by a contingent remainder-man does not of necessity destroy his estate. When the in-

ation of the conuzor is properly shewn by the deed declaring the uses, the fine works by estoppel only.

A stranger in estate cannot take advantage of such a estoppel.

Accordingly, the deeds of conveyance to the lessors of the plaintiff were made after the remainders became vested; they recited fines *sur connizance de droit* levied by the parties while the remainders were contingent. The defendant was a stranger in estate:—Held, that the nature of the fines might be collected from the recitals; that those contingent remainders were not thereby destroyed; but that the fines operated by way of estoppel only; and, therefore, (inasmuch as the defendant, being a stranger, could not take advantage of the estoppel,) that a good title in ejectment could be made by parties claiming under a conveyance by the conuzors, after the remainders vested, against all but parties or privies to the fines.

By marriage settlement, W M and T M conveyed certain lands to trustees, their heirs and assigns, to the use of W M for life, with remainder to trustees to preserve contingent remainders; remainder to W M for life; remainder to trustees to preserve contingent remainders; remainder to the use of the first and other sons of T M by M H, successively in tail male; with remainder to the use of the right heirs male of T M for ever:—Held, that the eldest son of W M took a contingent remainder, which on the death of T M became vested; and that the ultimate remainder in fee simple, on the death of such elder son without issue, vested in H M, the only other son of T M.

By the same settlement other premises were conveyed to the same trustees, to the use of T M for life, with remainder, during his life, to the trustees to preserve contingent remainders; remainder to the use of M H, the intended wife, for life, for raising an annual sum; and, subject thereto, to the use of the first and other sons of T M by the said M H, successively in tail male; with remainder, in case there should be no issue male, but should be issue female, to the use of the issue female, for raising portions to be paid at the age of twenty-one; the trustees to raise maintenance for the daughters, until they should attain that age, out of the rents; but if the said portions, at the times of payment, could not be advanced out of the profits of the premises, the said premises should stand charged with the payment of the portions, as soon after as the same could be advanced and raised, &c.; and, after raising and paying the said sums of money, or in case there should be no issue female, to the use of the right heirs male of T M for ever:—Held, that the trustees at all events took only a limited fee, which determined when the portions were paid; that, upon failure of the estate limited by the settlement, the ultimate fee resulted to the settlor; and that, no claim having been made by the trustees during more than twenty years' adverse possession, the presumption was, that their right was satisfied or released, and could not be set up by a stranger as a defence in an action of ejectment.

H M died without issue, devising all the premises mentioned in the settlement to his widow for life; remainder to the sons and daughters of his nephew and of his niece, as tenants in common. The tenant for life took possession of the premises, and retained that possession until within two years of her death, when the defendant entered and exercised certain acts of ownership, but did not continue in possession. A month after the death of the tenant for life, and about six weeks before the commencement of the action, the defendant again obtained possession and ploughed the land; but it did not appear whether the parties entitled in remainder had entered previously, or that the defendant's possession was with their knowledge and against their will:—Held, that the defendant's acts did not amount to a disseisin, or give him such an estate by wrong as prevented the remainder-men from executing a conveyance of the estate to the lessors of the plaintiff. *Doe* dem. *Bruns* v. *Martyn*, 7 Law J. K.B. 60, s.c. 8 B. & C. 497, s.c. 2 M. & R. 485.

Although a receiver has been appointed, and he has paid over rent, accrued from the rent day next preceding the death of the tenant for life to the day of her death (upon lands let from year to year), to her personal representatives,—the Court will order them to refund the same, and pay it over to the remainder-man. *Brown* v. *Candler*, 9 Law J. Chanc. 212.

A contingent remainder-man conveyed his interest to secure a debt; the remainder was afterwards destroyed by the tenant of the prior estate; the remainder-man afterwards acquired a new interest in the property, under the will of that tenant:—Held, that it was available to the creditor. *Noel* v. *Bewley*, 3 Sim. 103.

## REPLEVIN.

[See AMENDMENT, PAYMENT, and PRACTICE.]

A declaration in replevin must state the parish or place in which the taking occurred. *O'Neill* v. *Paul*, 9 Law J. K.B. 268.

In replevin, by reason of a clerical error the avowry omitted to state that the plaintiff was tenant to the avowant; but the Court held, that the allegation that the plaintiff held the premises under a demise at a yearly rent, and that a certain sum of the *rent aforesaid* was due from the plaintiff to the avowant, sufficiently shewed that the former was tenant to the latter. *James* v. *Colquhon*, 9 Law J. C.P. 90, s. c. 7 Bing. 265.

In replevin, the defendant made cognizance as bailiff of W G T, for rent in arrear under a demise at the yearly rent of 170*l*. The evidence was, that the premises were conveyed to W G T by two of three trustees only, the third not having executed the conveyance:—Held, a variance. *Philpott* v. *Dobbinson*, 7 Law J. C.P. 248, s. c. 6 Bing. 104, s. c. 3 M. & P. 320.

## REQUESTS, COURT OF.

(A) JURISDICTION.
(B) COSTS.

### (A) JURISDICTION.

[See *Elkins* v. *Harding*, *post*, B.]

Where an officer of the sheriff of Middlesex resided and carried on his business in that county,

but kept an office or counting-house in the city of London, in partnership with his son:—Held, that he must be taken to be a person seeking his livelihood in London, within the meaning of the London Court of Requests Act, 39 & 40 Geo. 3. c. 104. s. 5. *Bushnell* v. *Levi*, 7 Law J. C.P. 115, s. c. 5 Bing. 315, s. c. 2 M. & P. 577.

A defendant, to entitle himself to the advantage of the 39 & 40 Geo. 3. c. 104, (the London Court of Requests Act,) must shew that he is keeping a shop, &c. or seeking his livelihood by carrying on business in London on his own account. Therefore, a clerk in the Excise Office, London, held not to be within the act, although he was every day from ten to four at that office; and was there served with the writ in the cause, directed to the sheriffs of London. *Smith* v. *Hurrell*, 8 Law J. K.B. 198, s. c. 10 B. & C. 542.

(B) Costs.

Under the Westminster Court of Conscience Act, 23 Geo. 2. c. 27, the superior courts have no power to enter a suggestion to deprive a plaintiff of costs for suing for a debt cognizable by the court of conscience; the act merely empowers the defendant to take advantage of it by plea. *Andrews* v. *Phillips*, 8 Law J. C.P. 122.

A defendant who has removed a cause from the Lord Mayor's Court of London into one of the superior courts, is yet entitled to the benefit of the 39 & 40 Geo. 3. c. 104, (the London Court of Requests Act,) to deprive the plaintiff of his costs, if he recover less than 5*l.* *Copland* v. *Jacobs*, 8 Law J. K.B. 321.

Where a clerk in court and an attorney of the Court of King's Bench, sued an attorney of the latter court by capias of privilege, and recovered less than 5*l.*:—Held, that the clerk in court did not lose his privilege, and that the defendant was not entitled to enter a suggestion on the roll to deprive the plaintiffs of costs under the London Court of Requests Act, 39 & 40 Geo. 3. c. 104. *Elkins* v. *Harding*, 9 Law J. Exch. 82, s. c. 1 C. & J. 345, s. c. 1 Tyrw. 274.

Where the plaintiff sues on a disputed account for a larger sum, and the verdict is under 5*l.*, the defendant is entitled to a suggestion, under the 39 & 40 Geo. 3. c. 104. s. 12, to deprive the plaintiff of costs. *Harris* v. *Widdowson*, 8 Law J. C.P. 122.

Where a demand considerably above 5*l.* has been reduced below that sum by the effect of a plea of the Statute of Limitations, the defendant is not thereby deprived of his right to enter a suggestion under the London Court of Requests Act, 39 & 40 Geo. 3. c. 104. *Rothery* v. *Munnings*, 8 Law J. K.B. 386, s. c. 1 B. & Ad. 15.

In an action to recover 3*l.* 6*s.*, remaining due to plaintiff, on a bill of exchange for 8*l.* 6*s.*, which bill was given to secure the balance of an account between the parties originally amounting to more than 100*l.*:—Held, that the defendant was not entitled to enter a suggestion to deprive the plaintiff of his costs, under the Boston Act, 47 Geo. 3. sess. 2. c. 1, the 15th section ousting the commissioners of their jurisdiction to determine any cause for any debt being the balance of an account or demand originally exceeding 5*l.* *Abbey* v. *Lill*, 7 Law J. C.P. 96, s. c. 2 M. & P. 534, s. c. 5 Bing. 299.

In an action in the Exchequer for work done, against a defendant residing in the Isle of Wight, where the verdict was taken by consent for 5*l.*, the sum sued for being upwards of 6*l.*:—Held, that under the local act for the summary recovery of small debts in that island, the plaintiff was not entitled to costs.

The Court will not, on a motion to enter a suggestion on the roll, receive the facts from affidavits, but will require the Judge's report. *Oakes* v. *Atkin*, 13 Price, 793.

## RESCUE.

Attachment absolute for rescue, on an affidavit of the sheriff's officer, setting forth the sheriff's return of the fact. *Lund* v. *Owen*, 8 Law J. C.P. 198.

## RETAINER.

[See Executor and Administrator.]

Where the debtor makes his creditor executor of his will, the law raises no presumption that the creditor has retained enough to pay his debt, until it be shewn by evidence that he has received enough for that purpose. *White* v. *Fitch*, 7 Law J. K.B. 225.

## REVENUE.

[Amendment of laws of Customs, 10 Geo. 4. c. 43, 7 Law J. Stat. 76.

[Certain oaths and affirmations made in the Customs, abolished, 1 & 2 W. 4. c. 4, 9 Law J. Stat. 5.

[Fees of officers of Customs regulated by 1 & 2 Will. 4. c. 40, 9 Law J. Stat. 79.]

A person acting as a broker and auctioneer employed by the agent in England of a foreign ambassador, who had quitted this country at the termination of his embassy, to sell on his excellency's account certain wines, spirits, &c., by auction, which had been imported by the ambassador duty free, held to be personally liable, as agent of all parties, to pay the duties of Customs in respect of the goods so sold by him, under the circumstances of this case, where he had received, although he had from time to time, as he received the money, paid the net amount over to his employer, the immediate agent of the vendor.

The ambassador's privilege held to have ceased to protect the wines from duty, when so sold to a purchaser.

*Quære*, whether an information filed against the auctioneer for the recovery of the duties, consisting of a count in debt on the statute, and a count for money had and received, be sustainable, under the circumstances, on the first count, or on the second; the Chief Baron, Graham and Garrow, Barons, being of opinion that the verdict for the Crown might be supported on the second count—*dubitante* Hullock, B., *sed sentiente* the defendant liable on the first count. *The Attorney General* v. *Thornton*, 13 Price, 805.

An entry and landing of goods by bill of sight, without perfect entry, will not protect from penalties parties making such entry and landing with a view to a fraudulent evasion of duties. *Attorney General*

v. *Hawkes*, 9 Law J. Exch. 16, s. c. 1 C. & J. 120, s. c. 1 Tyrw. 3.

Whether a general writ of assistance will authorize an entry into a house, to search for uncustomed goods, there being reasonable cause to suspect such goods are there; or, whether the officer must enter and search at his peril, and be justified or not, according to the result of the search—*quære*.

*Semble*—At all events the officer would not be justified, unless there was reasonable cause of suspicion. *Rex* v. *Watts*, 8 Law J. K.B. 381, s. c. 1 B. & Ad. 166.

Motion for an attachment against parties, for disobeying an order of commissioners, appointed to inquire of debts due to the King, requiring production of papers.

*Quære*—Whether parties in trade, against whom a commission had issued to hold an inquisition, to find whether they are indebted to the Crown for arrears of duties of Excise, on the commodities sold by them in the course of their business, and who, on attending in pursuance of a summons, to be examined by the commissioners on the inquest, refused to submit to such examination, unless attended by their solicitor, are compellable to produce before them, for their inspection, the partnership books, for the purpose of furnishing evidence of the amount of duties in arrear, without first being duly released, by competent measures and authority, from any penalties which the contents of such books might be the means of shewing or ascertaining that they had incurred.

*Quære*—By whom, and by what means such indemnity is to be secured to the parties.

It cannot be given by the solicitor to the Excise, of his own personal authority.

Proceedings for duties withheld and in arrear, involve (*semble*) a waiver of penalties. *Rex* v. *Dausey*, 12 Price, 588.

In a case of issues on writ of *distringas* for arrears of land-tax set *insuper*.

Service of order for, on sheriff. *Attorney General* v. *Inhabitants of Ashby Tolville*, 12 Price, 649.

## REVERSION AND REVERSIONER.

[Scotch reversions, within burgh, 10 Geo. 4. c. 19, 7 Law J. Stat. 33.]

A reversion depending upon the contingency of the tenant for life, who was sixty-three years of age and a bachelor, dying without issue, is not the subject of estimate or calculation.

But the purchaser of this reversion having, in his treaty with the vendor, proposed to deduct one-half of the reversion in respect of such contingency, and the treaty having been concluded upon that basis, the Court, as between the vendor and purchaser, will value the contingency accordingly. *Baker* v. *Bent*, 1 Russ. & M. 224, s. c. 1 Tam. 368.

A reversioner may maintain an action for a nuisance, which produces no present injury to his reversion beyond that to the right, and which may be removed before the reversion comes into possession. *Shadwell* v. *Hutchinson*, 2 M. & M. 350, s. c. 3 C. & P. 615. [Tenterden]

After a reversioner has recovered in an action for an obstruction, to the injury of his reversionary interest, he may yet, if the obstruction be continued, maintain another action for continuing the obstruction. *Shadwell* v. *Hutchinson*, 9 Law J. K.B. 142, s. c. 2 B. & Ad. 97, s. c. 4 C. & P. 333.

In case, by a reversioner, for an injury done to the reversion, it is no answer that the injury complained of was caused by the wrongful act of the tenant, for which he might be liable to an action. *Lord Egremont* v. *Pulman*, 1 M. & M. 404. [Tindal]

## REVIEW.

[See PRACTICE.]

[*Dew* v. *Clarke*, 4 Russ. 511, Dig. Law J. 460.]

A commission of review is not grantable, unless the Lord Chancellor be satisfied that the principles of law, on which the Court decided, were wrong, or that the facts were either misstated or misunderstood. *Wyatt* v. *Ingram*, 3 Hag. Ec. 467.

## RIGHT, WRIT OF.

The word *esplees* having been omitted in the count, and it having been indorsed by an attorney in the country, the tenant signed judgment of *non pros.*—The Court held it to be irregular, and gave the demandant leave to amend on payment of costs. *Webb, demandant*; *Lane, tenant*, 7 Law J. C.P. 71, s. c. 5 Bing. 285, s. c. 2 M. & P. 478.

## RIOT, AND RIOT ACT.

If parties assemble together for a purpose, which, if executed, would make them rioters, but, having assembled, they do nothing, and separate without carrying their purpose into effect,—this is an unlawful assembly. *Rex* v. *Birt*, 5 C. & P. 154. [Patteson]

If, in reading the proclamation from the Riot Act, the magistrate omit to read the words "God save the King," at the end of it, persons remaining together for an hour after such reading of the proclamation cannot be capitally convicted under sect. 1. of that act. *Rex* v. *Child*, 4 C. & P. 442. [Vaughan, and Alderson]

Twelve persons were indicted for a riot and assaulting J W. The indictment did not conclude *in terrorem populi*. Several of the defendants had been convicted, and at an ensuing assize, at which the remaining defendants were tried, there was evidence that they had joined in the riot, but there was no proof of any assault, except the words "*po. se*," and "guilty," written on the indictment, over the names of the convicted defendants:—Held, that this was no proof of an assault as against the present defendants, and that the present defendants could not be convicted of the riot only, as the indictment did not conclude *in terrorem populi*. *Rex* v. *Hughes*, 4 C. & P. 373. [Park]

If persons be charged with a riot and cutting down fences, and the indictment do not conclude *in terrorem populi*, they cannot on that indictment be convicted of a riot, but may be convicted of an unlawful assembly. *Rex* v. *Cox*, 4 C. & P. 538. [Patteson]

An indictment on the Riot Act, 1 Geo. 1. st. 2. c. 5. s. 1, for remaining assembled one hour after pro-

clamation made, need not charge the original riot to have been *in terrorem populi*. *Rex* v. *James*, 5 C. & P. 153. [Patteson]

Where persons were convicted of a riot, attended by some violence to the prosecutors, the latter were held entitled to costs as "parties aggrieved," under the 5th & 6th Wm. and Mary, c. 11. s. 3, although the riot originated out of a dispute as to the office of churchwarden, to which office both the prosecutors and the defendants laid claim. *Rex* v. *Thompkins*, 9 Law J. M.C. 81, s. c. 2 B. & Ad. 287.

## RIVER.

[See WATER AND WATERCOURSE.]

## ROBBERY.

If persons who had formed part of a mob, obtain money from a party by advising him to give money to the mob, and be indicted for this as a robbery,—the prosecutor, to shew that this was not *bonâ fide* advice, may give evidence of demands of money made by the same mob at other places, before and afterwards, in the course of the same day, if any of the prisoners were present on those occasions. *Rex* v. *Winkworth*, 4 C. & P. 444. [J. Parke]

## ROMAN CATHOLIC.

[See 6 Geo. 4. c. 7, for the relief of the Roman Catholics, 7 Law J. Stat. 13.]

## SACRILEGE.

If a church tower be built higher than the church, and have a separate roof, but have no outer door, and be only accessible from the body of the church, from which it is not separated by any partition, this tower is a part of the church within the meaning of the stat. 7 & 8 Geo. 4. c. 29. s. 10. *Rex* v. *Wheeler, Turner and Davis*, 3 C. & P. 585. [Parke]

## SALVAGE.

Salvage refused for bringing into a port a barge found (without anchor or crew) aground, where it was a common usage to leave barges. *Upnor*, 2 Hag. 3.

Where the ship of a neutral had been seized by a belligerent, on an unfounded charge of the breach of a blockade, and the crew of the ship which was seized, afterwards rescued her, and took her to her destined port:—Held, that this rescue did not entitle the crew to salvage. *Wilson* v. *Anderton*, 9 Law J. K.B. 48, s. c. 1 B. & Ad. 450.

Claim of a passenger to salvage not sustained. *Brunstan*, 2 Hag. 3, n.

The crew of another vessel on board the wrecked vessel, rather as passengers than as part of the crew, are entitled to some reward for salvage services. *Salacia*, 2 Hag. 269.

Under the general rule, that a person not actually occupied in effecting a salvage service is not entitled to share in a salvage remuneration, the claim of an officer of a coast guard detachment, who sent his men and boat, but did not assist in person, rejected. *Vine*, 2 Hag. 1.

The provisions 6 Geo. 4. c. 49, and the order in council of September 1825, do not apply retrospectively to cases of salvage or rescues from pirates made and adjudicated upon, before the passing of that act; and the Court of Admiralty has no power of its own authority, to adopt the principle of constructive salvage. The Court, therefore, rejected the claim of the Admiral to share in such part as, if that statute and order in council applied, would belong to him in the case of a rescue of a British vessel.

*Quære*—whether the right of the Admiral under 6 Geo. 4. c. 49, to share in salvage for the rescue of vessels from pirates, extends to foreign ships.

All salvage, whether civil or military, is founded on the equity of remunerating private and spontaneous services rendered in the protection of the lives and property of others. *Calypso*, 2 Hag. 209, 218.

*Quære*—whether, if a custom to render mutual assistance be established, it would exclude a claim for salvage. *Margaret*, 2 Hag. 48, n.

Where vessels sail as consorts, and under an agreement to render mutual assistance, the Court will not entertain a claim for salvage for services rendered by one to the other. *Zephyr*, 2 Hag. 43.

Where a vessel being in distress, an agreement is entered into with the master of another vessel for assistance for a sum certain, the Court cannot entertain a claim from the owner for salvage. *Mulgrave*, 2 Hag. 77.

The Court, upon the evidence, being satisfied that it was understood and sufficiently expressed that a person, appointed "true and lawful attorney, in the name of the master, to use all possible means for the recovery of the ship and cargo," should act as agent, and that his claim for salvage should be controlled by that understanding:—Held, that such character, nevertheless, did not wholly supersede the character of salvor, so as to exclude the jurisdiction of the Court of Admiralty. The Court, out of the value of 4,500*l*. gave, together with costs, 225*l*. in addition to 815*l*. 15*s*. 6*d*. for disbursements. *Happy Return*, 2 Hag. 198.

War salvage being generally fixed at a low rate, may, on special services, in the nature of civil salvage, be increased. *Sir Francis Burton*, 2 Hag. 157.

In cases of civil salvage, the Court of Admiralty does not recognize the rule of proportion, but awards an equitable remuneration for the service rendered, though such remuneration is more liberally allotted in cases of large value. Arbitrators having given one-fourth of the ship, viz. 600*l*., the Court awarded out of the cargo, of the value of 38,000*l*., 1,000*l*. for contingent losses, 1,500*l*. salvage reward, and 200*l*. for the master's particular expenses.

In cases of large value, and where the service has been rendered with risk to the property of the owners, the Court, both in maritime and military salvage, allots a portion to the owners. *Salacia*, 2 Hag. 262—4.

In a case of derelict of extraordinary merit, where the proceeds were 600*l*., and the number of salvors four hundred, the Court inclined to give a larger sum, but finally gave only a moiety, (as no precedent of the allowance of a larger proportion could be produced,) and directed the costs to be paid out of the other moiety. *Frances Mary*, 2 Hag. 89.

A moiety and costs given in a case of derelict of the value of 5,668*l.*, where the salvage had been effected with great exertion and risk. *Reliance*, 2 Hag. 90, n.

The Court of Admiralty cannot, in a case of salvage, allow charges for repairs. *Ranger*, 2 Hag. 42.

The stat. 1 & 2 Geo. 4. c. 75. s. 9, requiring the parties dissatisfied with an award of Magistrates in a salvage case, to declare "within ten days after such award is made, and not afterwards," their desire of obtaining the judgment of the High Court of Admiralty; the ten days having expired, the award is conclusive; 4*l.* allowed *nomine expensarum*. *Semble*, that verbal notice to the Magistrates' clerk is not sufficient. *Industry*, 2 Hag. 73.

On an appeal from an award of Magistrates, in a case of salvage, the Court declined to admit further affidavits, and confirmed the award. *Osiris*, 2 Hag. 135.

In a cause of mixed military and civil salvage against the owners, the Court is unwilling, though no bail has been given, to disturb a valuation, not clearly excessive, made under a reference on the spot to three arbitrators chosen by the salvors and consignees of the vessel. *Sir Francis Burton*, 2 Hag. 156.

If the award of Magistrates is generally a reasonable reward for salvage services, the Court will not disturb it in a trifling sum, merely because the apportionment should be in some degree objectionable; it being the duty of the Court to support such awards, as far as they are not excessive, nor inconsistent with general principles. An award of two-fifths of the whole proceeds sustained; but the Court objecting to a different rate of salvage for the ship and different parts of the cargo, as unusual and inconvenient, refused to allow the salvors costs. *Vesta*, 2 Hag. 189.

In an appeal from a Magistrates' award in a case of salvage, their certificate of value under stat. 1 & 2 Geo. 4. c. 75, s. 9, even if not conclusive, is of great weight; and the Court, dissenting on no point from the award of one-third of the proceeds, affirmed it with costs. *Brothers*, 2 Hag. 195.

The primary object of stat. 1 & 2 Geo. 4. c. 75. was to provide for small and occasional services, though under the general words of the 8th section, it may be competent to the Magistrates to proceed in cases of greater magnitude, but with less prospect of advantage to the parties.

Upon an appeal from an award of Magistrates in a cause of salvage, the Court allowed a new appraisement to be made, at the prayer and expense of the owners (who had not by themselves or agents, objected to the original appraisement,) reversed the award and gave a fixed sum, together with their costs and losses, to each boat according to their respective merits, instead of a certain proportion of the value among them generally. *Oscar*, 2 Hag. 257.

In a cause of salvage, two persons, plaintiffs, as part of "the crew of the ship," on signing releases, dismissed to be examined as witnesses. *The Pitt*, 2 Hag. 149, n.

In a cause of salvage, by plea and proof, interested witnesses admitted, on the ground that they were the only witnesses. *Sara Barnardina*, 2 Hag. 151, n.

The Court does not consider loose conversation at the time the service is rendered, conclusive of the merits of the case, nor the *quantum* of reward. *Salacia*, 2 Hag. 265.

## SCIRE FACIAS.

[See BAIL.]

*Quære*—Whether, hereafter, two *nihils* will be permitted to operate as a *scire feci*. *Beddington* v. *Beddington*, 7 Law J. C.P. 79, s. c. 5 Bing. 284, s. c. 2 M. & P. 479.

The Court reprobating the practice of returning *nihil* to writs of *sci. fa.*, will in such cases take advantage of every trifling irregularity, to set aside the proceedings. Therefore, where the plaintiff's attorney directed the sheriff to return *nihils* to two writs of *sci. fa.*, and said that "he was afraid the proceedings would come to the knowledge of the bail," the Court set them aside, *on the ground of collusion between the attorney and the sheriff*. *Wilson* v. *Biden*, 8 Law J. C.P. 282, s. c. 4 M. & P. 537.

Upon a *scire facias* upon a recognizance entered into to abide an award respecting matters in difference upon an extent in aid:—Held, that the defendant, having succeeded upon demurrer, was not entitled to costs. *Rex* v. *Bingham*, 1 C. & J. 379, s. c. 1 Tyrw. 262.

## SCRIVENER.

[See BANKRUPT and CORPORATION.]

## SEA-SHORE.

Upon a commission under the Great Seal, and an inquisition returned into and filed in the Petty Bag Office of the Court of Chancery, lands were seized into the King's hands, as derelict by the sea. The lord of the adjoining manor, upon petition to the Lord Chancellor, having obtained leave to traverse the inquisition, filed his return in the Petty Bag, denying that the lands were derelict, and pleading that they were formed by alluvion, or gradual deposit of soil. The Attorney General, in his replication to this traverse, took issue upon the alleged fact of alluvion, and the defendant joined issue. Upon the trial, a verdict was found for the defendant; and afterwards, upon application of the Attorney General for a new trial, the Court ordered the facts proved to be stated in a special case, which being argued, a verdict for the defendant was entered by direction of the Court.

A writ of error from this judgment, directly to the House of Lords, being brought by the Attorney General, on behalf of the Crown:—Held, that the House of Lords has jurisdiction to hear such writ of error; that it is not necessary to carry a writ of error first to the Exchequer Chamber; and that lands formed by alluvion, that is, by gradual and imperceptible deposit on the shore of the sea, belong to the lord of the adjoining manor, and not to the King *jure coronæ*.

A custom regulating the rights of the owners of all lands bordering upon the sea, is so general, that

it need not be pleaded. *Rex* v. *Lord Yermouth*, 2 Bligh, N.S. 147.

## SEDUCTION.

In an action by a father for seduction, it is not necessary to shew any acts of service done by the daughter: it is enough that she lived in the father's family under such circumstances that he had a right to the services. *Maunder* v. *Venn*, 1 M. & M. 323. [Littledale]

## SEISIN.

[Registration of, within burgh, 10 Geo. 4. c. 19, 7 Law J. Stat. 33.]

## SEQUESTRATION.

[*Cornish* v. *Searell*, 1 M. & R. 703, Dig. Law J. 464.]

A clergyman, possessed of two livings in two separate counties, was sued to outlawry; two writs of special *capias utlagatum* were issued to the sheriffs of the respective counties, who severally returned *nulla bona* save these livings. The Court, at the instance of the plaintiffs in the suit, granted a writ of *sequestrari facias* to the bishop of the diocese in which both the livings were, to sequester them, in order that the plaintiffs might make further application for the profits to the amount of their debt. But they refused to grant separate writs for that purpose; which was prayed, lest a partial defect might defeat the whole. *In the matter of the outlawry of the Rev. Nathaniel Hinde*, 9 Law J. Exch. 107, s. c. 1 C. & J. 389, s. c. 1 Tyrw. 347.

## SESSIONS.

(A) When held.
(B) Jurisdiction.
(C) Appeals.

### (A) When held.

[See 1 Will. 4. c. 70. s. 35, 8 Law J. Stat. 162.]

### (B) Jurisdiction.

The statute 3 Geo. 4. c. 46. s. 6. empowers the Court of Quarter Sessions to discharge a forfeited recognizance in cases where the sheriff has levied part of the amount, and the party has been committed to prison for the remainder; and if, in such a case, the Sessions discharge the recognizance while the money so levied in part is in the hands of the sheriff, he must refund it to the party. *Harper* v. *Hayton*, 8 Law J. M.C. 129.

### (C) Appeals.

Any rated inhabitant of a parish to which an order of removal is made, may, as a party aggrieved, appeal against the order under the 13 & 14 Chas. 2. c. 12. s. 2, and 3 W. & M. c. 11. s. 9. *Rex* v. *the Justices of Denbighshire*, 9 Law J. M.C. 109, s. c. 1 B. & Ad. 616.

By a local act, the management of the parish poor was vested in the churchwardens, overseers, governors, and directors of the poor; and an appeal to them was given to any person thinking himself aggrieved by anything to be done by virtue of the act: and if the appellants should be dissatisfied with their determination, then an appeal was given to the Quarter Sessions. A parishioner having applied, for relief against a rate, to the churchwardens, overseers, governors, and directors, they, at a meeting, resolved to take no further notice of his application:—Held that, as they had not come to any determination on the subject-matter of his complaint, the parishioner could not appeal to the Quarter Sessions, but that he ought to have first applied for a mandamus to compel the churchwardens, overseers, governors, and directors to hear the appeal. *Rex* v. *Justices of Kent*, 9 B. & C. 283.

A local act for the government of a parish, appointed and incorporated certain persons as guardians and directors of the poor, giving them various powers; and, among others, a power to raise money by annuity. There was a proviso authorizing any rated inhabitant to attend their meetings and protest and object to their proceedings; his objections to be heard, and finally determined by them. There was also a power of appeal to the Sessions by any party who thought himself aggrieved by anything done in pursuance of the act, and for which no particular method of relief had been pointed out:—*Held*, that, where the objection of a rated inhabitant was to certain orders, made by the corporation themselves, for the payment of annuities they had granted, and of other sums of money, the party objecting was not bound to attend the corporate meeting and object, but might appeal to the Sessions.

In the case above mentioned, the appeal clause provided, that the appeal should be within four months after the *cause of complaint* should have arisen. The corporation having made orders for the payment of annuities granted more than four months before the appeal, but the orders for payment being within the four months:—Held, that an appeal against the orders was in time. *Rex* v. *the Justices of Salop*, 9 Law J. M.C. 111, s. c. 2 B. & Ad. 145.

By the construction given to the 41st Geo. 3. c. 23. s. 6, the person who appeals against the poor rate, on the ground that a person is omitted who ought to be rated, is bound to give notice of the appeal to the person so omitted; and on failure of proof of such notice, the Sessions are not bound to hear the appeal, but may confirm the rate. *Rex* v. *Brooke*, 8 Law J. M.C. 33, s. c. 9 B. & C. 915, s. c. 4 M. & R. 719.

*Semble*—That where notice is given that no business will be transacted on the day usually fixed for holding the Sessions, but that the Sessions will be adjourned for business until a future day, a notice of appeal given in time for that future day, according to the practice of the Sessions, will be sufficient.

And even, if a notice of appeal should be held insufficient by the Sessions, the Court will exercise a discretionary power over the Sessions practice, and, if they think it reasonable, will order the appeal to be heard. *Rex* v. *the Justices of Hampshire*, 7 Law J. M.C. 9.

An act of parliament authorised a conviction by two magistrates, and gave a power of appeal, upon

he person entering into recognizances and giving notice in writing, to the convicting magistrates, of his intention to appeal. A person convicted under this act expressed his intention to appeal; entered into the recognizances, and requested the magistrates' clerk to prepare the notice for him, but the latter declined so to do. The magistrates told the appellant, that they were then obliged to separate; but that if he left the notices at any time that day with their clerk, his so doing should be good service upon them. He did not send the notices until shortly before the Sessions; and for want of a proper notice the Sessions refused to hear the appeal. The appellant swore, that he believed at the time that he had done all that was necessary to secure his right of appeal:—Held, that the magistrates ought either to have waited together a reasonable time to give the appellant an opportunity to prepare his notice, or should have directed their clerk to do it for him; and that the appeal ought therefore to be heard. *Rex v. the Inhabitants of Gloucestershire*, 7 Law J. M.C. 7.

A notice of appeal against an order of removal, signed by the attorney for the overseers of the appellant parish, is sufficient. *Rex* v. *the Justices of Monmouth*, 7 Law J. M.C. 95, s. c. 8 B. & C. 127.

A notice of appeal pursuant to 57 Geo. 3. c. 94. s. 2. against a county rate, need not state the grounds of objection to the rate.

If the appellants profess in their notice to state the grounds, they ought not, on the hearing of the appeal, to be limited to those grounds: but if the Sessions should be dissatisfied that such notice has misled the other party, they may adjourn the hearing of the appeal. *Rex* v. *the Justices of Westmoreland*, 8 Law J. M.C. 70, s. c. 10 B. & C. 226.

A notice of appeal against a county rate, made in conformity with 55 Geo. 3. c. 51, by reason of inequality, ought, in the terms of the act, to state the ground of appeal to be, that the parish intending to appeal "is rated at a higher proportion of the pound sterling, according to the fair annual value of the rateable property therein, *than has been fixed* and declared by the Sessions *as the basis* of the rate. And, consequently, therefore, a notice of appeal, which stated the ground of appeal to be, that the rate was unequal and defective, inasmuch as the appellant parish was assessed at a higher proportion of the pound sterling according to the fair annual value, &c. *than the respondent parish was charged* according to the fair annual value, &c., was held to be defective; as both parishes might have been valued too low, and yet the appellant parish might have no reason to complain with reference to the basis on which the whole rate was made. *Rex* v. *the Inhabitants of Blackawton*, 8 Law J. M.C. 123, s. c. 10 B. & C. 792.

A notice of appeal given by a person convicted under the Vagrant Act, 5 Geo. 4. c. 83. s. 4, is sufficient, in stating the grounds of the appeal, by stating that the defendant is not guilty of the offence. Such a notice denies all the facts which are essential to constitute the offence. *Rex* v. *the Justices of Newcastle-upon-Tyne*, 9 Law J. M.C. 117, s. c. 1 B. & Ad. 933.

Where an order of removal has not been executed so as to give time for notice of trial of an appeal at the next Sessions, the appeal need not be entered until the Sessions following the next: but it should be then entered and tried; notice of entering and trying having been previously given. *Rex* v. *the Justices of Southampton*, 7 Law J. M.C. 77, s. c. 8 B & C. 641.

*Semble*—That it is unnecessary to enter and respite an appeal at the next Sessions, where the order of removal is served so late as to render it impossible to try the appeal at those Sessions. *Rex* v. *the Justices of Kent*, 8 B. & C. 639, s. c. 3 M. & R. 15.

Although the Sessions should in general grant a motion to enter an appeal against an order of removal, they are not bound to grant a motion to enter *and respite* an appeal, without inquiring into the circumstances which cause the necessity for the latter part of the motion.

Accordingly, notice was given of an intention to enter and try an appeal at the next Sessions; but, at the Sessions, the appellants found they could not try by reason of the absence of a material witness. The parties who were to be respondents had come prepared to try. A motion was made upon affidavit to enter *and adjourn* the appeal. The Sessions would not accede to this, except upon the terms of paying the costs of the day to the other side. This was refused; and the appeal was not entered:—Held, by the Court of King's Bench, that the Sessions were right; and the Court refused to order the appeal to be then received, even upon an offer to pay all the costs. *Rex* v. *the Justices of Monmouthshire*, 9 Law J. M.C. 116, s. c. 1 B. & Ad. 895.

The Sessions are not warranted in refusing to hear an appeal against an order of removal, because the appellants do not produce the pauper; they tendering evidence that he had absconded, and that they had *bonâ fide* used due diligence to find him out.

Nor are they warranted in so refusing, although the appellants had previously obtained an adjournment, to enable them to find out the pauper, upon an understanding that no further time should be applied for. *Rex* v. *the Justices of Cornwall*, 9 Law J. M.C. 82.

Where, upon the hearing of an appeal, a former order of Sessions, quashing an order of removal between the same parishes, is relied upon by one party, it is competent to the other party to give evidence of the grounds upon which that order of Sessions was made; and if it appear that they were independent of the merits, the order is not conclusive. *Rex* v. *the Justices of Worcestershire*, 7 Law J. M.C. 72, s. c. 8 B. & C. 254.

When the respondent parish has made out a *primâ facie* case to warrant the removal, it will be sufficient for the appellant parish to disprove its own liability, by shewing that a settlement has been gained, to which, if the parish were ascertained, the removal ought to have been made. The burthen of ascertaining which is the parish, falls upon the respondents, and not upon the appellants. *Rex* v. *the Inhabitants of St. Mary, Beverley*, 9 Law J. M.C. 17, s. c. 1 B. & Ad. 201.

Where a party enters an appeal against poor-rates, which he afterwards abandons, the Sessions may confirm the rate, *quoad* the subject-matter of the appeal, and award costs to the respondents, to the time of the abandonment; such costs to be taxed by the clerk of the peace; whose act, in ascertaining the costs, is to be deemed the act of the Sessions, as being adopted by them, and embodied in their adju-

dication. *Rex* v. *the Justices of Norfolk*, 9 Law J. M.C. 73.

Where a special case shewed facts, some of which pointed to a weekly, and others to a yearly hiring, but the Sessions had not drawn any conclusion of their own from the fact, whether the hiring was weekly or yearly, the Court refused to draw the conclusion; but sent the case back to the Sessions. *Rex* v. *the Inhabitants of Road*, 9 Law J. M.C. 8, s. c. 1 B. & Ad. 362.

An order of removal on the complaint of the parish officers of A, was made for a removal to B. By mistake, the order was filled up as made on the complaint of the parish officers of B. Upon an appeal against the order, the mistake was discovered. The Sessions refused to amend under 5 Geo. 2. c. 19; and allowed the appeal:—but held, that they ought to have amended; and a mandamus ordered that they should. *Rex* v. *the Justices of Durham*, 8 Law J. M.C. 103.

Where the Sessions have decided an appeal without any reservation, they cannot, at a subsequent Session, enter a continuance of the appeal, on the ground of perjury having been committed on the hearing, and then proceed to re-hear the appeal. Having once finally decided, they cannot, at a subsequent Session, review the decision. *Rex* v. *the Inhabitants of Middlewich*, 9 Law J. M.C. 44.

## SET-OFF.

(A) Where allowed, in general.
(B) Costs and Judgments.
(C) Pleadings and Evidence.

### (A) Where allowed, in general.

In an action for money had and received, by the assignees of a bankrupt to recover the produce of bills sent to a creditor before bankruptcy to be discounted, and applied to a particular purpose, and which has been appropriated to the payment of his own debt, the creditor is not entitled to set off his debt. *Buchanan* v. *Finlay*, 7 Law J. K.B. 314, s. c. 9 B. & C. 738, s. c. 4 M. & R. 593.

Against a note given to the husband, for a debt due to the wife before marriage, and sued upon by him alone, the defendant may set off debts due from the husband to him; but he cannot set off debts due to him from the wife before marriage.

In an action by the indorsee against the maker of a promissory note, the defendant is not entitled to set off a debt due from the payee to himself upon a matter independent of and collateral to the note; although the note was indorsed over after it had become due. *Borough* v. *Moss*, 8 Law J. K.B. 287, s. c. 10 B. & C. 558.

### (B) Costs and Judgments.

Costs payable to the parties in the course of interlocutory proceedings in a cause, may be set off against each other, notwithstanding the attorney's lien. Thus, where, in an indictment, both defendant and prosecutor gave notice of trial, both made default, and there were rules upon each to pay the costs of the day to the other,—it was held, that the costs upon one of those rules might be set off against the costs of the other, notwithstanding the lien of the attorney.

But where the payment of such interlocutory costs is made a condition precedent to the party having the benefit of any proceeding, such costs cannot be set off against interlocutory costs which may become due to the party in a subsequent stage of the cause.

They may, however, be set off against interlocutory costs due to the party before the costs which are to be paid as a condition precedent became payable. *Rex* v. *Burke*, 7 Law J. K.B. 330.

Costs recovered in one action, cannot be set off against costs of the other party in another action, on which he has a verdict, but on which a new trial is pending; but, *semble*, that execution for the costs actually recovered, may be suspended for a short time, till the rule in the other action is determined. *Masterman* v. *Malin*, 9 Law J. C.P. 171, s. c. 7 Bing. 435, s. c. 5 M. & P. 324.

Where a plaintiff brought two actions (trespass and detinue), arising out of the same transaction, for trifling causes, and obtained a verdict of 40s. in one, and a verdict was found for the defendant in the other, the Court, upon motion on the part of the defendant, founded on affidavits stating the object, nature, and result of the actions, and facts impeaching the plaintiff, and that she was not to be found, ordered, that the costs incurred by the defendant, in the action wherein he was successful, should be set off against those of the suit in which he had failed; and that notwithstanding the objection of the plaintiff's attorney, who objected to it his claim for costs and his general lien. *Lane* v. *Pearce*, 12 Price, 742.

Where an action is brought for a simple contract debt, which is not denied, the Court, on motion, will set off a judgment obtained by the defendant against the plaintiff in that action; subject to the lien of the attorney in the judgment for his costs. *Russell* v. *May*, 7 Law J. K.B. 88.

### (C) Pleadings and Evidence.

If A agrees to do work for a certain sum of money and afterwards B purchases some of the materials, which are worked up by A, the money expended on that account must be set off, and cannot be given in evidence on the general issue. *Allinson* v. *Davies*, Pen. A.C. 82.

Where the parties to the record are at issue upon a plea of set-off by the defendant, it is not competent for those who represent the plaintiff to give evidence, shewing that the plaintiff on the record is only the nominal plaintiff; and that, as regards the real plaintiff, the defendant has no set-off. Such an alteration of the parties to the action, if admissible in evidence, must be specially pleaded in reply to the plea. *Wilton* v. *Buxton*, 7 Law J. K.B. 91.

## SETTLEMENT, MARRIAGE.

(A) Validity.
(B) Construction.

### (A) Validity.

A and B, in contemplation of marriage, made a settlement of real estate belonging to B, the wife, and of personalty belonging to the husband: a mar-

riage was solemnized, but, some time afterwards, it was discovered to be void: the parties then executed a deed purporting to revoke the settlement, and, some time afterwards, executed, in contemplation of marriage, a new settlement, altogether different from the former as to the provisions in favour of issue:—Held, that, under such circumstances, the first settlement was not binding on the parties; and that the rights of the issue were regulated by the second settlement. *Robinson* v. *Dickenson*, 7 Law J. Chanc. 70, s. c. 3 Russ. 399.

A, being tenant for life of certain premises, with a power of limiting a jointure to his wife, a settlement is executed on his marriage, by which he demises the land, of which he was tenant for life, to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife, as pin-money during the coverture, and he limits a jointure to her after his death; the same parties, on the same day, execute another instrument, by which A covenants not to sell or incumber the lands comprised in the term, and it is declared, that, if he shall at any time sell or incumber them, or attempt so to do, the trustees of the term shall receive the rents and profits, and apply them, as they may think fit, for the maintenance and support of A, or his wife, or children, or issue: the covenant and this proviso are fraudulent and void, as against a subsequent incumbrancer of A's life estate. *Phipps* v. *Lord Ennismore*, 4 Russ. 131.

(B) Construction.

[*Collier* v. *Squire*, 3 Russ. 467, Dig. Law J. 470. *Edwards* v. *Alliston*, 4 Russ. 78, Dig. Law. J. 470.]

By a settlement made before marriage, part of the wife's fortune was settled for the use of the husband and wife, and then the children of the marriage; and it was stipulated "that all other the personal estate to which the wife was, or might be or become, entitled, should be permitted to vest absolutely in the husband by right of marriage:" the wife survived the husband:—Held, that a contingent reversionary interest, which was in the wife at the date of the settlement, and which continued reversionary and contingent during the whole period of coverture, belonged to the wife, and not to the executors of the husband. *Farrer* v. *Grant*, 7 Law J. Chanc. 95.

By a marriage settlement, a portion to which the wife was entitled was assigned, in trust, for her separate use during the coverture, and in case she should die in her husband's lifetime, then in trust for him during his life, and after the death of the survivor, in trust for the issue of the marriage living at the death of the survivor, as the wife should appoint, and in default of such issue, in trust for such persons as the wife should, by deed or will appoint: the wife survived the husband:—Held, that she was entitled to the interest of the portion for her life. *Tunstall* v. *Trappes*, (*Margaret Gosling's case*,) 3 Sim. 312.

By a marriage settlement, the ultimate trust declared of a copyhold estate (the property of the husband), was for his executors or administrators, and a similar trust was declared with respect to the executors or administrators of the wife, as to a copyhold estate which was her property. The wife survived and took out administration to her husband:—Held, that she was not entitled to hold the former estate, for her own exclusive benefit, but for the benefit of herself and her husband's next of kin. *Wellman* v. *Bowring*, 3 Sim. 328.

By a marriage settlement, stock was vested in trustees, upon trust, to pay the dividends to the husband during coverture, and to the wife during her life, in case she survived him, and from and after her decease, in case there should be any children of the marriage then living, then upon trust for such of the said children as should attain twenty-one or be married, with a direction, that if all or any of such children should be under twenty-one and unmarried, to apply the dividends for their maintenance; and in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such child or children then living, yet all of them should die under twenty-one and unmarried, upon trust, if the husband should survive the wife and all such children, to pay the dividends to him during his life, and from and after the death of the survivor of the husband and wife, and from and after the death of the said children, in case there should be any, and all of them should die under age and unmarried, in trust for certain other persons. The wife survived the husband, and at her death there was no child of the marriage living; but a son, who died in her lifetime, had attained twenty-one and married:—Held, that the stock vested in that son absolutely. *Torres* v. *Franco*, 1 Russ. & M. 649.

Under an order of reference to one of the Masters of the Court of Chancery, B, who proposed to marry C, a ward of the Court, sent in a statement of facts and proposals, in which he stated that, under the will of his grandfather, he was tenant in tail in remainder, after the death of his two brothers, without issue, of divers manors, &c., of the value of 10,000*l.* a year; and in the event of his brother G dying without issue male, or becoming entitled to the said manors, &c. under the will of his grandfather, he, B, was entitled under the will of M B, his grandmother, to a life estate, with remainder to his first and other sons in tail male, in certain manors and lands of the value of 5,000*l.* a year; and thereupon he proposed to settle to the uses of the marriage, a sum of 2,000*l.* sterling, to which he was entitled in possession, and to covenant that in case either of the limitations in his favour, contained in the wills of his grandfather or grandmother, should take effect, he would in twelve months next after coming into possession of the estates thereby devised, convey so much thereof as should be of the clear annual value of 1,500*l.* to trustees, in trust, to pay to C, (the intended wife) in case she should survive him, so much of the rents as with her own fortune would make up a jointure of 2,000*l.* per annum; and to charge the estate so to be conveyed with the payment of 8,000*l.*, in addition to the fortune provided for younger children, and upon the same ultimate trusts as the 2,000*l.* then proposed to be assigned, and, subject thereto, to limit the estate to the first and other sons of the marriage in tail male, &c.

By an indenture of marriage settlement, made upon the basis of these proposals, and under the authority of an order of the Court, B assigned 2,000*l.* to trustees, upon the trusts specified in the proposals; and then after covenanting to settle the estates

of the wife, if and when they should vest according to the proposals and orders, it was further witnessed that, in pursuance of the order confirming the report on the proposals, and in consideration of the marriage and the settlement of the fortune of the intended wife, B, the intended husband, covenanted that "in case at any time during his life he should, under the limitations contained in the wills of his grandfather and grandmother, or in either of them, or otherwise, become seised or entitled to all or any of the manors, &c. thereby devised by any estate of inheritance in possession, or otherwise capable of being settled or bound in law or equity, he would within twelve months after he should become so seised, convey and settle so much of the said manors, &c., as would be of the yearly value of 1,500*l.*, upon the trusts specified in the proposals and orders." But as to the 8,000*l.* additional portion for younger children, mentioned in the proposals, no notice was taken in the indenture of settlement.

I, the brother of B, upon the death of his grandfather's widow, came into possession as tenant in tail of the lands devised by the will of the grandfather, and suffered a recovery of those lands, declaring the use to himself in fee simple; and upon the death of G, another brother, B came into possession as tenant for life, under the will of his grandmother, of the lands devised by her will.

Of the marriage between B and C there was issue a son and a daughter.

Upon a bill filed against B, on behalf of the daughter (an infant) to have the sum of 8,000*l.* raised by sale or mortgage of the interest of B in the lands devised to him by the will of his grandmother:—Held, that the event upon which those lands were charged with the sum of 8,000*l.* had not happened. *Willis* v. *Robinson*, 2 Bligh, N.S. 101, s. c. 1 Dow. & Cl. A.C. 469.

A, by marriage articles, bound himself "to pay to H, upon his marriage with E, (the said H settling all the estates and money he was then entitled to on the issue of the marriage, and a suitable jointure to the fortune E gave him,) the sum of 5,000*l.*" H, in the same articles bound himself "to settle all the estate and money which he was then entitled to upon the issue of E, and a jointure of 5,000*l.* a year." Four years after the date of these articles and the marriage, H acquired an estate, which was limited to the issue of the marriage, with a power reserved to H, under which, after a lapse of twenty-six years, he by deed appointed to his wife E, 500*l.* per annum by way of jointure, and 6,000*l.* to the younger children of the marriage as portions:—Held, in the court below, and on appeal, that this was a performance of the condition upon which A contracted to give H a marriage portion of 5,000*l.*, and that so much of that sum as was not paid on the marriage became due on that event, and was a charge on the estate of A, payable with interest from the date of the marriage.

The original articles were not produced in the cause, but it was in proof that H was the executor of A; that the house of H, in Ireland, had been occupied by a French rebel army, and his papers ransacked and scattered; that L was the executor of H, and that the houses of H and L had been searched, but that the original articles could not be found. Under these circumstances, secondary evidence, viz. a copy of the articles sent with a case laid before counsel, a charge in the solicitor's bill for the copy and case, a recital of the articles in an act of parliament for settling lands on the issue of the marriage, and a deed appointing a jointure according to the articles and portions to children, under a power reserved by the act, were admitted as proof of the existence and contents of the articles.

This decision was affirmed on appeal. *Gore* v. *Lord Lorton*, 2 Bligh, N.S. 236, s.c. 1 Dow. & C. 190.

P being possessed of lands for a term of lives, with a covenant for perpetual renewal, by articles made upon the marriage of his son in the year 1743, covenanted to convey his estate and interest in the lands to W and other trustees, to the use of himself for life, remainder to the use of his son T for life, remainder subject to a jointure to the sons of the marriage successively in tail male, reversion to P, the settlor. In 1749 the reversion of the lands subject to the lease, was granted to W, as trustee for P, to whom it was soon afterwards granted over by W.

P, by his will, dated in 1776, devised all his real estate, including his leases for lives, in trust for T, his son, for life, remainder to P, (son of T,) his grandson for life, remainder to the sons of P, the grandson, successively in tail male, with divers remainders over, reversion to the heirs of P, the devisor. The testator, by his will, declared that, "If his grandson, P, should not settle such interest in that part of the lands which was settled on his father's intermarriage, and which he would become entitled to on the testator's and his father's decease, to the uses to which the testator's estates were thereby limited upon the desire of his father, his son T, at his will and pleasure, and in his discretion, might and was by the will empowered to deprive P, the grandson, of the life estate in the lands thereby limited to him, so as such deprivation should not alter the limitations in remainder;" and in a subsequent clause, he having provided, "that in case his grandson P happened to die without issue male, and should settle the interest which was settled on his father's marriage in part of the real estates of the testator, and to the same uses as limited by the will, so that his acquisitions should go together," he gave to P a power to charge the lands devised with portions for daughters; and in a subsequent part of the will he gave a power to P to charge a jointure upon the real estate of inheritance thereby limited to him, provided he settles his said interest in part of the real estate to the uses therein mentioned.

P, the testator, died in 1769; T, his son, entered upon the lands under the limitations of the will, and remained in possession during his life. In 1776, T and P, the grandson, upon the occasion, and in consideration of his marriage and a portion, conveyed the term for lives with the right of covenant for perpetual renewal, in trust, to secure a jointure to the wife, and subject thereto for the use of T for life, remainder to P for life, remainder to secure another jointure, and subject thereto to the sons of the marriage, and in default of issue male, to the trustees for a term to raise portions for daughters, and subject thereto to T in fee.

Upon a bill filed by a party claiming under this settlement, against parties claiming the reversion, to compel a specific performance of the covenant for

mewal:—held, that according to the limitations, nd upon the events above stated, the term of the nds was not merged in the fee; that no case of lection arose upon the will of Peter Rutledge, binding those who took under that will, to leave the term a question to go according to the limitations of the ill. *Rutledge* v. *Rutledge*, 2 Bligh, N.S. 352, s. c. Dow. & Cl. A.C. 331.

The portion of a daughter, held to have been ested in her, notwithstanding her death in her father's lifetime.

Construction of clauses in a marriage settlement, s to the wife's power of disposition over a fund. *Fry* v. *Lord Sherborne*, 8 Law J. Chanc. 25, s. c. 3 Sim. 243.

In a marriage settlement, reciting that the father f the wife had agreed to make a further provision or his daughter equal to his younger child or children, he covenanted to give or secure to the trusts f the settlement, as large a share of his property as e should give to any of his other younger children, o take effect on the death of the survivor of himself nd his then wife; and that, if he died intestate, or mitted to make the provision before covenanted or, there should be paid to the trustees of the settlement as great a share of his property, as any younger child should in that event become entitled o:—Held, that the decree of the Vice Chancellor, declaring that those interested under the settlement were entitled to a further provision, equal only to hat which any younger child took upon the death of the covenantor, and without reference to advancements made by the covenantor during his life, was erroneous; and that the parties interested under the settlement were entitled, on the settlor's death, to a share of his property equal to what any of his younger children either received during his life, after the date of the settlement, by way of advancement, or took upon his death. *Willis* v. *Black*, 7 Law J. Chanc. 3, s. c. 4 Russ. 170.

In a marriage settlement, reciting that I, his intended wife, was possessed of certain goods, and that it had been agreed, that, in case she survived him, she should have the goods and such articles as might be bought in lieu thereof, for her own use; and in case she should die before him, that she might dispose of the goods, covenanted with trustees that he would not dispose of the goods without the consent of I; that he would purchase new articles in lieu of those which might be worn out or disposed of; that if she survived him, she should have the goods for her own use, and if he survived her, she should dispose of them, subject to his life-interest. No assignment of the goods was made to the trustees. N and I separated after their marriage, and I demised the goods to F, as a yearly tenant:—Held, first, that the goods were, notwithstanding the settlement, the property of N, and might be seised under a *fi. fa.* against him; but, secondly, that they could not be seised for his debt during the continuance of the demise to F. *Izod* v. *Lamb*, 1 C. & J. 35.

## SETTLEMENT OF THE POOR.

[See Poor.]

## SEWERS.

No person is chargeable to the sewers rate in respect of a sewer from which he derives no benefit; although it may be within the jurisdiction and under the controul and management of the commissioners, who may legally rate him for another sewer or sewers. *Rex* v. *the Commissioners of Sewers of the Tower Hamlets*, 7 Law J. K.B. 131, s. c. 9 B. & C. 517, s. c. 4 M. & R. 365.

Commissioners of sewers may order works to be done without a previous presentment shewing that they are necessary. And it is consequently no objection to a rate that it is to defray expenses in respect of works which were undertaken without being preceded by a presentment.

Commissioners of sewers may include in their rate, as expenses of working their commission, certain legal expenses incurred in supporting their own proceedings, where the expenses had been fairly and *bonâ fide* incurred; although in the rate they may press upon individuals who successfully resisted those proceedings.

A rate made apparently in the alternative, for works done *or* to be done:—Held, to be a good rate, it clearly appearing from the context that the rate was made in respect of work done *and* to be done. *Rex* v. *the Commissioners of Sewers for the Tower Hamlets*, 9 Law J. M.C. 30, s. c. 1 B. & Ad. 22.

The Court will not, upon an application to discharge an amerciament, enter into a disputed question, as to the validity of the practice of the Court of Sewers.

Where A was fined by commissioners of sewers, for refusing to be re-sworn upon a standing jury, the Court discharged the fine, it being admitted that it was not usual to re-swear the jury, except upon the issuing of a new commission. *Ex parte Taylor*, 3 Y. & J. 91.

## SHEEP-STEALING.

If on an indictment for stealing "one sheep," it appear that the animal stolen was under a year old, the prisoner must be acquitted, as he ought to have been indicted for stealing "one lamb." If a ewe is stolen, it must be so called in the indictment, and so a lamb must be called a lamb; and the term sheep is proper only where the animal stolen is a wether. *Rex* v. *William Birket*, 4 C. & P. 216. [Bolland]

## SHERIFF.

(A) Rights and Privileges.
(B) Duties and Liabilities.
  (a) *Generally.*
  (b) *Arrest.*
  (c) *Bringing in the Body.*
  (d) *Executions and Extents.*
  (e) *Return of Writs.*
(C) Fees and Costs.

### (A) Rights and Privileges.

It is not contrary to the policy of the law, that

[illegible]

the sheriff, although the latter has not given up the bail-bond. But whether an action can or cannot be maintained under such circumstances, an action of trespass and false imprisonment appears not to be the proper form of action, inasmuch as the plaintiff can show but one act of imprisonment, and that act can be justified under the writ. *Preece v. Griffith*, 1 Law J. K.B. 10, s. c. 5 M. & R. 120.

The omission to indorse upon a writ of *ca. sa.* a description of the defendant's residence and occupation is not in general a ground for setting aside the writ as between the parties. But, under special circumstances, it may be a ground for setting aside the writ, where, if it were allowed to remain, it might subject the sheriff to an action, at the suit of the plaintiff, who had been guilty of the omission. *Clark v. Palmer*, 7 Law J. K.B. 165, s. c. 3 B. & C. 153, s. c. 4 M. & R. 141.

(c) *Bringing in the Body.*

Where the sheriff has properly taken a bail-bond, and is afterwards attached for not bringing into court the body of the defendant, he is liable only to the amount of the penalty in the bail-bond, and the costs of the attachment. *Rex v. the Sheriff of Devon*, 8 Law J. K.B. 385, s. c. 1 B. & Ad. 159.

Attachment against sheriff for not bringing in body. *Harrison v. ——*, 1 Tyrw. 531.

Practice of discharging an attachment against a sheriff, for not bringing in the body. *Smith v. Parsons*, 1 Tyrw. 425.

(d) *Executions and Extents.*

Where a woman has cohabited with a man for several years and passed as his wife, it seems that she cannot maintain trespass against a sheriff for taking goods in execution against the man, they being in the house where the parties resided; but it having been left to the jury to say, whether they thought that the property might not have been given up by the woman to the man during cohabitation, and they having found in the affirmative,—Held, that their verdict is conclusive. *Edwards v. Farebrother*, 7 Law J. C.P. 72, s. c. 2 M. & P. 293.

The sheriff seized under a *fi. fa.* issued by a creditor of one L, goods which had previously been conveyed by L to the plaintiff by bill of sale, of which the sheriff had notice. Both parties refusing to indemnify the sheriff, and the plaintiff having sued him in trespass—The Court ordered the proceedings to be stayed until the plaintiff indemnified the sheriff. *Beeson v. Dawson*, 8 Law J. C.P. 296, s. c. 6 Bing. 566, s. c. 4 M. & P. 387.

*Semble*—That the sheriff is liable to an action of trover at the suit of the assignees of a bankrupt, whose goods the sheriff has seized under a writ of *fi. fa.* against the bankrupt's goods; such seizure being made after an act of bankruptcy; though the sheriff had no knowledge of it—*sed quære. Dillon v. Langley*, 9 Law J. K.B. 143, s. c. 2 B. & Ad. 131.

The sheriff being in possession of goods of one L under a writ of *fi. fa.* issued at the suit of one P, assented to an arrangement, whereby the goods were delivered over to P in satisfaction of his debt, a portion of them being handed over to the officer to secure his poundage. Before the issuing of the *fi. fa.* L had committed an act of bankruptcy, whereupon a commission was sued out after the delivery

f the goods by the sheriff's officer to P:—Held, that ich delivery amounted to a conversion, for which the heriff was liable in trover at the suit of the assigees of L—[*But see the note at the end of the report.*] *Carlisle* v. *Garland*, 9 Law J. C.P. 96, s. c. 7 Bing. 98, s. c. 5. M. & P. 102.

The acts of a special bailiff appointed by a bailiff n execution, who indemnifies the sheriff, are equialent to the acts of the plaintiff himself; and herefore, where a plaintiff, in execution upon a udgment by confession, appointed a special bailiff, who seized and sold goods during two days, for part of which he received the money, and for the est gave credit, before an act of bankruptcy was committed by the defendant; it was held, that the plaintiff was entitled to retain the proceeds of those sales against the assignees, although the *fi. fa.* was not returnable before the act of bankruptcy. *Higgins* v. *M'Adam*, 3 Y. & J. 1.

If a sheriff, contrary to the 8 Ann. c. 14. s. 1, remove the goods, and sell them without paying rent (up to a year if due) to the landlord; and the goods sell for less than the rent, the sheriff cannot compel the landlord to accept the sum which they produced on the sale. The landlord is entitled to such damages as a jury may think he has sustained by the removal. *Calvert* v. *Joliffe*, 9 Law J. K.B. 240, s. c. 2 B. & Ad. 418.

In an action against the sheriff for not retaining for the landlord a year's rent due from the tenant, on a levy at the suit of an execution creditor, the plaintiff, at the trial, released the tenant in order that he might prove the tenancy:—Held, that the release did not operate *quasi* payment, but that the sheriff was still liable for the amount of the rent.

The statute 8 Anne, c. 14. s. 1. is not confined to a demise of an entire messuage, but equally applies to a letting of part of a house. *Thurgood* v. *Richardson*, 9 Law J. C.P. 121, s. c. 7 Bing. 428, s. c. 5 M. & P. 266.

*Semble*—That, under a writ of *venditioni exponas*, issued under an extent at the suit of the Crown, the duty of the sheriff is, to sell by auction the goods seized, without any extra charge beyond the poundage to which he is legally entitled. If, from any extraordinary services rendered by him, a greater remuneration is sought for, the mode of obtaining it is by application to the Court, under 3 Geo. 1. c. 15. s. 14, or (as is adopted in practice) by petition to the Commissioners of the Revenue Board, at whose instance the extent issued. *Rex* v. *Jones*, 9 Law J. Exch. 2, s. c. 1 C. & J. 140.

### (*e*) *Return of Writs.*

Where there are conflicting claims to goods taken in execution, the Court will not assist the sheriff by giving him time to return the writ, unless he has promptly, as well as impartially, discharged his duty.

Accordingly, where the sheriff's officer, though urged on behalf of the plaintiff to sell, had neglected to do so for so long a time, that (the defendant becoming bankrupt) the right of the plaintiff to the fruits of his execution became endangered by the 16 Geo. 4. c. 16. s. 108, the Court would not give the sheriff time to return the writ. *Colley* v. *Hardy*, 8 Law J. K.B. 121, s. c. 5 M. & R. 123.

The Court granted time for the sheriff to return a *fi. fa.* under which he had levied on the 2nd, but had not sold until the 24th of May, a commission of bankrupt having issued in the interval, the plaintiff refusing to indemnify him against the assignees, who had claimed. *Ex parte Sheriff of Yorkshire*, 9 Law J. C.P. 228.

An attorney sends a *fi. fa.* to the sheriff by the post, with directions to forward a warrant to a particular officer, whom the attorney names. Whether the sheriff would or would not have been discharged by a timely application to the Court, it is too late for him to apply to amend the return of *nulla bona* at the end of five months, an action having been brought, and the plaintiff having declared in the interval. *Ex parte Sheriff of Gloucester*, 9 Law J. C.P. 229.

### (C) Fees and Costs.

Where there is an express promise, a sheriff's officer may maintain an action for fees. *Ormerod* v. *Foskett*, Pea. A.C. 77. [Kenyon]

If a plaintiff direct the sheriff to return *nihil* to a writ of *scire facias*, and the latter refuse to return the writ until he has been paid a fee, the plaintiff is not entitled to the costs of applying to the Court, in calling on the sheriff to return the writ. *Beddington* v. *Beddington*, 7 Law J. C.P. 79, s. c. 5 Bing. 284, s. c. 2 M. & P. 479.

If a sheriff defends an action for a false return, as well as he can, he may recover his costs from the sureties of his bailiff, who executed the writ; though he has a verdict against him, on the ground that evidence was not produced, which, in another and subsequent suit between other parties, involving the same question, was obtained. *Semble*, that, if in such an action, after he has obtained a rule *nisi* for a new trial, he compromises the suit, with the assent of some of the sureties, by paying a less sum for damages than would be recoverable, and a less sum for costs than were incurred, he may recover his own costs against the surety who did not assent, if it appears that the compromise was, under the circumstances reasonable. *Semble*, also, that in such a case the words "costs of any application to the Court touching or concerning any matter wherein the bailiff should act or assume to act as bailiff," will comprise the costs of an application to the Court to set aside the judgment on which the execution was founded, the return to which gave rise to the action against the sheriff. *Farebrother* v. *Worsley*, 5 C. & P. 103. [Lyndhurst]

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## SHIP AND SHIPPING.

[See Admiralty, Insurance, and Prize.]

(A) Property in Ships.
- (*a*) *Registry.*
- (*b*) *Sale.*
- (*c*) *Mortgage.*

(B) Owners.
- (*a*) *Rights.*
- (*b*) *Liabilities.*

(C) Masters and Commanders.

(D) Seamen.
- (*a*) *Contracts.*
- (*b*) *Wages.*
- (*c*) *Discharge.*

(E) Pilots.

(F) Charter-party.
(G) Demurrage.
(H) Freight and Primage.
(I) Bill of Lading.
(K) Losses and Injuries.
(L) Ship Brokers.

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## (A) Property in Ships.

### (a) *Registry.*

The 4 Geo. 4. c. 41. s. 25, incorporated in 6 Geo. 4. c. 110. s. 27, does not give authority to Magistrates in respect of the detention of a ship's register upon the mere complaint of the owners, unless there has been a refusal to deliver it up to the custom-house officers.

Nor, *semble*, does the act apply to a case where the person who detains the register has a lien upon it for advances made on account of the ship. *Bowen* v. *Fox*, 8 Law J. M.C. 68, s. c. 10 B. & C. 41, s. c. 5 M. & R. 4.

The master and part owner of a ship, compelled by stress of weather to put in to a certain port on a voyage, incurred debts there in respect of the ship, for which he was arrested. Upon this he sent to the ship-agents the certificate of registry, accompanied by a letter, in which he stated that he lodged it with them as a security for the payment of all demands and charges on account of the vessel since she had been in port; adding, that he hoped it would be satisfactory to them. The agents received the register, but did not pay the demands, nor would they return the register to the master:—Held, that the receipt of the register on the terms in the letter did not create any implied contract on the part of the agents to pay the demands; but that the terms of the letter rather evidenced a promise on the part of the master, that the ship should not leave the port till those demands were satisfied. *Bowen* v. *Fox*, 4 C. & P. 452. [Tenterden]

### (b) *Sale.*

The Court of Admiralty does not interfere in case of adverse title; nor does 6 Geo. 4. c. 110. extend its jurisdiction, or make ships more absolutely transferable under a conditional bill of sale for the purpose of security, than before.

A warrant of arrest refused for the purpose of transferring the possession to the holders of such bill of sale. *Fruit Preserver*, 2 Hag. 181.

### (c) *Mortgage.*

A vessel being sold under a decree of the Court of Admiralty, in a suit of subtraction of wages,—the Court, having no cognizance of mortgagees, will not order the surplus of the proceeds to be paid to a mortgagee to whom possession had never been given; but will direct such surplus to remain in the registry, subject to such order as may come to the Court. *Portsea*, 2 Hag. 84.

The interest of a mortgagee is not a question for the decision of the Admiralty Court. *Exmouth*, 2 Hag. 88, n.

## (B) Owners.

### (a) *Rights.*

Messrs. F. & Co. chartered the plaintiff's ship for three voyages, and covenanted by the charter-party to pay for the provisions and seamen's wages. On the return of the vessel from the first voyage, the charterers removed the anchors and cables to the defendants' wharf, the vessel then lying alongside it. A few days afterwards, the ship was arrested under an Admiralty warrant by the holder of a bottomry bond, given by the captain of the charterers for the outfit of the ship and provisions. The ship was afterwards sold under a decree of the Admiralty, but the cables and anchors were not included in the catalogue, and the plaintiff demanded them before the sale, but not afterwards:—Held, that he was not entitled to recover the cables and anchors in an action of trover against the defendants, although the jury found that they had been removed by the charterers, to avoid the process of the Admiralty Court, and not in the due course of business. Held also, that the removal was no injury to the plaintiff's reversionary interest, as the three voyages, for which the ship was chartered, were not completed at the time of the sale. *Ferguson* v. *Cristall*, 7 Law C.P. 91, s. c. 5 Bing. 205, s. c. 2 M. & P. 524.

An action is maintainable by a ship's husband, who is also part-owner, against one of several other part-owners, for his proportion of outfit, although there was no express promise; part-owners of ships being tenants in common, and not joint tenants, and each separately liable for his proportion of outfit.

Where the dealings between the parties are on the footing of one part-owner having a larger share of the ship than appears by the register, such part-owner is liable to the ship's husband, in proportion of such larger share. *Helme* v. *Smith*, 9 Law J. C.P. 206, s. c. 7 Bing. 709, s. c. 5 M. & P. 744.

### (b) *Liabilities.*

[*Colvin* v. *Newberry*, 2 M. & R. 47, Dig. Law J. 479.]

The owner of a ship is not liable for money advanced to the master, and expended by him in the necessary use of the ship, unless the money is advanced expressly for that purpose. *Thacker* v. *Marten*, 2 M. & M. 79. [Tenterden]

In an action against one of the *owners*, for work done to a vessel, by the order of the ship's husband, such owner will be liable, unless it be shewn that the dealing was, that the person who directed the work to be done should be looked to exclusively. *Thompson* v. *Finden*, 4 C. & P. 158.

In an action against the owner of a ship for goods supplied, the master is a competent witness to prove the ownership. *Rowcroft* v. *Basset*, Pea. A.C. 199.

## (C) Masters and Commanders.

[See *post*, H.]

The master of a merchant ship has authority over the mariners, to enforce obedience to his lawful commands, for the navigation of the vessel and preservation of good order; and, in case of disobedience or disorderly conduct, may inflict corporal punishment, moderate and proportionate to the offence. *Lamb* v. *Burnett*, 9 Law J. Exch. 55, s. c. 1 C. & J. 291, s. c. 1 Tyrw. 265.

The captain of an insured ship, which has been injured by perils of the seas, is not justified in selling the ship, instead of repairing it, unless he either

s not the means of getting the repairs done at the ice where the vessel is obliged to put in, or cannot t them done except at such an expense as would ıder it undoubtedly improper to repair, if the ship ıre not insured; or has not money in his possision sufficient to pay for the repairs, nor is in a nation to raise it by loan or otherwise, except at ch an extravagant rate as would prevent a prudent an, in the exercise of a sound and vigorous judgent, from undertaking the repairs under such cirmstances. *Somes* v. *Sugrue*, 4 C. & P. 276. [Tindal]

(D) SEAMEN.

[Provision for the relief of the widows of comissioned and warrant officers in the royal navy, 10 eo. 4. c. 14, 7 Law J. Stat. 28.]

(*a*) *Contracts.*

Deviations, proceeding from accident or overıling authority, do not amount to a breach of the ariner's contract. *Cambridge*, 2 Hag. 247.

*Semble*, that a regulation in the seamen's articles f a merchant ship, that "every seaman committed ı custody for the preservation of good order, shall ırfeit his wages, together with everything belongıg to him on board the ship," is in point of law a ood and proper regulation. *Rice* v. *Haylett*, 3 . & P. 534. [Best]

The law of England, in ordinary cases, requires ıe mariner to stay by the ship till the discharge of ıe cargo; but this is only where the party has one nothing to supersede the contract. *Cambridge*, Hag. 246.

(*b*) *Wages.*

[See 11 Geo. 4. c. 22, as to pay of the royal navy, Law J. Stat. 32.]

Though, under the principle that freight is the nother of wages, mariners lose their wages by an sterruption of the voyage from accident, the conlemnation of the vessel for illegal trading on the ıart of the master, to which the mariners are not ıarties, does not work a forfeiture of wages, nor ıven bar the mariners of their action against the ıwners; and charges of disobedience, neglect of luty, of intoxication and mutiny, not being estaılished, wages pronounced for. *Malta*, 2 Hag. 158.

A sailor's wages and expenses pronounced for, as getting drunk on shore (at Dominica), and not reurning on board immediately leave of absence exıires, (his clothes and other property being on ıoard,) is not an act of desertion working a foreiture of wages; and is amply punished by seventyive days' imprisonment in the island, when the man was willing to return to his duty. *Ealing Grove*, 2 Hag. 15.

A vessel, whose voyage was described in the articles as to Madras and Calcutta, and back to London, deviated, under a new charter-party, from Madras by Prince of Wales' Island to Calcutta. The deviation, though not notified, was known to the crew, who were dissatisfied, but did not remonstrate. The mariner, who after arriving at Calcutta soon demanded his discharge, and refused to work, was put in irons till the unloading was completed, and then quitted the ship:—Held, first, such proposed deviation entitled him to his discharge at Madras; and, secondly, his remaining on board subsequently was not an implied consent, nor, as the vessel was not, under the new charter-party, to return direct from Calcutta to England, a virtual renewal of his engagement. The whole wages, to the time of his quitting the ship, and costs, pronounced for; though the Court inclined to think that the mariner had acted illegally in refusing to discharge the cargo. *Cambridge*, 2 Hag. 243.

A mariner having, at Jamaica, quitted the ship by order of the mate, applied to the master, who was on shore, for his discharge. The master refused, and ordered him to return to his duty. The mariner, however, engaged in another ship:—Such conduct is desertion, working a forfeiture of wages. *Jupiter*, 2 Hag. 221.

A sailor, serving under articles providing for a forfeiture of his wages in case of breach of any of his engagements, among which is that of serving faithfully during the voyage, can recover nothing if he is left ashore in the course of it, owing to his own fault in being absent, though he had no intention of deserting.

He is left on shore by his own fault, if he is so in consequence of his going away, after being forbidden by the captain, though he subsequently obtains the leave of an inferior officer.

This defence may be proved on a plea of *nil debet*. *Sherman* v. *Bennett*, 1 M. & M. 489. [Tenterden]

Insolent expressions, and acts of mutinous tendency, not apologized for, held a forfeiture of wages. *Susan*, 2 Hag. 229, n.

An information against the vessel for trading in slaves, by the mate, not appearing to be a false or malicious act, cannot work a forfeiture of wages. *Malta*, 2 Hag. 172.

A single instance of intemperance does not work a forfeiture of wages; it must be a habit, to produce that effect. *Malta*, 2 Hag. 168.

Occasional acts of drunkenness, not more than usual with sailors, and latterly (when more frequent) arising from the undue force given by bodily disease to the moderate use of strong liquors, will not enure to the forfeiture of a steward's wages. *Lady Campbell*, 2 Hag. 5.

A seaman, who had elected to take, at Calcutta, a bill of exchange on the owners, instead of cash, in payment of wages, cannot sue the ship, on payment of such bill being refused, the owners having become bankrupts. *William Money*, 2 Hag. 136.

Articles of agreement provide, that a seaman shall receive for his wages a proportion of the net proceeds of the cargo, after the same are actually received by the owner, subject to certain stipulations as to the seaman's conduct: *Semble*, that his share may be recovered in an action for money had and received; the owner having received the money, and the seaman having fulfilled the stipulations on his part. *Hayward* v. *Kain*, 1 M. & M. 311. [Tenterden]

Motion for leave to enter an appeal, in a suit for wages, from a decree of the Vice Admiralty Court at the Cape, eighteen months before, refused; no sufficient circumstances being stated. *Mary*, 2 Hag. 26.

Where a vessel had been sold, in a suit for subtraction of wages, the Court refused to direct proceeds in the registry to be paid out to material men, where the owners opposed the application, and the accounts were disputed. But the case being

a new one, the Court did not give costs. *Maitland*, 2 Hag. 253.

A plea of set-off, in answer to a suit for wages, rejected. *Lady Campbell*, 2 Hag. 14, n.

In a suit for wages, the owners, having pleaded the desertion of the mariner from the vessel, and the payment of his wages into Greenwich Hospital, under stat. 4 Geo. 4. c. 25. s. 11, were dismissed, but without costs. *Semble*, that it would have been sufficient to allege such facts in acts of court. *Vibilia*, 2 Hag. 228.

In a suit for wages, service and good conduct are to be presumed till disproved. *Malta*, 2 Hag. 166.

In a suit for wages, a logbook, not pleaded, but asserted to be in the mariner's hand-writing, allowed to be brought in by the owners. *Malta*, 2 Hag. 159.

Extract from a police record, annexed to an allegation in proof of a mariner's misconduct, rejected. *Susan*, 2 Hag. 229, n.

Where, by the articles, wages were not payable till the cargo was discharged (within a limited time), and where, after an arrest, the wages were paid within such time, the owners held liable to the costs of such arrest, they having refused to pay the mariner at the same time as the rest of the crew, but tendered him a less sum than was due "in full of his wages." *Minstrel*, 2 Hag. 40.

The payment of wages after the arrest of the ship, is an admission of the justice of the claim, and renders the owners liable to the expenses of the warrant and arrest. *Thomas Handford*, 2 Hag. 41, n.

### (c) *Discharge.*

A spontaneous deviation of importance entitles mariners to their discharge by the law of England; and where, by some other codes, an alteration is permitted, the mariners are to be compensated. *Cambridge*, 2 Hag. 245.

### (E) Pilots.

In general, the master of a ship is bound to take a pilot to conduct her into port. But he is to be allowed a discretion whether he will or not;—and whether he has properly exercised that discretion, is a question for the jury. *Phillips* v. *Headlam*, 9 Law J. K.B. 238, s. c. 2 B. & Ad. 380.

To charge a master of a ship with a penalty, under 6 Geo. 4. c. 125. s. 58, for not taking a pilot on board, it is necessary that the pilot produce his licence when he offers his services, according to sect. 66.

This is not rendered unnecessary by the fact of the master having previously known the person so offering himself to have been a duly licensed pilot. *Hammond* v. *Blake*, 8 Law J. K.B. 140, s. c. 10 B. & C. 424.

The Court, assisted by Trinity Masters, held, that if towing is necessary, pilots are bound to perform it, having a claim for compensation for damage to their boats, or for extra labour; they are bound to offer their services in all weathers, and their claims for extra compensation are *stricti juris*. A tender of 50*l.* held sufficient, and the pilot's costs refused. *General Palmer*, 2 Hag. 176.

In extraordinary pilot service, additional pilotage is the proper rate of reward. *Enterprise*, 2 Hag. 178, n.

Persons, assuming the characters and duties of *pilots*, are only to be remunerated according to the rates of that service, and not as salvors. *Columbus*, 2 Hag. 178, n.

### (F) Charter-Party.

The lay days allowed by a charter-party for a ship's discharge, are to be reckoned from the time of her arrival at the usual place of discharge, and not at the port merely, though she should, for the purposes of navigation, discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge. *Brereton* v. *Chapman*, 7 Bing. 559, s. c. 5 M. & P. 526.

Proviso in a charter-party, that if the ship do not arrive at her port of loading on or before, &c., unless prevented by stress of weather or other unavoidable impediment, the freighter not to be obliged to ship a cargo:—Held, that if ordinary diligence were used in the voyage to reach the port of loading, the owners are within the exception of the proviso, though the ship is delayed till after the stipulated time, by causes which extraordinary exertion might have counteracted. *Granger* v. *Dent*, 1 M. & M. 475. [Tindal]

The defendants chartered a vessel to New Zealand, there to load a cargo, or to give notice by an agent there of their determination not to load, in which event they were to pay the plaintiff 500*l.* The vessel arriving at New Zealand found no cargo ready, nor had the defendants any agent there, whereupon the master proceeded to Batavia, to obtain a freight. The voyage home by the way of Batavia, though circuitous, in the event turned out to be more profitable to the owner than would have been the voyage originally contemplated:—Held, that, under these circumstances, the plaintiff was not entitled to recover the 500*l.* in addition to the increased profit upon the homeward voyage. *Sesniforth* v. *Lyall*, 9 Law J. C.P. 23, s. c. 7 Bing. 169, s. c. 4 M. & P. 829.

Where the cause of complaint, in an action on a charter-party by the freighters, against the owner of a vessel, was, that a full cargo was not taken in, in consequence of arrangements in the stowage varying from those contemplated by the charter-party—it was held, that the plaintiffs were not entitled to recover, as it appeared that one of them and the broker, who managed the business, were present from time to time during the loading, and cognizant of the arrangements, but did not make any objection. *Hazill* v. *Stephenson*, 4 C. & P. 469. [Tindal]

The owners of a ship, by an instrument called a charter-party, *bonâ fide* entered into between them and G. B., appointed G. B. to the command, and agreed that (the ship being tight, &c., and manned with thirty-five men,) G. B. should be at liberty to receive on board a cargo of lawful goods (reserving 100 tons to be laden for account of the owners) and proceed therewith to Calcutta, and there reload the ship with a cargo of East India produce, and return therewith to London, and upon her arrival there and discharge, the intended voyage and service should end; and the owners further agreed, that the complement of thirty-five men should, if possible, be kept up; that they should supply the ship with stores, and that she might be retained in the said service twelve months, or so much longer as was necessary

to complete the voyage:—In consideration of which, G. B. agreed to take the command and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owners for the use and hire of the ship after the rate of 25*s.* per ton per month, of which 1,000*l.* was to be paid on the execution of the charter-party, and 2,000*l.* by two approved bills on Calcutta, one of which was to be payable one month, and the other two months, after her arrival there; the residue to be paid or secured to the satisfaction of the owners, on the arrival of the ship at London, and previous to commencing the discharge of her homeward cargo. Certain other stipulations for payment of freight, if the ship should be detained in India, were then made; and it was urther agreed, that G. B. should remit all freight bills for the homeward cargo to B. B. & Co. in London, who should hold them as joint trustees for the owner and G. B., and that they should first be applied in payment of the balance of freight due from G. B., and the surplus, if any, then to be handed over to him; and it was then provided, that the owners should have an agent on board, who was to have the sole management of the ship's stores, and power to displace G. B. for breach of any covenant in the charter-party, and appoint another commander.

C. & Co. in Calcutta having knowledge of this instrument, shipped goods on board the vessel for London, which were never delivered there:—Held, (reversing the judgment below, that C. & Co. ought to recover against the owners, notwithstanding the agreement between them and G. B. being in the nature of a special appointment of the latter to the command, and not a charter of the vessel to him,) —that, under the charter-party, by a special verdict found to have been entered into *bonâ fide*, G.B. became in fact the freighter of the vessel, and owner *pro tempore*—and that C. & Co. shipping goods with full knowledge of his real character as such freighter and owner, could not recover against the plaintiffs in error, the absolute owners of the vessel. *Newberry* v. *Colvin*, 9 Law J. Ex. 13, s. c. 7 Bing. 190, s. c. 4 M. & P. 876, s. c. 1 C. & J. 192, s. c. 1 Tyrw. 55.

### (G) Demurrage.

The consignee of a cargo requested the master of the vessel not to take her alongside a wharf, as, if he did, it would get down the price of the goods. The master consequently delayed procuring the certificate required by the statute 7 & 8 Geo. 4. c. 56. s. 15, authorising the landing and unshipping the cargo:—Held, that the owner was not thereby precluded from claiming demurrage, as the delay or detention of the vessel was attributable to the act of the consignee. *Palmer* v. *Thomas*, 7 Law J. C.P. 73, s. c. 2 M. & P. 276.

If A has goods consigned to him, and there be on board the same ship goods consigned to other consignees, and those goods are so placed on board that A, after the ship arrives, cannot obtain his goods within the time limited by the bill of lading, A is not liable for demurrage.

Where a bill of lading stipulates for demurrage after a certain time, the owner can only recover for the time during which the goods remain owing to the default of the consignee. It is no answer to an action for such demurrage, that another consignee on another bill of lading has already paid demurrage to a greater amount for the same period. *Dobson* v. *Droop*, 2 M. & M. 441, s. c. 4 C. & P. 112. [Tenterden]

It is no defence to an action by the owner of a ship for demurrage, that the owner has omitted to procure the necessary papers for the discharge of the cargo, if he omitted to do so at the request of the defendant. *Furnell* v. *Thomas*, 5 Bing. 188.

No action for demurrage can be maintained by a master of the ship in his own name, unless there be an express contract for its payment to him. *Evans* v. *Forster*, 8 Law J. K.B. 348, s. c. 1 B. & Ad. 118.

### (H) Freight and Primage.

Primage belongs of right to the master of a ship; and nothing but an express agreement can exempt the consignee of the goods from the liability to pay it.

An agreement between the owner and the master, that the latter should have certain wages, "and a sum certain in full for all cabin or other allowances," held, not to be sufficient to take away the master's right of primage.

A bill of lading contained in its terms "that the goods were to be delivered to the consignee, he paying freight for the said goods as per charter-party; with primage and average accustomed:"—Held, in an action by the master for his primage, that the reference to the charter-party applied only to the freight: that it was not necessary for him to give it in evidence, and that, upon shewing what was the accustomed primage, he was entitled to recover. *Best* v. *Saunders*, 7 Law J. K.B. 50, s. c. 3 M. & R. 4, s. c. 1 M. & M. 209.

On a bill of lading of goods "shipped by A B, to be delivered to C D or his assigns, he or they paying freight;" if the goods are delivered without receiving freight, the shipper is not liable for the freight, there being no charter-party. In such a case, where the shipper afterwards promised by writing to pay freight, held, that it was a question for the jury whether, on the account between A B and C D, A B was, as between them, to pay the freight; and that, if he had consented to do so, he was liable on the subsequent promise. *Drew* v. *Bird*, 2 M. & M. 156. [Tenterden]

The plaintiff, by charter-party, agreed with G to convey corn at 4*s.* 6*d.* a quarter, G made a subcharter with S, who consigned corn to the defendants under bill of lading, by which they were to pay 6*s.* a quarter freight, and gave them notice to retain 1*s.* 6*d.* a quarter for him.

The plaintiff having sued for freight at 6*s.* a quarter:—Held, he was entitled to recover only 4*s.* 6*d.* *Mitchenson* v. *Begbie*, 6 Bing. 190, s. c. 3 M. & P. 442.

The captain of a ship signed a bill of lading, expressing the freight of the goods to have been paid. He did so upon an assurance that it should be paid before the ship sailed. This was not done. The bill of lading was assigned over for value to a third person:—Held, that, as against that person, the owners had no lien upon the goods for the freight. *Howard* v. *Tucker*, 9 Law J. K.B. 108, s. c. 1 B. & Ad. 712.

### (I) Bill of Lading.

A bill of lading is not conclusive between the shippers of the goods, and the owners of the ship; but the owners may shew that less goods than specified in the bill of lading were shipped, the master, who signed the bill of lading, having been misled by the fraud of the agent of the shippers. *Bates* v. *Todd*, 1 M. & Rob. 106. [Tindal]

Goods taken on board a ship, the bill of lading containing an exception of the perils of the seas; the ship runs foul of another ship, without any fault in the master of either:—Held to be an injury by the perils of the seas, within the exception. *Buller* v. *Fowler*, Peak. A. C. 183. [Kenyon]

An indorsee of a Spanish bill of lading, to whom the goods have been delivered under it, is liable in assumpsit for the freight, although the bill of lading is for delivery to the consignees, without saying "or their assigns," such bills of lading appearing by evidence to be usually passed by indorsement. *Renteria* v. *Ewing*, 1 M. & M. 511. [Tenterden]

### (K) Losses and Injuries.

[See Insurance and Salvage.]

In an action for running down a vessel, the plaintiff cannot recover unless the injury is attributable entirely to the fault of the defendants; if he were partly in fault, but the defendants with care might have prevented the accident, he cannot maintain his action. *Waterbank* v. *Miller*, 2 M. & M. 101. [Tenterden]

In a case of collision, where the loss was charged to be owing to wilful malice or gross negligence, the Court, with the assistance of Trinity Masters, being of opinion that the damage was occasioned by accident solely imputable to the mismanagement of the vessel first, and not to the misconduct of the other vessel, dismissed the owners of the other vessel with costs. *Catherine of Dover*, 2 Hag. 154.

If a vessel at sea is going close hauled to the wind, and another meeting her is going free, the rule of the sea is, for the latter vessel to go to leeward; and, although such vessel may either go to leeward or windward as she best can, yet she ought as a general rule, to suppose that the vessel going close hauled will keep her position. *Handaysyde* v. *Wilson*, 2 C. & P. 548. [Best]

In a case of collision against a steam vessel, the Court, assisted by Trinity Masters, pronounced for damages and costs, holding, that the steam vessel, being under command, and manifestly having [illegible] the other vessel, was to blame. *Shannon*, 2 Hag. [illegible]

By the stat. 1 & 2 Geo. 4. c. 75, the Court of Admiralty is authorized not only to arrest a foreign ship, but to proceed to judgment in a case of collision. Plea of foreign owner overruled. But a [illegible] pilot being intrusted with the navigation of a vessel, the owner is exonerated under [illegible] Geo. 3. c. 123, s. 55, which applies equally [illegible] to British ships. Foreign owner and [illegible] arrested. *Christiana*, 2 Hag. 183.

In a case of collision, the protest of the master of a foreign vessel, which being in distress, was in tow by the vessel run foul of, is *res inter alios acta*, and not admissible evidence where no necessity exists. The Court may order compensation for consequential damage. *Betsey Caines*, 2 Hag. 23.

In a case of collision, the crew of the ship charged with committing the damage, admitted (on the ground of necessity, and that no other evidence could be expected) as witnesses, though being sharers in the profits and losses of the vessel, they would not swear they were disinterested in the result. *Catherine of Dover*, 2 Hag. 145.

In a case of collision, where payment of a sum for damage, interest, and costs reported to be due, had been delayed by the party liable, the other party is entitled to interest on the whole sum, fifteen days after the date of such report; and stat. 53 Geo. 3. c. 159. s. 1, limiting the liability of owners to the value of the ship, appurtenances and freight, applies only to the original claim for damage, and extends not to costs and interest. *Dundee*, 2 Hag. 137.

In a case of collision, the Court will, preparatory to a decree of sale, sign a *primum decretum*, on an affidavit of a perishable condition. *Sylvan*, 2 Hag. 155.

### (L) Ship Brokers.

A broker, who is employed by a ship-owner to procure the effecting of a charter-party, and who procures a person to treat, but with whom ultimately no charter-party is effected, is not entitled to his commission, although the treaty has gone off in consequence of the unusual and unreasonable demands made by the ship-owner upon the proposed charter.

Nor, *semble*, is he entitled to any compensation for his work and labour on the *quantum meruit*, the usage of the trade being against it. *Read* v. *Rann*, 8 Law J. K.B. 144, s. c. 10 B. & C. 438.

It seems that, by the custom of London, a ship-broker is not entitled to commission for negotiating the terms of a charter-party, if from any cause the charter-party is not afterwards executed. *Broad* v. *Thomas*, 9 Law J. C.P. 32, s. c. 4 M. & P. 732, s. c. 7 Bing. 99.

Where a broker is employed by a ship-owner to procure a charter-party, if the negotiation goes off on account of any fault in the broker, he is not entitled to recover anything in the shape of remuneration; nor is he, in such case, entitled to recover for expenses which he may have been put to, unless such expenses are unusual, and have been incurred in consequence of the ship-owners having urged him to extraordinary expedition in the matter. And, *semble*, that where the negotiation is not carried into effect, but there is no fault in the broker, he is not entitled to anything, unless the charter-party is actually signed. *Dalton* v. *Irvin*, 4 C. & P. 289. [Tindal]

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## SILK.

Duties and drawbacks on importation and exportation of silk and silk goods, 10 Geo. 4. c. 23, 7 Law J. Stat. 37.

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## SIMONY.

By the stat. 31 Eliz. c. 6. s. 5, it is enacted, that "if any person, &c., shall, for any sum of

money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration; that every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon, shall be utterly void, frustrate, and of none effect in law."

In *quare impedit* it was found, by special verdict, that B, the incumbent of a rectory, was, on a certain day, afflicted with a mortal disease, of which he died at eleven o'clock at night, and that at three o'clock in the afternoon of the same day, T, the patron of the living, and F, both knowing the condition of B, in pursuance of an agreement, executed a deed, by which, in consideration of 6,000*l.*, T granted to F the advowson for a term of ninety-nine years, if F should so long live, with a proviso that as soon as F, by vacancy or otherwise, should have made presentation to the rectory, he should re-assign to T the residue of the term. It was found also by the verdict, that this agreement and deed was a device to convey the next presentation; but that the deed was executed without the knowledge or privity of H (the person afterwards presented by T, and rejected by the bishop ordinary), and without any intention to present him.

Upon this finding, judgments having been given for the defendant in the Courts of Great Sessions, Chester, and the King's Bench, they were reversed in the House of Lords upon writ of error, the House being of opinion that this sale of the next presentation was not void under the statute. *Fox* v. *the Bishop of Chester*, 3 Bligh, N.S. 123, s. c. 1 Dow. & Cl. 426, s. c. 6 Bing. 1.

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## SLANDER.

[See LIBEL.]

(A) ACTION FOR, WHERE MAINTAINABLE.
(B) PLEADINGS.
(C) EVIDENCE.

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### (A) ACTION FOR, WHERE MAINTAINABLE.

The agent for R, a person convicted for poaching, applies to the convicting Magistrate for a mitigation of the penalty, on the ground that the poacher supported his father and mother by his labour or industry. A, one of the Magistrates, said, "I do not think the defender deserves any mercy, as I am informed that, besides being a poacher, he is a thief, and has been known to steal bee-hives and leather;" and he appealed to B, another Magistrate, who said, "I cannot say as to the bee-hives; but I was informed by a respectable farmer now dead, that he stole a quantity of leather." R brings his action of damages against the Magistrates for defamation, and the action held by the Court below to be relevant and sent to a jury, and the verdict for the pursuer for 125*l.* damages against each of the Magistrates, and the verdict confirmed by the Court. The interlocutor of relevancy affirmed by the House of Lords, but the interlocutor confirming the verdict reversed, and the case remitted for a new trial. *Allardice* v. *Robertson*, 1 Dow. & Cl. 495.

Words, where spoken of a person in office, to be actionable, must be spoken of him in reference to that office, and must have a tendency to occasion the loss of such office, or must impute the want of some qualification for such office, or some misconduct in it. Thus, where the words charged in a declaration, and which were spoken of the plaintiff, who was the clerk to a Gas Light Company, were—"You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores;" such words were held not to be actionable.

Where the words charged in a declaration are not actionable, but are proved at the trial, the plaintiff cannot be nonsuited in that case, as the defendant should demur, or after trial move in arrest of judgment. *Lumley* v. *Allday*, 9 Law J. Exch. 62, s. c. 1 Tyrw. 217, s. c. 1 C. & J. 301.

The repeating of slanderous words is not justified by the person who repeats them merely naming, at the time, from whom he heard them. *Macpherson* v. *Daniels*, 8 Law J. K.B. 14, s. c. 10 B. & C. 263.

### (B) PLEADINGS.

Where a count for slander, after alleging that the plaintiff was a livery-stable keeper, and was about to prove a debt under a commission of bankrupt, stated that the defendant spoke of and concerning the plaintiff, and of and concerning the matter in that count mentioned, and of and concerning the plaintiff in his trade, these words: "You are a regular prover under bankruptcy, (meaning that the plaintiff was accustomed to prove fictitious debts under commissions of bankrupt,) you are a regular bankrupt maker:"—Held, that the count could not be maintained, for the words were not actionable, as spoken of the plaintiff in his trade; nor were the words as laid actionable, as imputing a crime punishable by law, because the innuendo was broader than the words, which were unexplained by prefatory averment, and did not of themselves necessarily import a crime. *Alexander* v. *Angle*, 1 C. & J. 143, s. c. 7 Bing. 119, s. c. 4 M. & P. 870, s. c. 1 Tyrw. 9.

### (C) EVIDENCE.

The words imputed the prescribing of medicines in improper doses, and the defendant justified:—Held, that medical books, which were stated by the medical witnesses to be works of medical authority, could not be put in, to shew that such doses were sanctioned; but that the medical witnesses might be asked their judgment, and the grounds of it, which might in some degree be founded on these books as a part of their general knowledge. *Collier* v. *Simpson*, 5 C. & P. 73. [Tindal]

In an action of slander, the plaintiff, in shewing special damage, must confine his proof to the evidence of persons who received the slanderous statements from the defendant himself. *Rutherford* v. *Evans*, 4 C. & P. 74. [Tindal]

In an action of slander, averring special damage to have accrued to the plaintiff from the speaking of the words by the defendant, evidence that the words were spoken by the defendant to J S, who repeated them to J B, who thereupon refused to

trust the plaintiff—held, not sufficient to support the declaration. *Ward* v. *Weeks*, 9 Law J. C.P. 6, s. c. 7 Bing. 211, s. c. 4 M. & P. 796.

In an action of slander, where three witnesses were called for the plaintiff, the evidence of two of whom was quite inconsistent with the notion of a confidential communication, it was held, that it was not a misdirection in the Judge, to leave it to the jury to say, whether, or not, they believed the communication to be confidential; and that it was not necessary in such a case for him to tell them in distinct terms, that, if they believed the evidence, they must find their verdict for the plaintiff. *Picton* v. *Jackman*, 4 C. & P. 257. [Gaselee]

The declaration in slander stated, that the defendant, intending to injure the plaintiff in the opinion of certain persons, who had been in the habit of employing him as a fruit-broker, represented to those persons that the plaintiff had prejudiced the sale of a cargo of oranges belonging to them, by reporting in the sale room that he (the plaintiff) had three or four ships laden with fruit between Gravesend and London. The proof at the trial was, that the plaintiff had said, that there were three or four ships laden, &c. This was held, at Nisi Prius, to be a fatal variance; and the plaintiff was nonsuited; and the nonsuit was confirmed in the Court above, a rule for setting it aside being refused. *Wood* v. *Acton*, 4 C. & P. 268. [Tindal]

## SLAVES.

A female attendant, by birth and servitude a domestic slave, accompanied her mistress to England, resided there for a year, and then voluntarily returned with her mistress to the place of her birth and servitude; though during the residence in England, no dominion, authority, or coercion can be exercised over such persons, yet, on her return to her place of birth and servitude, the right to exercise such dominion revives. *The Slave Grace*, 2 Hag. 94.

The regulations in the 59 Geo. 3. c. 120, were made to prevent slaves being transferred from one of our own colonies to other settlements, and also the introduction of new slaves into any of our colonies; but have no reference to the transit of slaves to or from this country and its colonies. *The Slave Grace*, 2 Hag. 98.

The 5 Geo. 4. c. 113. s. 47. is only indefinitely retrospective as to importations: the Court, therefore, on appeal, reversed a sentence, condemning a slave as illegally exported nine years before. *The Slave Fanny Ford*, 2 Hag. 271.

Where the master, unknown to the owners, receiving persons on board as pledges, and not under an absolute sale, the Court, on appeal, holding such conduct did not, under the particular circumstances of the case, subject the ship to condemnation under the slave acts, reversed the sentence of the Court at Sierra Leone, but allowed the captor his expenses, costs, and insurance of the vessel. *Malta*, 2 Hag. 241.

Where, on a voyage to North Carolina from Roseau in port in Dominica, to which the vessel belonged, the master, discovering two slaves from Dominica on board, landed and delivered them up at St. Kitt's, the nearest British port he could reach: such an importation was not held to amount to a forfeiture under statute 5 Geo. 4. c. 113; and the superior Court, upon an appeal on behalf of the Crown, holding that the master was ignorant of the slaves being on board, and that the importation arose from unavoidable necessity, declined to disturb the sentence, though it was undefended on the part of the owners. *Two Slaves*, 2 Hag. 273.

An inhabitant of Trinidad, after a residence of about a month at Bermuda, purchased there a slave and her four children, aged eleven, nine, seven, and three, and shortly after embarked with his family and them for Trinidad, the mother and four children being described in the indorsement on the clearance as domestic servants in personal attendance on himself and others of his family: the owner of the vessel, who had a residence at Bermuda and Trinidad, also embarked with two slaves, born in his family, aged eleven and seven, similarly described in the indorsement. There had been no registry act in the island since the year 1822, but the late registrar gave a certified copy of the expired registry, and there was an affidavit of the late owner as to the birth of the youngest child. The vessel was seized while lying at anchor near the port of Hamilton, (having cleared out for Trinidad,) and preparing to weigh anchor. The Court, on appeal, holding, that the circumstances and situation in which the vessel was seized brought the case within the 5 Geo. 4. c. 113, and that the removal of none of the slaves was protected by section 17, reversed the sentence of the Court at Bermuda, and pronounced for the penalties prayed. *Adelaide*, 2 Hag. 232.

## SMUGGLING.

The magistrates of the place, on land, to which a person charged under the 6 Geo. 4. c. 108. s. 74. is carried, have jurisdiction over the subject-matter; although the person may have been taken on board a vessel, upon waters within another jurisdiction. *Rex* v. *James Nunn*, 7 Law J. M.C. 10, s. c. 8 B. & C. 644, s. c. 3 M. & R. 75.

An action of debt for the penalty of 50*l.* (given by the statute 32 Geo. 2. c. 28, for carrying a prisoner to gaol on an arrest within twenty-four hours) against a revenue officer acting under a warrant granted to him by the sheriff by the directions of the solicitor of Excise, pursuant to the statute 7 & 8 Geo. 4. c. 53. s. 95, and founded upon an attachment for not appearing to an information filed in the Court of Exchequer for smuggling, may be removed from the Court of Common Pleas into the Office of Pleas of the Exchequer. *Sidden* v. *East*, 1 C. & J. 12.

## SOLICITOR.

[See ATTORNEY AND SOLICITOR.]

## SPAIN.

Claims between Britain and Spain—settlement of; 10 Geo. 4. c. 22, 7 Law J. Stat. 33.

## SPECIAL CASE.

[See SESSIONS.]

The Court of Exchequer does not direct a case for opinion of a court of law, as the Court of Chancery does, but only directs the matter to be heard before a full Court. *Gaskell* v. *Gaskell*, 3 Y. & J. 305. *Semble*, the Attorney General has not power to turn a special case into a special verdict, no leave having been given for that purpose at the trial. *Attorney General* v. *Dimond*, 1 Tyr. 286.

## SPECIFIC PERFORMANCE.

[See VENDOR AND PURCHASER.]

(A) BILL FOR, WHERE SUSTAINABLE.
(B) PRACTICE.

### (A) BILL FOR, WHERE SUSTAINABLE.

A written undertaking will be enforced against the party entering into it; although the party, to whom it is given, is not bound to be satisfied with it. *Palmer* v. *Scott*, 8 Law J. Chanc. 127, s.c. 1 Russ. & M. 391, s.c. 1 Tam. 488.

A court of equity will not entertain jurisdiction to compel the performance of an agreement to pay a sum annually upon the happening of a certain event. *Brough* v. *Oddy*, 8 Law J. Chanc. 23, s. c. 1 Russ. & M. 55, s.c. 1 Tam. 215.

A husband being prosecuted and found guilty at the Quarter Sessions of an assault upon his wife, the Court recommended an accommodation of the disputes and differences between them. The counsel of the parties signed a memorandum of agreement, that the husband should allow the wife an annuity of 50*l.*; and the Court, adverting to the arrangement, passed a sentence upon the defendant, imposing only a nominal fine upon him. It was proved, that the defendant's attorney stated publicly in court, that the defendant had come into the agreement, and that the defendant was in court when the arrangement was entered into. The defendant, by his answer, denied that he ever consented to it; and, on his part, there were depositions that, to some extent, supported it:—Held, that it was not incumbent on the plaintiffs to prove that the defendant did assent to an agreement entered into by his counsel, but on the defendant to disprove it:—Held also, that the weight of the evidence being that the defendant did not dissent, a Court will conclude a counsel had authority: Held also, that the plaintiffs were entitled to a decree for a specific performance, with costs. *Elworthy* v. *Bird*, 1 Tam. 38.

Bill for the specific performance of a covenant, by which the defendants engaged, within two years, to procure the heir-at-law of A B to convey certain lands to the plaintiffs, or, within the same period, to prefer a petition to the House of Lords for, and to use their utmost endeavours to procure an act of parliament for substituting a trustee in the place of the heir, in case such heir could not be found, or there should not be any heir. On inquiry, no heir being found, the Court decreed the defendants to allow their names to be used in an application to parliament for the act, expressing, however, a doubt whether such an application could succeed, the estate appearing to have escheated. *Frederick* v. *Cexwell*, 3 Y. & J. 514.

A agrees to lend B 3,000*l.* on mortgage of leasehold houses, and not to call for the title of the lessor, and advances 600*l.* in part. He then calls for the lessor's title, and files a bill for specific performance, or sale of the property to repay him the 600*l.* and interest:—Held, that he was not entitled to the title, but only to a specific performance of the contract, as proved, and that the plaintiff, not obtaining the decree he asked, shall pay the costs. *Bass* v. *Clivley*, 1 Tam. 80.

Where a person having a clear title to 12*l.* for rent, and claiming the property of the land, is induced, by the representations of two professional persons, that he had no right to either rent or land, to agree to accept 10*l.* in full for rent and land, the Court will not entertain a bill for the specific performance of the agreement.

It is no defence to a bill for specific performance by the vendor, that, during the treaty, he falsely assumed the character of agent for another, when, in fact, he was dealing on his own behalf, and that he thereby deceived the purchaser as to the party with whom the contract was made, provided the purchaser does not shew that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise. *Fellowes* v. *Gwydyr and Page*, 1 Russ. & M. 83.

A, B, and C, being jointly interested in certain property, A contracts with B to take a lease of the whole of it; and the contract expresses that B is to be bound by the contract only so far as it is to be performed by him; but that A is to be answerable to B, even for what is to be done by C:—Held,

That B will be precluded from enforcing the contract against A, by the circumstance that C, under a deed, which the parties either were not aware of or had forgotten, has taken proceedings in a court of equity, which deprive A of that possession and enjoyment of the property, the subject of the contract, which it was the purpose of the contract to give him.

That it is a defence to a bill for specific performance, if the plaintiff has made inaccurate representations with respect to the property which was the subject of the contract, although those representations proceeded upon, and had reference to, sources of information which were open to all parties, and which might have enabled them to detect the alleged inaccuracies.

That in such a case the Court will not decree specific performance, even though the defendants have taken possession of the property, and materially altered its management or lessened its value. *Harris* v. *Kemble*, 7 Law Journ. Chanc. 79.

A, a shareholder in a theatre, entered into an agreement with B, C, and D, three other shareholders, by which the theatre was to be leased to them at a certain rent. He subsequently filed a bill against them for specific performance, on which they proved that another agreement, of which they had before had no notice, had been entered into some years before between A and other parties, his then co-shareholders in the theatre, and that the earlier agreement contained conditions incompatible with the performance of that into which they had entered; they also proved, that two transactions,

with regard to the letting of boxes, had not been truly represented to them. The Vice Chancellor held, that, as the theatre had, in substance, the benefit represented to accrue from these lettings, the misrepresentation as to mere form was no bar to A's claim for a specific performance. The Lord Chancellor reversed that decision, and the reversal was held right by the House of Lords. *Harris* v. *Kemble*, 2 Dow. & Cl. 463.

If an agent for a purchaser, having a general authority, contracts to purchase such title as the vendor has, the Court will compel specific performance of the contract. *St. John* v. *Stirling*, 7 Law J. Chanc. 189, s.c. 1 Tam. 23.

If, after a contract for sale of an estate, but before the title is accepted, the title deeds be destroyed by fire, this Court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of shewing what were the contents of the destroyed deeds, and proving that such deeds were duly executed and delivered. *Bryant* v. *Busk*, 4 Russ. 1.

Specific performance of an agreement for the purchase of a reversionary interest refused, where the sale was by private contract, and the price inadequate. *Kendall* v. *Beckett*, 9 Law J. Chanc. 24.

Where an agreement is entered into for the sale of an estate, and the parties differ as to the quantity agreed to be sold, and the vendor files a bill for specific performance of the agreement *as to part*, and the vendee offers to complete the contract as to that part; but the vendor adds, as a condition, that the vendee shall pay the costs of the bill;—the Court will refuse a decree for specific performance. *Spence* v. *Mawson*. 9 Law J. Chanc. 10.

Leasehold property given by a will to the separate use of a female infant. On her marriage, a settlement is made under the orders of the Court (she being still an infant), containing certain trusts for sale. The trustees offer the property for sale by auction, and file a bill against the purchaser for a specific performance:—Held, that the settlement of the female infant's chattel interest (already secured to her separate use), though made under the orders of the Court, was invalid, and the purchaser not bound to take the title. *Simson* v. *Jones*, 9 Law J. Chanc. 106.

M, being possessed of a house and lands for a term of years under a lease, by the covenants of which he was bound to keep and deliver up the premises in repair at the expiration of the term, entered into an agreement with C, who had acquired the reversion in the premises, subject to the term, that C should grant to him a new lease: and, thereupon, an agreement between M and C was executed, whereby C agreed to grant to M a lease of the premises for a term of forty-seven years, at such yearly rent as should be put upon the same by two chosen arbitrators, and in case of difference between them, that an umpire should be named by them, and the rent fixed by a majority of the three.

The arbitrators having differed, an umpire was called in, who, with the arbitrator for M the tenant, received evidence to shew that, at the date of the agreement between M and C, the premises were in a very ruinous state, and that it would require 800*l.* to put them in repair. Upon this view of the case, and assuming as the basis of their award, that M was not bound to repair, and that he had agreed to expend 800*l.* in repairs, they adjudged and awarded that a rent of 60*l.* per annum should be paid by M to C during the term of forty-seven years. But the arbitrator for M the tenant had differed from the umpire as to the amount of rent, and refused to concur in a larger rent than 43*l.*, until he was prevailed on by the entreaty of M's wife to concur with the umpire in fixing the rent at 60*l.*

Held, on appeal, reversing the decree in the court below, that M was not entitled to a specific performance of the agreement under the circumstances attending this award. *Chichester* v. *M'Intire*, 4 Bligh, N.S. 78, s.c. 1 D. & C. 460.

F C, under a settlement executed in 1715, was tenant for life of certain lands, with a power to lease for any term not exceeding thirty-one years, remainder to his first and other sons successively in tail male. In 1745 F C granted to S O, who was then acting as his attorney, a lease of lands comprising two hundred acres of good land, Irish plantation measure, for three lives, or thirty-one years, which ever should last the longest. M C was the only son of F C. In 1749 M C, by a writing indorsed upon that part of the lease of 1745, which was in the possession of S O, in consideration of 20*l.* agreed to ratify that lease; and, on the expiration of the term, to grant a renewal for a further term of lives, a blank being left in the agreement as to the number of lives. The agreement was not indorsed on the counterpart of the lease in the possession of F C, and was not registered till June 1760. In May 1760 F C died, leaving M C surviving, who, by deed in 1760, settled the lands in trust for himself for life; remainder to his two daughters as tenants in common. The respondent became entitled to one moiety of the lands, as the only son of one of the daughters; and, at a sale under a decree in Chancery in 1814, purchased the other moiety. At the time of the sale, it was mentioned, that the lands were sold subject to the lease of 1745. S O died in 1780, leaving S L O, who was the last surviving life in the lease of 1745, and held the lands under the lease till his death, which took place in 1817. The appellants claimed as devisees of S L O. In 1820 the appellants filed a bill in Chancery stating the facts above mentioned, and praying a specific performance of the agreement to grant a renewal of the lease.

Held, that under the circumstances the appellants were not entitled to such relief. *Blakeney* v. *Bagott*, 3 Bligh, N.S. 237, s.c. 1 D. & C. 405.

### (B) Practice.

The plaintiff, the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance till about a year afterwards: the bill was dismissed on the ground of unreasonable delay. *Watson* v. *Reid*, 1 R. & M. 236, s.c. 1 Tam. 382.

Unless the evidence of identity of a plan referred to in an agreement is clear and satisfactory, specific performance of such an agreement will be refused. *Hodges* v. *Horsfall*, 1 Russ. & M. 116.

In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the master reports that a good title was not shewn till

after the filing of the bill, if that finding proceeded on the ground that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced before the institution of the suit in consequence of the purchaser insisting upon other and unsubstantial objections. *Long* v. *Collier*, 4 Russ. 269.

## STAGE COACH.

In an action against the proprietor of a stage coach for damages, occasioned by negligence, it is not a defence to the action that there was a want of sufficient care and attention by the passenger. The action is maintainable, notwithstanding that want of care and attention, if the injury would not have occurred but for the negligence which is the subject of the action. *Curtis* v. *Drinkwater*, 9 Law J. K.B. 175, s. c. 2 B. & Ad. 159.

In an action against the proprietor of a stage coach for negligence, evidence of his name being on the coach, is evidence of his being owner or proprietor, according to the 50 Geo. 3. c. 48. and 9 Geo. 4. c. 49. *Barford* v. *Nelson*, 9 Law J. K.B. 93, s. c. 1 B. & Ad. 571.

## STAKEHOLDER.

[See WAGER.]

## STAMPS.

(A) IN GENERAL.
(B) AGREEMENTS.
(C) AWARDS.
(D) DEEDS.
(E) LEASES.
(F) POLICIES OF INSURANCE.
(G) PROMISSORY NOTES.
(H) RECEIPTS.
(I) FELONIOUSLY CUTTING OFF STAMPS.

### (A) IN GENERAL.

The proper stamp to be borne by a written instrument, must depend on what is the leading character of such instrument. *Pratt* v. *Thomas*, 4 C. & P. 554. [Patteson]

Where an instrument, if executed by one person only, would require but one stamp, the circumstance of its being executed by several, for one common purpose, will not render it necessary that there should be more than one stamp, although the interest of the different persons may not be the same.

Accordingly, where several persons, members of an insurance club, executed a power of attorney, to underwrite policies of insurance on their account, one stamp on the instrument was held to be sufficient, although some of the members themselves insured with the club for their own ships. *Allan* v. *Harrison*, 7 Law J. K.B. 106, s. c. 8 B. & C. 565, s. c. 3 M. & R. 70.

### (B) AGREEMENTS.

[*Doe* d. *Morgan* v. *Amos*, 2 M. & R. 180, Dig. Law J. 492; *Cornish* v. *Searell*, 1 M. & R. 703, Dig. Law J. 493.]

If an agreement, or other written instrument, be charged to be part of a fraud or other crime, it is immaterial whether it is stamped or not. *Rex* v. *Fowle*, 4 C. & P. 592. [Tenterden]

Where work has been done under a written contract, and the plaintiff seeks to recover for extra work, which, as he contends, is beyond the contract, he must offer the written contract in evidence, properly stamped, in order that it may be seen whether the contract includes the work in question or not. The Judge at Nisi Prius will not look at the contract for that purpose unless it be stamped. *Vincent* v. *Cole*, 7 Law J. K.B. 130.

A draft agreement, on the back of it the following memorandum: "We approve of this draft." And this was signed by the parties:—Held, that it did not require any stamp. *Doe* d. *Lambourn* v. *Pedgriph*, 4 C. & P. 312. [Tenterden]

A note given by a broker to his principal, containing an account of a purchase made by the former for the latter, of shares in a public company, is not subject to a stamp (as an "agreement" under the 55 Geo. 3. c. 184,) in an action by the principal against the broker, in respect of the subject-matter. *Tomkins* v. *Savory*, 7 Law J. K.B. 334, s. c. 9 B. & C. 704, s. c. 4 M. & R. 538.

An agreement to supply a house and buildings with water, by means of pipes to be laid in a certain manner and to a certain height, is an agreement relating to the sale of goods, and need not be stamped. *West Middlesex Waterworks Company* v. *Suwerkropp*, 2 M. & M. 408, s. c. 4 C. & P. 87. [Tenterden]

In assumpsit by the indorsee against the drawer of a bill of exchange, the defence was, that time had been given to the acceptor. To meet this defence, a copy of a paper that the defendant had promised to sign, was offered in evidence. By this the defendant consented to the plaintiff's using any means to obtain payment from the acceptor, without prejudice of his right to recover from the drawer:—Held, that this paper did not require a stamp. *Hill* v. *Johnson*, 3 C. & P. 456.

Three persons, in the same line of business, had "agreed to divide, and not to interfere with certain districts of the several cities, boroughs, &c. set forth on Bowles's post map of England and Wales, thereto annexed and referred to;" and that the three parties should respectively sell, without interruption, in the several cities, &c., marked and set forth, and described in the said map, which was annexed to the agreement:—Held, that all the names of places on the map must be counted as words, and, that if the words of the agreement, with the names on the map, amounted to more than 1080, the agreement must be stamped accordingly with a 1*l.* 15*s.* stamp. *Wickins* v. *Evans*, 4 C. & P. 359. [Park and Bosanquet]

### (C) AWARDS.

[*Doe* d. *Suffield* v. *Preston*, 1 M. & R. 713, Dig. Law J. 349.]

A bond conditioned for the due discharge by A M of the duties of clerk, provided that such discharge should be ascertained by the inspection of A M's accounts by J S; and that the amount so ascertained should be liquidated damages. A paper by which J S has ascertained such amount, requires to be stamped as an award. *Jebb* v. *M'Kiernan*, 1 M. & M. 340. [Parke]

### (D) Deeds.

Where two parties were interested in a sum invested in the funds, one having a life interest, and the other a reversion, and a deed was executed between them, by which, in consideration of the person entitled for life consenting to a sale of part of the stock for the benefit of the reversioner, the latter covenanted to pay an annuity to the person entitled for life:—Held, that such deed was not a conveyance upon the sale of an annuity, so as to render it liable to the *ad valorem* duty, according to the 55 Geo. 3. c. 184, schedule, part 1, title "Conveyance."

An assignment of a policy of insurance of goods is not an assignment of property within the above act, so as to require an *ad valorem* duty. *Blandy* v. *Herbert*, 7 Law J. K.B. 223, s. c. 9 B. & C. 396.

A conveyance liable to *ad valorem* duty, by the 55 Geo. 3. c. 184, (schedule, part 1, title "Conveyance,") is not void, because the true consideration money is not expressed on the face of the deed. The duty is payable merely on the sum *expressed*; though, under the 48 Geo. 3. c. 149, the parties may be liable to punishment for not truly *expressing* the consideration.

And such a conveyance is therefore admissible in evidence, though it be not properly stamped.

So, a lease granted in consideration of a premium, as well as of an annual rent, which made no mention of the premium, held admissible in evidence; inasmuch as the *ad valorem* duty under the title "Lease," in the above schedule, referred to the title "Conveyance," which regulates the *ad valorem* duty, according to the sum *expressed* to be paid. *Doe* d. *Keppel* v. *Lewis*, 8 Law J. K.B. 300, s. c. 10 B. & C. 500.

Mortgage to three persons to secure a certain sum, stamped with the *ad valorem* duty on that sum. It appeared that the three were separate creditors, and that the duties upon their three several debts exceeded the duty on the deed:—Held, that the stamp was sufficient.

In mortgages of copyhold and other property, by separate deeds, the *ad valorem* duty must be upon the deed relating to the other property.

A mortgage of barges, without delivery of possession, is valid, if the mortgagor's continuing in possession is not contrary to the deed. *Read* v. *Wilmott*, 9 Law J. C.P. 176, s. c. 7 Bing. 577, s. c. 5 M. & P. 553.

### (E) Leases.

By indenture, in the form, and containing the usual covenants, of a lease, A demised premises to B, and B and C covenanted to pay the rent, but C was not otherwise referred to in the instrument. In an action against C on the covenant to pay rent:—Held, that the indenture was available against him, though stamped as a lease only, and that a deed stamp was unnecessary. *Price* v. *Thomas*, 2 B. & Ad. 218, s. c. as *Pratt* v. *Thomas*, 4 C. & P. 554.

### (F) Policies of Insurance.

A policy of insurance on a ship from an English port to foreign parts, accepted in England by the agent of an Irish insurance company, subject to the approval of the directors, was transmitted to them in Ireland; and there by them signed:—Held, that an Irish stamp was sufficient upon such policy, and that it did not require an English stamp under the 1 & 2 Geo. 4. c. 55. s. 1. *Iveson* v. *Hunter*, 8 Law J. K.B. 146.

A policy of insurance was effected on a ship from Liverpool to Quebec. The policy was duly stamped. The ship being detained, a memorandum was indorsed, by which, in consideration of one guinea per cent. additional, the underwriters continued the policy, changing the destination of the ship from Liverpool to St. John's, New Brunswick:—Held, that the memorandum came within the meaning of the 35 Geo. 3. c. 63. s. 13; and that no new stamp was necessary. *Brocklebank* v. *Sugrue*, 8 Law J. K.B. 371, s. c. 1 B. & Ad. 81.

### (G) Promissory Notes.

A promissory note for 100*l.* and interest, made payable to M S or order, on demand, held to be properly stamped with a stamp for 3*s.* 6*d.* under the Stamp Act, 55 Geo. 3. c. 184, schedule, part 1, title "Promissory Note," c. 2. *Moyser* v. *Whittaker*, 7 Law J. K.B. 228, s. c. 9 B. & C. 409.

A promissory note thus—"*On demand*, we jointly and severally promise to pay to I G or order, the sum of 100*l.*, &c." requires a 3*s.* 6*d.* stamp only; the larger stamp in the 55 Geo. 3. c. 184, schedule, part 1, being only necessary where the note is payable, *on demand, to the bearer*. *Armitage* v. Berry, 7 Law J. C.P. 229, s. c. 5 Bing. 501, s. c. 3 M. & P. 211.

### (H) Receipts.

A receipt in the following form "Received of W C the sum of 9*l.* in full, for what I done for him," is not a receipt in full of all demands, so as to require a 10*s.* stamp. *Law* v. *Gunby*, 4 C. & P. 149. [Tindal]

### (I) Feloniously cutting off Stamps.

It was the duty of the prisoner, who was a clerk in the Stamp Office, to cut off the corners of parchments which bore the blue paper stamps allowed for as spoiled by the commissioners of stamps, and to put the blue paper stamps and the small pieces of parchment so cut off, and which were glued to them, into the fire, without separating them. Instead of doing this, he separated a blue paper stamp from the small piece of parchment to which it had been glued, and glued it to a new skin of parchment, on which the words "This Indenture," had been written. The jury found, that he had no fraudulent intent when he cut the stamp from the skin of parchment, but that he had when he separated the blue paper stamp from the small piece of parchment; and that he then intended to apply the stamp to a parchment intended to be used as an indenture:—Held, that this was a capital offence. And, it being uncertain whether the stamp so separated was impressed before or after the passing of the stat. 55 Geo. 3. c. 184, it was held, that the party might be properly convicted on a count stating the stamp to be the impression of a die made and used in pursuance of the statute made and provided for denoting a certain duty; being one of those under the management of the Commissioners of Stamps. *Rex* v. *Smith*, 5 C. & P. 107. [Bosanquet]

## STATUTE.

(A) CONSTRUCTION.
(B) EVIDENCE.

### (A) CONSTRUCTION.

If an act of parliament, by general words, purports o confer a power upon special donees, one of whom ossesses the same power more amply at common aw as incident to his estate, the statute shall not e intended to apply to him, so as by implication to bridge his power; and acts of his, therefore, which he statute would have authorized, will be referred o his common-law right. *Ex parte Clayton*, 1 Russ. & M. 369.

A private act of parliament, which directs a compensation to be made to the several persons interested "in any lands, sands, tenements, buildings, or other hereditaments," used for the purposes of he act, "or for any damage which shall have been lone thereto, or to the parties interested therein," loes not entitle a vicar or lay impropriator to a compensation in respect of titheable lands taken for the purposes of the act, and thereby rendered incapable of producing tithes. *Rex* v. *the Commissioners of the Vene Outfall*, 8 Law J. K.B. 1, s.c. 9 B. & C. 875, s.c. 4 M. & R. 646.

An act of parliament authorized duties according to a schedule. The schedule, under the head 'metals," specified cast metal, copper, brass, pewter, and tin, authorizing a certain duty upon each, and then a certain duty upon "all other metals not enumerated:"—Held, that the latter words meant all other metals *ejusdem generis;* and that they did not include gold and silver. *Casher* v. *Holmes*, 9 Law J. K.B. 280, s.c. 2 B. & Ad. 592.

By a canal act, the company were empowered to purchase land for the use of their navigation; the minerals beneath to remain in the owners. Whenever the owner was desirous of getting the minerals, he was to give notice to the company. They, within a limited time, were to have the option of purchasing. If they did not purchase, the owner was to be at liberty to work his mines, *doing no injury to the navigation.*

An owner, who was desirous to work his mines, gave notice to the company. They did not purchase within the limited time. The owner then proceeded to work the mines, and his doing so produced an injury to the navigation; but it did not appear that he had worked them in an improper manner:—Held, that as the company had not availed themselves of their right to purchase, the proviso, that the owner must do *no injury to the navigation*, required to be so far qualified as to mean, that he was not to work them so as to do any injury beyond that which was necessary in the ordinary course of working; and, therefore, that the company were not entitled to maintain an action against the owner for the amount of the damage sustained by the ordinary course of the working. *The Proprietors of the Dudley Canal Navigation* v. *Grazebrook*, 8 Law J. K.B. 361, s.c. 1 B. & Ad. 59.

By a local act, power was given to the Bishop of Bath and Wells, and the Justices of the county, or to any five Justices in the absence of the bishop, at the Quarter Sessions, to examine certain accounts, and ascertain the balances. At a Quarter Sessions the accounts were produced; and the Court adjourned the examination to the following Sessions, when they examined the accounts, and ascertained the balance:—Held, that the authority given had not been properly pursued, as the power was given to the bishop, &c., not as a court; and that they had no power to adjourn the examination to a future Sessions. And, as it did not appear that any five Justices had adjourned the examination, and had been present subsequently when the accounts were examined,—Held, that the fixing of the balance at the subsequent Sessions was not binding. *The Conservators of the River Tone* v. *Ash*, 8 Law J. K.B. 226, s.c. 10 B. & C. 349.

By a drainage act, the commissioners were empowered, when required for the purposes of the act, to purchase, and to make satisfaction for damage done to lands, and if the land-owners refused to treat, then to apply to two magistrates to issue their warrant to the sheriff to summon a jury to ascertain the amount of the purchase-money or satisfaction. By a subsequent section, if the land-owners and the commissioners could not agree as to the compensation for damages done by the commissioners, the same were to be ascertained by a jury to be impanelled as aforesaid:—Held, that, in that case, the owners of the lands damaged, and not the commissioners, were to apply to the magistrates. *In re Eau Brink Drainage*, 3 Sim. 435.

By statute 16 & 17 Car. 2, the trustees or adventurers for draining Deeping Fen were seised of 10,036 acres of land, and the rates and taxes for completing the drainage of the fen were to be levied on the 10,036 acres. They were called taxable lands. There were 500 acres called free lands, and the other lands in the fen consisted of common land. The adventurers were, at their own costs and charges, to keep the river Glen with sufficient diking, roading, scouring, and banking. By a subsequent act, of the 41 Geo. 3, reciting the former act, and that the works of drainage were insufficient, and that the owners and proprietors of free lands, and persons interested in the commons, notwithstanding their exemption from the costs of making works of drainage, together with the adventurers, being desirous to obtain a better drainage for all the said lands, and more effectually to protect the same from injury by a breach in any of the banks of the river, had agreed that the respective works of drainage thereinafter mentioned should be made, erected, maintained, and supported at the expense of the trusts, proprietors, and persons, in the proportions thereinafter mentioned. By a subsequent clause, the commissioners under that act were thereby required well and sufficiently to enlarge, deepen, and scour out the river, and straighten the course thereof, where necessary, and enlarge and straighten the banks of the river in such manner as in the judgment of the commissioners should be requisite; and the costs of executing all the said works were to be paid and borne by the several persons then respectively liable to the repairs of such banks, in conjunction with the owners and proprietors interested in the drainage of the said commons, in such proportions as to the commissioners should seem just and equitable, and as they by their award should appoint; and such

respective banks, after the commissioners should have completed the same, should from time to time be repaired by such persons as the commissioners should by their award direct:—Held, that the adventurers were not, by this statute, released from the obligation imposed on them by the 16 & 17 Car. 2, of cleansing and scouring the river Glen. *Syson* v. *Johnson*, 8 B. & C. 795.

(B) EVIDENCE.

An act of parliament, private in its nature, is not made admissible in evidence against strangers, by a clause declaring "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded."

A canal act is not rendered a public act by containing provisions empowering the company to regulate and take tonnage rates and tolls from persons using the canal. *Brett* v. *Beales*, 1 M. & M. 421. [Tenterden]

## STOCK.

[See LEGACY.]

[Transfer of 4*l.* per cent. stock to 3½*l.* or 5*l.* per cent., 11 Geo. 4. c. 13, 8 Law J. Stat. 9.]

In a contract for the purchase of stock, time is of the essence of the contract.

Where a contract is made, by which a party binds himself to deliver stock, upon condition of the payment of certain sums, at certain times, and the terms of the contract do not render it obligatory upon the other party to accept the stock, but leave him an option to take or reject it; if he do not afterwards perform the condition, he cannot, in an action, recover back any deposit he has made at the time of entering into the contract. *Rothschild* v. *Hennings*, 7 Law J. K.B. 230, s. c. 9 B. & C. 470, s. c. 4 M. & R. 349.

Where a testator makes a specific bequest of stock in the public funds to one person, and appoints another as his executor, the executor is entitled to have the stock transferred into his name, unless he has previously assented to the legacy. *Franklin* v. *the Bank of England*, 7 Law J. K.B. 183, s. c. 9 B. & C. 156, s. c. 4 M. & R. 11.

The plaintiffs were possessed of certain stock, which was sold and transferred in the Bank books under a forged power of attorney. The plaintiffs entered into an agreement with the Bank to tender a proof of the sum thus surreptitiously obtained, under a commission of bankrupt issued against the firm of which the party who forged the power of attorney was a member, in consideration of the Bank agreeing without litigation to replace the stock:—Held, that the plaintiffs' right of action against the Bank in respect of this stock, was suspended until they had fulfilled their engagement. *Stracey* v. *the Bank of England*, 8 Law J. C.P. 234, s. c. 6 Bing. 754, s. c. 4 M. & P. 639.

Order made for a transfer of stock under 56 Geo. 3. c. 60, without a reference. *In re Avery*, 1 Russ. & M. 356.

The Court will, on the petition of an assignee of the reversion, order the accountant-general not to transfer stock, although the petition has not been served on the assignor. *Salmon* v. ——, 1 Tam. 74.

## STOLEN GOODS.

[See RECEIVER OF STOLEN GOODS.]

## STOPPAGE IN TRANSITU.

Where goods sent directed to the residence of the buyer, arrived at the warehouse of a wharfinger, and subsequently, the buyer being insolvent, the contract between him and the seller was rescinded, but no application was made to the wharfinger until six weeks after their arrival at the warehouse: it was held, that the mere delay in applying to the wharfinger did not determine the transitus; that the goods were still in transitu; and consequently that the wharfinger could not set up a lien upon the goods in respect of the general balance due to him from the seller. *Morley* v. *Hay*, 7 Law J. K.B. 104.

Where the vendor has a right to stop in transitu, and exercises that right, and the whole matter rests in contract, without any completion, either by payment on one part, or by delivery on the other, the stoppage in transitu amounts to a rescinding of the contract, so as to revest the right of property in the goods in the vendor. Accordingly, where, under such circumstances, the vendor rescinded the contract:—Held, that the assignee of the bankrupt vendee could not maintain an action on a policy of insurance on the goods, effected in the name of the bankrupt, he having no insurable interest in them. *Clay* v. *Harrison*, 8 Law J. K.B. 90, s. c. 10 B. & C. 99, s. c. 5 M. & R. 17.

## SUBPŒNA.

[See PRACTICE and WITNESS.]

## SURGEON AND APOTHECARY.

[See MURDER and MANSLAUGHTER.]

An apprentice to an apothecary, who was in the habit of practising at a town nine miles from his master's residence, but *bonâ fide* on his master's account, in cases in some of which the patients never saw the master, and did not know of his existence, held to be liable to the penalty under the 55 Geo. 3. c. 194. s. 20, for practising as an apothecary without a certificate.

*Semble*—that the lawful practice of the apprentice is confined to his master's residence. *The Apothecaries' Company* v. *Greenwood*, 9 Law J. K.B. 351, s. c. 2 B. & Ad. 708.

In an action by an apothecary, to prove practising as such previous to August 1815, the plaintiff ought to shew instances of compounding and making up prescriptions: merely attending local complaints is not enough. *Thompson* v. *Lewis*, 1 M. & M. 255, s. c. 3 C. & P. 483. [Tenterden]

An apothecary may either charge for his attendances, or for the medicines he sends, but he cannot be allowed to charge for both. *Town* v. *Lady Gwyley*, 3 C. & P. 581. [Best]

A surgeon and apothecary may, besides his charges for medicine, recover such charges for attendances

as the jury shall consider to be fair and reasonable. *Handey* v. *Henson*, 4 C. & P. 110. [Tenterden]

## SURRENDER.

The circumstance of an outstanding term not being noticed in the marriage settlement of the person entitled to the inheritance, does not warrant a presumption that the term has been surrendered. *Doe* d. *Blacknell* v. *Plowman*, 9 Law J. K.B. 289, s. c. 2 B. & Ad. 573.

In ejectment, it appeared, that the premises were conveyed by deeds of lease and release for a term of six hundred years for raising a sum of money by mortgage, with a clause of cesser of the term on payment of the mortgage money and costs; and that in 1802, the Court of Chancery had decreed a sale of the mortgaged property for the payment of the money, under which decree some sales had taken place; but no evidence was given as to any further proceedings in the Chancery suit, nor of any title to the premises in the defendant. Under these circumstances, the Court refused to presume that the mortgage money was paid off, and that the term had either ceased under the proviso of cesser, or had been surrendered to the owner of the inheritance. *Doe* d. *Hammond* v. *Cooke*, 7 Law J. C.P. 255, s. c. 6 Bing. 174, s. c. 3 M. & P. 411.

## TAXES.

[See STATUTE.]

Duties of receivers general of the land and assessed taxes, to be transferred to inspectors of taxes, and other provisions for the receipt and remittance of such taxes, 1 & 2 Will. 4. c. 18, 9 Law J. Stat. 20.

33 & 38 Geo. 3, as to double assessments of the land tax, explained and amended by 1 & 2 Will. 4. c. 21, 9 Law J. Stat. 24.

## TENANT FOR LIFE.

Devise to trustees, in trust to sell, for payment of testator's debts, and subject thereto, to A for life, *sans* waste, remainder to his first and other sons in tail. The trustees sold timber on the estates, and applied the proceeds in payment of the debts:—Held, that A was entitled to have the amount raised by sale of the estates, and paid to him. *Davies* v. *Wescomb*, 2 Sim. 425.

Devise to trustees and their heirs, during the life of A, in trust for A, and after his decease to B in fee.

The trustees recover, in A's lifetime, damages for breach of covenants in a lease granted by the testatrix, and still subsisting. A dies; the damages belong to her estate. *Noble* v. *Cass*, 2 Sim. 343.

The Court will not, on the application of a tenant for life, direct an inquiry, whether it would be for the benefit of all parties interested in the property, that certain permanent and substantial improvements should be made in the mansion house. *Nairn* v. *Marjoribanks*, 3 Russ. 582.

Order made *ex parte*, under the 6 Ann. c. 18, that a lessee for lives should produce the *cestuis que vie* to persons named, and at a time and place specified in the order. *Ex parte Whalley*, 4 Russ. 561.

## TENANT IN TAIL.

A tenant in tail, under a will, permitted to set aside a conveyance made by two successive tenants for life to a purchaser, on the ground that the transaction had been collusively managed between the tenants for life and the purchaser, to the injury of the interest of the tenant in tail. *Mullins* v. *Townsend*, 2 Dow. & Cl. 430.

## TENDER.

If an attorney send a letter to demand payment, and the debtor make a tender to him, that is a good tender, unless he disclaims his authority at the time; and, if the attorney be absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, after such a letter being sent, a tender to the clerk of the attorney at his office (the attorney being absent) is good.

A tender to a person in the office of the plaintiff's attorney, who is referred to on the subject by a clerk in the office, and refuses the tender, as being of an insufficient sum, is a good tender, without shewing who that person was. *Wilmott* v. *Smith*, 2 M. & M. 138, s. c. 3 C. & P. 453. [Tenterden]

Where the amount of the debt, or the fact of an alleged tender, be in dispute, the Court will not refer either the one or the other to the Master, without the consent of both parties; but will leave the defendant, if he has made a tender, to plead it; or if he has not, to pay money into court under the common rule. *Frowd* v. *Lucas*, 9 Law J. K.B. 65.

*Semble*, that by a tender of a certain sum in an action of assumpsit for goods sold and delivered, the defendant admits his liability to that extent, but is not precluded from contesting it beyond the sum tendered. Where, therefore, the defendant had tendered 10*l.*, and at the trial the Judge told the jury, that, had the tender not been made, the plaintiff must have been nonsuited; but that, the tender having been made, the case was altered; and they accordingly returned a verdict for the residue of the plaintiff's demand:—The Court refused to nonsuit the plaintiff, no leave being reserved; but the Judge certified to deprive the plaintiff of costs. *Seaton* v. *Espinasse*, 9 Law J. C.P. 56, s. c. 5 Bing. 187, s. c. 2 M. & P. 301.

A tender not accepted in due time, may be reduced by the Court. *General Palmer*, 2 Hag. 180.

## TERMS.

[Alteration of, by 1 Will. 4. c. 70. s. 6, 8 Law J. Stat. 157.]

## THEATRE.

[See PLAYERS and SPECIFIC PERFORMANCE.]

The statute 10 Geo. 2. c. 28. s. 2. prohibits acting plays, &c. for gain, without patent from the King,

licence from the lord chamberlain. Section 5 provides that no person shall be authorized by patent or licence to act except within the city and liberties of Westminster, or where the King shall be resident — and that the prohibition in section 2 is not meant to interfere with the exempting power, as mentioned in section 5, but prevails throughout the kingdom.

The act 28 Geo. 3. c. 30. enables Magistrates in sessions to license theatrical performances in places where they cannot be authorized under the statute of 10 Geo. 2. A conviction under 10 Geo. 2. c. 28. s. 2 for performing without patent from the King, or licence from the lord chamberlain, at Manchester, is good, it is for the defendant to shew, if such be the fact, that he had a licence from the Sessions. *Rex* v. *Mercier*, 1 B. & Ad. 489.

## THREATENING LETTERS.

An anonymous letter stated, that the writer had overheard certain persons agree together to do an injury to the person or property of the prosecutor, to whom the letter was sent; and that if thirty sovereigns were laid in a particular place, the writer would give such information as would frustrate the attempt:—Held, that this was not a threatening letter within the stat. 7 & 8 Geo. 4. c. 29. s. 8, although it appeared that the letter was a mere device to defraud the prosecutor of thirty sovereigns. *Rex* v. *Jackson*, 4 C. & P. 227. [Bolland]

A letter was signed "I am your cut-throat," and stated, that if the person to whom it was sent had his deserts, he would not live the week out, and that the writer would be with him shortly; and if he made light of it, the writer would make light of him and his:—Held, that this letter so plainly conveyed a threat to kill and murder, as to render it unnecessary to insert either innuendos or prefatory allegations in the indictment to explain its meaning. *Rex* v. *Fowcher*, 4 C. & P. 562. [Patteson]

## TIME.

[See CORPORATION (A, *b*,) and LIMITATIONS, STATUTE OF.]

In computing the six months limited by 24 Geo. 2. c. 44. s. 8, for bringing an action against a Magistrate for false imprisonment, the day of discharge from imprisonment is to be reckoned exclusively. Therefore, where a party, discharged on the 14th of December, sued out a writ on the 14th of June following, it was held, that the action was commenced in time. *Hardy* v. *Ryle*, 7 Law J. M.C. 118.

Under 6 Geo. 4. c. 16. s. 81, where the computation of time is to be from an act done, the day when such act is done is to be included. For some purposes the Court notices the fraction of a day. *Ex parte Vaughan, in re Starkey*, 1 Mont. & M'Ar. B.C. 8.

## TITHES.

[See STATUTE.]

(A) WHAT ARE.
(B) TITLE TO.
(C) WHAT TITHEABLE.
(D) EXEMPTION.
(E) SETTING OUT.
(F) COMPOSITION.
(G) SUITS IN EQUITY.
(H) PLEADINGS.
(I) EVIDENCE.
  (*a*) *In general.*
  (*b*) *Title.*
  (*c*) *Exemption.*
  (*d*) *Modus.*
  (*e*) *Composition.*
(K) PRACTICE.

### (A) WHAT ARE.

The word "tithes," is a word of equivocal meaning, and as such, where found in written documents, is not conclusive, but may, according to circumstances, either mean tithes in kind, or may mean that which is in lieu of tithes in kind, viz. the ecclesiastical emolument or modus, or payment in lieu of them. *Beck* v. *Bree*, 9 Law J. Exch. 26, s. c. 1 C. & J. 246, s. c. 1 Tyrw. 132.

### (B) TITLE TO.

Where the order of birth of calves can be ascertained, the tenth born calf is that which the tithe-owner is entitled to. *Tratman* v. *Carrington*, 9 Law J. Exch. 75, s. c. 1 C. & J. 320, s. c. 1 Tyrw. 167.

Whether the natural or artificial grasses, cut green and lying in the swathe, or set up in cocks, are great or small tithe? *Lewis* v. *Allnutt*, 2 Bligh, N.S. 83.

A purchaser entitled to tithe-hay, is not necessarily entitled to tithe of clover, vetches, and grass cut and carried away green — *semble*. *Lewis* v. *Bridgman*, 3 Sim. 316.

### (C) WHAT TITHEABLE.

[See D.]

Wood cut from hedges is titheable, although used on the farm. *White* v. *Smith*, 1 Tam. 306.

A miller who grinds his own corn, and *sells* the flour, is not liable to tithes for his *mill*. *Townley* v. *Colegate*, 2 Sim. 297.

### (D) EXEMPTION.

The word "or" in the 6th section of 2 & 3 Edw. 6. c. 13. is, from the context, to be read as "and." Consequently, barren land, inclosed under an inclosure act, into which the person entitled turned his cattle, but who did not act to render the land more productive than it was before,—was held, not to be improved thereby, within the meaning of the above section, so as to render the land liable to tithe seven years afterwards. *Ross* v. *Smith*, 9 Law J. K.B. 162, s. c. 1 B. & Ad. 907.

Whether the natural or artificial grasses cut green, and lying in the swathe, if given to husbandry horses, there being other food grown on the farm sufficient for these horses, are exempt from tithe—*quære*. *Lewis* v. *Allnutt*, 2 Bligh, N.S. 83.

### (E) SETTING OUT.

To set out the tithe of potatoes by the tenth basket, as raised, and immediately remove the nine parts, is not sufficient; reasonable quantity must be raised, before the setting out, in order to afford to the tithe-

wner a fair opportunity of view. *Bearblock* v. *Meains*, 2 Hag. Ec. 495.

In a particular parish, the practice had been to set ut the tithe of potatoes in sacks, and for the tithe-wner to come once or twice a day to see the setting ut. The growers, of whom there were fifty in the arish, then had recourse to a new mode of setting ut the tithe, viz. in baskets called prickles, ten of hich could be filled every twenty minutes; and fter they had been suffered to remain half an hour, ine baskets were removed to the sorting places, to repare the potatoes for the London markets.

It appeared that an adherence to the old practice aused injury to the potatoes under the particular ircumstances; on the other hand, the new practice ould compel the tithe-owner, in order to prevent raud, to have a man in each field all day.

In an action against the tithe-owner for not taking way the tithe set out according to the new mode, he jury, against the opinion of the Judge, found hat the potatoes might be as well judged of in the rickles as in any other way; and that it would njure new potatoes to put them in sacks: they herefore found for the plaintiff. The Court would ot disturb the verdict. *Thompson* v. *Bearblock*, 9 Law J. K.B. 153, s. c. 1 B. & Ad. 812.

### (F) Composition.

[See *post*, I, *e*.]

A custom, that the rector shall occupy, from Lady-day to Michaelmas in each year, forty acres, part of a fen consisting of about 1200 acres, in lieu of the tithes of all hay and fodder arising on the fen, is a valid custom. *Sparke* v. *Ivatt*, 7 Law J. Chanc. 158.

### (G) Suits in Equity.

[*Cherry* v. *Legh*, 1 Dow. & Cl. 98, Dig. Law J. 506.]

The language of an endowment being ambiguous, with respect to the tithe of hay, and being unexplained by any subsequent documents, and there being no modern evidence of usage, and no evidence of perception by the vicar, the Court declined to decree for the vicar, as against a portionist claiming the tithe in question, but directed an issue. *Wyld* v. *Ward*, 3 Y. & J. 192.

Issue directed, on the application of a vicar, to try the right to tithes. *Townley* v. *Colegate*, 2 Sim. 297.

*Quære*—whether a court of equity can make a decree to establish the right to tithes. *Day* v. *Drake*, 3 Sim. 72.

### (H) Pleadings.

The landlord may be joined with his tenant as a defendant to a bill for tithes, where he has documents in his custody, a discovery of which is sought by the bill, in aid of the plaintiff's claim. *Day* v. *Drake*, 3 Sim. 72.

To a bill by a vicar, for some of the tithes of certain lands, no person except the occupiers ought to be made parties, although they allege that the tithes in question have been always received or demanded by the rector, and state that it is uncertain whether their lands are, or not, within the parish. *Cook* v. *Blunt*, 2 Sim. 417.

Defendant, in her answer to a bill for tithes of a mill, said that it was an ancient mill, built before living memory; that no tithes had ever been paid for it; and that it had always been considered exempt from tithes:—Held, that the exemption was well pleaded. *Townley* v. *Colegate*, 2 Sim. 297.

Mode of pleading a farm modus. *Wharton* v. *Child*, 7 Law J. Chanc. 106.

Moduses pleaded, as in the answer set forth in the statement of the pleadings in this case:—Held, not to be ill pleaded; but to be well and sufficiently laid as a defence to a bill for tithes, where it had been objected at the bar by the counsel for the plaintiff, 1st, that the moduses as there pleaded, were badly and insufficiently laid, having left it wholly in doubt, and uncertain to what lands they were meant to be pleaded, or, in other words, that the lands in respect of which the particular tithes were meant to be shewn to be covered thereby, were not set forth with sufficient certainty; and, 2ndly, that the character and nature of the moduses set up had not been distinctly stated or shewn. *Southwood* v. *Foreman*, 10 Price, 327.

### (I) Evidence.

[See Evidence.]

#### (*a*) *In general.*

The bishop's registry is the proper place of custody for the sequestrator's receipts, accounts (&c.), with reference to their admissibility, as legal evidence in questions of disputed right to tithes. *Pulley* v. *Hilton*, 12 Price, 625.

A terrier, though signed by churchwardens only, is admissible evidence in a suit for tithes, by a portioner against an occupier. *Lewis* v. *Bridgman*, 3 Sim. 316.

There being a question as to the local situation of the lands, and the extent of a grant to the defendant, and little or no evidence of perception on either side, the Court considered that they must be bound by the verdict of the jury.

Presumption of grant founded on non-perception, may be raised against a lay rector, if the pleadings are so framed as to admit it. *Ringrose* v. *Todd*, 12 Price, 650.

Where, on the trial of an issue,—whether a modus set up as covering a certain district or tract of land, has existed from time immemorial,—conflicting documentary evidence, and evidence of usage, &c. have been produced for and against such modus (not in itself rank, as a district modus,) and the jury have found their verdict establishing such modus:—The Court will not disturb such verdict by granting a new trial, unless on the score of misdirection, or it appears satisfactorily that the weight of evidence preponderates against such verdict, or that some plain ground is furnished by such documentary evidence, to shew that the verdict is an incorrect one. *Beck* v. *Bree*, 9 Law J. Exch. 26, s. c. 1 C. & J. 246, s. c. 1 Tyrw. 132.

#### (*b*) *Title.*

Where a vicar's general title is admitted, it is not necessary for him to prove more than perception of the particular tithes demanded by the bill to be paid to him by composition, and the defendants cannot insist on such payments as moduses. The Court may determine such a case without issues, notwith-

standing conflicting evidence. *Southwood* v. *Foreman*, 10 Price, 327.

In a suit for tithes, an admission by the defendant of the plaintiff's right to a specified modus, in lieu of tithes, which cannot be sustained, in consequence of its being defectively pleaded, is an admission of his title to the tithes. *Wharton* v. *Child*, 7 Law J. Chanc. 106.

In favour of a long continued enjoyment of tithes in conformity with successive recitals in old leases, the Court will presume performance of conditions to endow, &c., and adopt every other presumption necessary to give effect to such a title so supported. *Wooley* v. *Birkenshaw*, 12 Price, 702.

A terrier is evidence as to personal tithes. *Townley* v. *Colegate*, 2 Sim. 297.

Though mere non-payment of tithes, for however long a period, would not be evidence of a grant, yet, a layman's adverse enjoyment or pernancy, for a long series of years, of the tithes of certain lands, or of a money payment in lieu of tithes, coupled with a succession of deeds, by which the tithes or money payments in lieu of tithes, have been conveyed from one person to another, corresponding with the enjoyment, affords evidence sufficient to justify a jury in presuming a legal grant of the tithes. *Bacon* v. *Williams*, 3 Russ. 525.

Upon a bill for tithes, by a vicar against the occupiers of an estate, which had belonged to the Knights Hospitallers of St. John of Jerusalem, and, after the dissolution of the monasteries, being vested in King Henry the Eighth, had been granted by him to the Archbishop of York and his successors, under whom the defendants occupied, the defendants pleaded that the lands were held by the Hospital exempt from tithes; that they were so held and granted by the king; and they proved that no tithes had, within memory, been paid for the lands. On the part of the vicar was produced an *inspeximus* of an inquisition made under the authority of the Archbishop of York in 1314, by which it was found, after specifying certain tithes, "that the vicar ought to receive all other tithes to the said church belonging, (except corn and hay,) which the master and brethren of the Hospital of St. John of Jerusalem received as rectors; but that all the vicars had, ever since the time of the ordination of the vicarage, received all other tithes, and peaceably, and did so at that time; but they were bound to give their tithe of corn and hay:"—Held, upon the evidence of this document, that the vicar was entitled to the tithes claimed by his bill. *Elsley* v. *Donnison*, 2 Bligh, N.S. 95.

A, the owner of the tithes of a district in a parish, and B, his lessee, in July 1824 file a bill in Chancery against C, the occupier of lands within the district, praying an account for six years back of the tithes of clover, vetches, meadow and rye grass, and other grasses, cut green, and partly left in the swathe, and partly cocked. C, by his answer, admits the title of A and B to the tithes of the district, and his own occupation, and the taking of the tithes; but contends, that the clover, &c. are small tithes, and belong to, and are claimed by the vicar, and that he pays to the vicar a composition for all the small tithes, and that the clover, &c. had been used as green meat for his husbandry horses; and upon these grounds he denies the title of the plaintiffs to the tithes in question. It appeared in evidence, that in the year 1822, C had written a letter to B, stating, that on the day of writing the letter he should cut vetches, and set out the tithes, and that he had no objection to compound; and in the year 1824, a letter having been written by the solicitor of A, threatening to file a bill for the tithes in question, C, by his answer to that letter, says, that he has never refused to pay the lessee the tithes of green clover, vetches, and grass.

Upon these admissions, notwithstanding the objections raised by the answer,—Held, (reversing the decree of the Court below,) that the plaintiffs were entitled to a decree for an account. *Lewis* v. *Allnatt*, 2 Bligh, N.S. 83.

### (c) *Exemption.*

A general title to tithes throughout a parish in a vicar, gives him a *primâ facie* case, and casts upon the occupier claiming exemption on the ground of his lands being liable to pay tithes to a rector, the onus of proving that case on the trial of an issue directed, for the purpose of procuring to the court of equity the aid of the verdict of a jury. *Pelley* v. *Hilton*, 12 Price, 625.

Where tithes have never been paid since the dissolution, the Court of Chancery will presume all facts which, consistently with the evidence in the cause, would give legal origin to an exemption from the payment of tithes. *Humphreys* v. *Waguaff*, 1 Russ. & M. 529.

A party setting up an exemption from vicarial tithes for part of his farm, as being the demesne lands of a priory or monastery, the tithes of which were excepted from the endowment of the vicar, is bound to prove, that his lands actually were the demesne lands; and it is not sufficient for him to shew that the priory had a manor and lands in the parish; that, on the dissolution of monasteries, the manor and lands devolved to the crown, by whom the same, together with the rectory, were granted to persons under whom the defendant claimed title; and that the defendant's farm was known by the name of the Manor Grange, which, it was insisted, meant the demesne lands: and therefore, where a defendant set up such an exemption, but did not actually prove that his lands were the demesne, and there was evidence of the receipt for a century past of a composition for tithes for the farm in question, though alleged by the defendant to be paid for a part of the farm only, which he admitted not to be demesne lands:—The Court decreed an account, with costs. *Young* v. *Merchant*, 3 Y. & J. 467.

### (d) *Modus.*

To support a parochial modus, it is not sufficient for the defendants to prove the non-render of tithes in kind; they must distinctly shew the acceptance of the modus for some time, and to some extent. *Lynes* v. *Lett*, 3 Y. & J. 405.

A *modus decimandi* may be proved by a document signed by a former rector, setting out what tithes are usually paid in the parish, although it be not found in the registry of the bishop or archdeacon, but is in the custody of a parishioner. *Maddison* v. *Nuttall*, 8 Law J. C.P. 27, s. c. 6 Bing. 226, s. c. 3 M. & P. 544.

A single terrier, unsupported by usage, is wholly

sufficient to establish a modus, though there be ot only no proof of payment of tithes in kind, but niform evidence of the non-payment of tithes in kind, rithin living memory. *Lynes* v. *Lett*, 3 Y. & J. 405.

S, as vicar of A, filed a bill in equity, stating a itle by endowment, usage, or otherwise, and claiming against the occupiers of certain farms all tithes, xcept of corn and grain. The defendants, by answer, admitted that S was vicar; but stated, that hey did not know whether he was entitled by endowment, or usage, or otherwise, to all the tithes, xcept grain, or to what tithes he was entitled, except as after mentioned; and they set up a modus, which they stated to be payable, in respect of their arms, in lieu of all tithes belonging to the vicarage. No proof of endowment was given on the part of he vicar, nor of any perception of tithes. On the contrary, it was proved that no tithes had been rendered in kind for thirty years before the commencement of the suit; but that a sum of 37*l.* had been paid to the vicar for the tithes of the farms occupied by the defendants. At the hearing, an issue was directed to try the validity of the modus. *Denchfield* v. *Strong*, 4 Bligh, N.S. 136, s. c. 1 D. & Cl. A.C. 480.

(*e*) *Composition.*

By the act 37 Hen. 8, after reciting that divers variances, contentions, and strifes had grown within the city of London, between the parsons, vicars, and curates, and the citizens and inhabitants, touching the payment of tithes, oblations, and other duties, for appeasing whereof, as well the said parsons, vicars, and curates, as the citizens and inhabitants, had compromitted and put themselves to stand to such order and decree touching the premises as should be made by the Archbishop of Canterbury and the several other persons therein named, for a final end and conclusion to be had and made touching the premises for ever: it was enacted, that such order and direction as should be made, decreed, and concluded by the archbishops, lords, and knights therein named, or any six of them, before the first day of March then next ensuing, concerning the payment of the tithes, oblations, or other duties within the said city or liberties, and inrolled in the King's High Court of Chancery of record, should stand and remain and be as an act of parliament, and should bind, as well all citizens and inhabitants of the city and liberties for the time being, as the said parsons, vicars, curates, and their successors for ever, according to the effect, purport, and intent of the said order and decree so to be made and inrolled.

In a suit instituted by the impropriate rector of the parish of St. Helen's, Bishopsgate, against the occupier of a house within the parish, claiming payment by way of composition, as under a decree made in pursuance of the act, it appeared that at various times, from the date of the act to the time of filing the bill, decrees and orders had been made in all the courts of Westminster Hall, and in the House of Lords, upon the supposition or presumption that a decree according to the act had been made and inrolled; but no proof of such inrolment was produced in the cause; and the defendants to the suit proved that the records had been searched, and that no such inrolment was to be found.

Upon these pleadings and evidence an issue was directed in the court below, to try whether the decree mentioned in and authorized to be made by the statute was duly inrolled according to the provision in the statute.

This order was reversed upon appeal; and it was declared, that if to give effect to the statute it was necessary that the decree should be inrolled, it ought to be presumed that the decree had been duly inrolled. *Macdougall* v. *Purrier*, 4 Bligh, N.S. 433.

In a suit for tithes, by the rector, the defendant set up a real composition of 10*s.*, as covering, with other lands, the lands in his occupation. In support of this defence he proved, that in the reign of Charles the Second the lands in question were divided among three persons, on a partition, and from which persons the title was regularly deduced by numerous instruments, many of which conveyed the tithes of the portions of the lands comprised in them; and from some of them it appeared that a money payment, parcel of a larger payment, amounting to 10*s.*, was provided for the parson, in lieu of tithes; he also proved, that, in 1666, in an action on the statute, for not setting out tithes, by the then rector, against an occupier of the lands, a verdict was found for the defendant. It appeared, from the evidence, that the tithes had been rendered prior to the reign of Edward the Second; but from that period no trace could be found of any tithe having been rendered; nor was there any evidence of the payment of the 10*s.*, or any part of it. There was no reference in the pleadings, or in the evidence, to the actual deed of composition:—The Court held, that there was not sufficient evidence from which a real composition could, in the present state of the law, be inferred, and decreed an account with costs. *Lediard* v. *Austie*, 3 Y. & J. 548.

It is clearly settled, that mere non-payment will not support the defence of a real composition, nor be evidence from whence to presume the deed which must have been the foundation of it. *Lediard* v. *Austie*, 3 Y. & J. 548.

(K) PRACTICE.

[*Ross* v. *Aglionby*, 4 Russ. 489, Dig. Law J. 512.]

Motion by defendants in tithe suits, in all of which the same defence was made, that the suits might be consolidated, refused. *The Warden and Fellows of Manchester College* v. *Isherwood*, 2 Sim. 476.

Leave refused, in a tithe suit, to file a supplemental answer, setting up a modus, after the cause had been set down for hearing. *Macdougal* v. *Purrier*, 4 Russ. 486.

Defendant, in her answer to a bill for tithes, pleaded a modus for all tithes. She then discovered that the modus covered part only of the tithes, and moved to correct the mistake by filing a supplemental answer:—Ordered, that the cause should proceed as if the modus had been laid in the manner proposed. *Popmore* v. *Skipwith*, 2 Sim. 565.

## TOBACCO.

[Growth of, in, and importation from Ireland, permitted. 1 & 2 Will. 4. c. 13, 9 Law J. Stat. 14.]

## TOLLS.

[Turnpike acts regulated, so far as they relate to certain exemptions from toll. 1 & 2 Will. 4. c. 25, 9 Law J. Stat. 47.]

A grant of a fair or market, with an express grant of toll, passes reasonable toll, though no amount of toll be specified. *Corporation of Stamford* v. *Pawlett*, 1 C. & J. 57, s. c. 1 Tyrw. 291.

The grant of a fair or market, "*cum omnibus tolentis, et aliis dictis feriis sive nundinis pertinentibus et spectantibus*," passes a reasonable toll to the grantee, though the amount of toll be not specified. *Pawlett* v. *the Corporation of Stamford*, 1 C. & J. 400.

A prescription to take a toll of all fish landed in a particular place, in consideration of keeping a capstan and rope for the use of the fishermen, to draw their boats up from the sea,—Held good. *The Earl of Falmouth* v. *George*, 7 Law J. C.P. 40, s. c. 5 Bing. 286, s. c. 2 M. & P. 457.

In support of a claim of toll thorough, over *the whole* of a town, it is not a sufficient consideration to shew that the party claiming is liable to repair roads and bridges in *a part* of the town. *Brett* v. *Beales*, 8 Law J. K.B. 141, s. c. 10 B. & C. 508, s. c. 1 M. & M. 426.

Where the king, before the time of legal memory, was entitled to the soil of the town of C, and to toll traverse within it, and afterwards granted to the burgesses of the town, "the town of C, with all its appurtenances," the words were held sufficient to pass the toll. *Brett* v. *Beales*, 1 M. & M. 426. [Tenterden]

A company formed by act of parliament, in order to render a river navigable, were empowered to take certain tolls, until the expenses incurred, and interest, should be satisfied. To enable themselves to compete with a rival canal company, they took lower tolls than they were authorized:—Held, that they had a right to do this, and could not be compelled by mandamus to take the full sum authorized. *Rex* v. *the Conservators of the River Tone*, 9 Law J. K.B. 80, s. c. 1 B. & Ad. 561.

Where a person entitled to toll of a commodity, (wheat, for instance,) takes more than he is entitled to, an action of trover lies against him for the excess, although the part lawfully taken be mixed up with the excess. *Norman* v. *Bell*, 9 Law J. K.B. 177, s. c. 2 B. & Ad. 190.

An old deed between a public body claiming tolls and others liable thereto, regulating the amount of payment, is evidence in the nature of reputation of the existence of the tolls. *Brett* v. *Beales*, 1 M. & M. 416. [Tenterden]

In an action for tolls claimed by a corporation, an ancient schedule produced from among their muniments, copies of which were delivered by their officer to the lessee of the tolls, and by the lessee to the collectors, by which they have actually collected, is admissible in evidence for the corporation.

*Contrà*, where the copies in the hands of the lessee are not shewn to have been delivered to him from the corporation, although they correspond accurately with the old schedule. *Brett* v. *Beales*, 1 M. & M. 419. [Tenterden]

*Semble*—That, in convictions under the 3 Geo. 4. c. 126, and 4 Geo. 4. c. 95, the following is the result as to appeal and certiorari:—

1st. If the conviction be for a sum not exceeding 40*s*., there is neither appeal nor certiorari.
2nd. If it be for a sum exceeding 40*s*. and not exceeding 5*l*., there may be an appeal, but no certiorari.
3rd. If it be for a sum exceeding 5*l*., there may be appeal or certiorari.

In case of an appeal against a conviction, the informer, and not the Justice, is the party appealed against, though the notice of appeal is to be served upon the latter; and, although the informer do not appear at the Sessions to support the conviction, costs may be awarded to the appellant against him.

And if the Sessions award such costs, the Court of King's Bench will, by mandamus, compel them to issue a warrant of distress for their payment. *Rex* v. *the Justices of Hants*, 9 Law J. M.C. 109, s. c. 1 B. & Ad. 654.

## TRADE.

[See Covenant and Contract.]

[Payment of wages in goods, in certain trades, prohibited by 1 & 2 Will. 4. c. 37, 9 Law J. Stat. 66.]

The custom in favour of unrestrained trade among the King's subjects is so strong, in point of law, that even the Lord Mayor's Court of London cannot support proceedings upon by-laws in restraint of trade among the citizens, without first shewing the immemorial custom, that none but freemen of the city shall carry on trade within it. The shewing the general custom to make by-laws is not sufficient. *Clark* v. *Le Cren*, 7 Law J. K.B. 186, s. c. 9 B. & C. 52.

## TRANSPORTATION.

[Amendment of 5 Geo. 4., 1 Will. 4. c. 39, 8 Law J. Stat. 94.]

## TRESPASS.

[See Assault.]

(A) Where maintainable.
(B) Pleading.
(C) Evidence.
(D) Verdict and Damages.
(E) Costs.
(F) Malicious Trespass Act.

### (A) Where maintainable.

Held, that trespass for breaking and entering plaintiff's dwelling-house, and taking away goods of a lodger of plaintiff, who had not paid part of a year's rent, under the circumstances of the case, might be maintained by the plaintiff on such a possession as he had, although he had not actually distrained them, the plaintiff being entitled to a species of lien on the goods of the party in his custody, under the circumstances. *Symons* v. *Hearson*, 12 Price, 369.

Where goods, apparently the property of A, pass upon his death into the possession of his widow, she is entitled, upon her mere possessory right, and without shewing that she is her husband's legal representative, to maintain trespass against a wrongdoer for the taking of the goods; or, if they be sold,

he may waive the tort, and maintain assumpsit for he proceeds, without proof of title. *Oughton* v. *Seppings*, 8 Law J. K.B. 394, s. c. 1 B. & Ad. 241.

By rule of court, a writ of *fi. fa.* was ordered to be set aside, the defendant (who was plaintiff in this action) undertaking not to bring an action for the seizure; and it was further ordered, that an *alias* writ should be set aside. The sheriff, who had seized under the first writ, continued in possession, and sold under the second writ:—Held, that the rule of court did not prevent the present plaintiff from bringing trespass against the plaintiff in the former action, for what was done under the second writ; and that the defendant in this action could not justify under either of the writs, which must be considered to be void. *Parkins* v. *Plympton*, 9 Law J. C.P. 223, s. c. 7 Bing. 676, s. c. 5 M. & P. 731.

A man who takes possession of a ship by the consent of plaintiff's agent, not liable to an action of trespass. *Miles* v. *Dawson*, Pea. A.C. 59. [Kenyon]

Where a person goes out sporting with his friends, and purposely conducts them to another's land, he is equally guilty of a trespass, although he may remain off the land whilst his friends go on it. *Hill* v. *Walker*, Pea. A.C. 234. [Lawrence]

A Judge will not certify a wilful trespass, unless there be proof of personal notice. *Bevans* v. *Reynolds*, Pea. A.C. 217. [Lawrence]

### (B) Pleadings.

[*Fancy* v. *Scott*, 2 M.& R. 335, Dig. Law J. 518.]

Where a plea justifies a trespass, it need not expressly aver the identity of the trespass justified, with that declared for, provided the identity be manifest from the whole subject-matter. *Carridge* v. *Lautour*, 7 Law J. K.B. 33.

Plea of leave and licence, to trespass for breaking and entering plaintiff's dwelling-house, and taking away goods of plaintiff's lodger, from whom rent was due, under the circumstances in evidence, rebutted by the replication *de injuriâ absque tali causâ*, without replying or new assigning excess; the principle being, that such replication traverses the defendant's justification to the extent pleaded. *Symons* v. *Hearson*, 12 Price, 369.

Where a plaintiff complains of a trespass in a close which he names and describes by metes and bounds, and the defendant pleads a justification as to the trespass in the close "*in which, &c.*," such expression, "in which, &c." means not the whole close, but the spot in which the trespass was committed; and the plea will be proved if the justification proved apply to that spot, although it do not extend to the whole of the close. *Bassett* v. *Mitchell*, 9 Law J. K.B. 140, s. c. 2 B. & Ad. 99.

Special plea, by way of justification to an action of trespass *quare clausum fregit*, that the *locus in quo* was part and parcel of the liberty of the Rolls, and lying and being within the same, situate at and being part of the boundaries thereof; that the defendant then was, and at the time when, &c., was an inhabitant and resident within the said liberty, and beadle thereof; and that all and singular the inhabitants of the said liberty, from time whereof the memory of man is not to the contrary, had used and been accustomed, at their free will and pleasure, yearly and every year, on the feast of the Ascension of our Lord, called Holy Thursday, to go and perambulate the boundaries of the said liberty; that at the same time when, &c., being the feast of the Ascension, called Holy Thursday, the defendant, then being such inhabitant and beadle of the said liberty, together with other inhabitants of the said liberty, was and were perambulating the said liberty and the boundaries thereof; and in their said perambulation it then and there became necessary, for the purpose of such perambulation, for the inhabitants of the said liberty to enter, pass, repass, and perambulate, in, along, and over the said closes in which, &c.; wherefore defendant, as such inhabitant aforesaid, for the purpose of the said perambulation, did enter, pass, repass, and perambulate, in, along, and over the said closes, as he lawfully might, for the purpose aforesaid; and, in so doing, defendant, with his feet in walking, unavoidably a little trod, &c. the grass, &c. in the said closes; averring that the railing was an obstruction to the defendants, standing over and across the way by which said inhabitants were in the said perambulation to pass, so that without a little digging up, throwing down, and removing, &c., the inhabitants of the said parish and liberty could not proceed to make said perambulation; and therefore defendant did, &c.

Replication, *Precludi non*, because, protesting that the said last-mentioned plea, and the matters therein contained, are wholly insufficient in law: protesting also, that the said close called the Kitchen-garden, and the said other close near and adjoining to the same, in the said first count of the said declaration mentioned, are not, nor at the said time when, &c. were, nor from time whereof the memory of man is not to the contrary have been, part and parcel of the liberty of the Rolls, in the county of Middlesex, and lying and being within the same, situate and being part of the boundaries thereof; and that all and singular the inhabitants of the said liberty, from time, &c., have not used or been accustomed, at their free will and pleasure, yearly and every year, on the feast of the Ascension of our Lord, called Holy Thursday, to go and perambulate the boundaries of the said liberty, in manner and form as the said defendant hath above in the second plea in that behalf alleged. For replication in this behalf, the said plaintiffs say that there is not, nor from time whereof the memory of man is not to the contrary hath been, any custom used and approved of within the said liberty, for the said inhabitants of the said liberty, on perambulating the boundaries of the said liberty, to go into, over, and along the said closes in which, &c.; and thereupon issue is joined.

Held, that protestation of the matter protested in the replication, has not the effect of admitting it, so as to dispense with proof of it on the trial of the issue.

Verdict for defendant set aside, and entered for the plaintiffs *non obstante*, on the ground of defendant failing to support the special pleas by way of justification by evidence.

Replication (*semble*) bad, as traversing more than the pleas alleged, if specially demurred to. *Grant* v. *Kearney*, 12 Price, 773.

### (C) Evidence.

[*Johnson* v. *Howson*, 2 M.& R. 226, Dig. Law J. 519.]

In trespass, for breaking and entering a close called the Lord's Leys, the defendant pleaded that

the Lord's Leys was part of B Common, and that he had a right to dig stone upon the waste and uninclosed parts of the common, and upon the Lord's Leys as part and parcel thereof; the plaintiff in his replication, protesting that the Lord's Leys was not part of the waste of B Common, traversed the right claimed in the Lord's Leys. At the trial, the defendant admitted that he had no evidence of the exercise of a right to take stone on the Lord's Leys, and the plaintiff admitted the defendant's right over the whole of B Common, with the exception of the Lord's Leys:—Held, that, upon these pleadings, the affirmative of the issue was upon the defendant, and therefore that the plaintiff was entitled to judgment. *Maxwell* v. *Martin*, 8 Law J. C.P. 174, s.c. 6 Bing. 522, s c. 4 M. & P. 291.

A document appearing to be a presentment by the homage of a manor, stated that the jurors had examined a certain place described, and claimed by one of the tenants of the manor to belong to his tenement; and they presented that the land so claimed by that tenant, was parcel of the common of the manor. In an action touching the title, this document was held not admissible—

As a presentment; because the jurors had no jurisdiction to try the right to the soil; and besides, they were interested in the enlargement of the boundary of the common:

As an award; because no submission appeared; and the lord was not a party:

As evidence of reputation; because it was *post litem motam*. *Richards* v. *Bassett*, 8 Law J. K.B. 289, s. c. 10 B. & C. 657.

Property in goods transferred by bill of sale to the assignee of the plaintiff's lodger, subject to plaintiff's lien as landlord, is not such an interest as would support a plea, by way of justification of an alleged assault, that it was committed in the protection of the defendant's rightful possession, under the circumstances. *Symons* v. *Hearson*, 12 Price, 369.

Evidence of a custom to perambulate the boundaries of a parish, not sufficient to support the allegation in the pleas of a right to perambulate the boundaries of a liberty. *Grant* v. *Kearney*, 12 Price, 773.

Trespass for stopping and turning back the plaintiff's cart, and seizing and converting the goods in it. Plea, not guilty, as to converting the goods: judgment by default, as to stopping and turning back the cart.

Evidence, that the defendant had authorized the stopping and taking back the cart, and saying to a man, that he left him in possession.

The Judge thought this not sufficient evidence of the conversion of the goods; and, therefore, the jury found a verdict for the defendant upon the issue; and gave nominal damages on the judgment by default. And held to be right. *Hopkins* v. *Ainsworth*, 8 Law J. K.B. 71.

Action of trespass.—Pleas, first, general issue; secondly, a justification, setting up a certain right. New assignment, that the trespasses were committed in excess of the exercise of that right. No plea to the new assignment:—Held, that, on the trial, as the defendants had not pleaded to the new assignment, they could not be allowed to offer evidence to shew that no excess had been committed, and so obtain the verdict; but that the plaintiff, on proving the trespass committed, was entitled at all events to a verdict with nominal damages. *Hamilton* v. *Pentress*, 8 Law J. K.B. 331.

If there be a joint action of trespass against six defendants, and the plaintiff prove a joint trespass committed by all, and then go on to prove another act of trespass by three of them, expecting to connect the other three with this also, but fail in so doing, the latter three are entitled to be acquitted before the defence is opened, as the plaintiff must be taken to have elected to waive the joint trespass, and to have gone on as against those three for the second act of trespass only.

If an action be brought against six, for a single act of trespass, and the plaintiff by his evidence only fix three of them, the Judge will not direct the other three to be acquitted, until all the evidence for the defence is gone through. *Wynne* v. *Anderson*, 3 C. & P. 596. [Park]

In an action of trespass, *quare clausum fregit*, the defendant pleaded that A C was seised in fee, and, being so seised, granted a right of way by non-existing grant. The plaintiff replied, traversing the grant:—Held, that on these pleadings it was not competent for the plaintiff to give evidence to shew that A C was not seised in fee, for the purpose of rebutting the presumption of the grant. *Cortishaw* v. *Cheslyn*, 1 C. & J. 48.

### (D) Verdict and Damages.

Trespass for breaking and entering a dwelling-house, and taking away goods, brought by a plaintiff against defendants, who professed to be authorized to take away the goods of a person who had lodged in the plaintiff's house, and had left the occupation without paying part of a year's rent, under pretext of a bill of sale executed by the tenant to the defendant's employer by the vendee, by whom they were engaged to lot and carry them away.

Second count, for carrying away the goods and assaulting the plaintiff.

Pleas—Not guilty. 2ndly, Leave and licence as to the breaking and entering; 3rdly, As to the taking and carrying away, that the goods, &c., were the property of a third person, whose authority the defendants had for removing them; 4thly, *Son assault demesne*; 5thly, Justification, whilst protecting the possession of the goods. Verdict for plaintiff, 29*l.* 5*s.*, 20*l.* damages for the assault, and 9*l.* 5*s.* for the rent:—Held, the verdict sustainable on the whole case, and not to be disturbed; although, in explaining their assessment of the damages, the jury had not given a good reason; for, if bad (though *semble* not) for the 9*l.* 5*s.*, it would be good for the 20*l.*

The questions raised by the issues on the pleas, are rather questions for the jury applying the evidence to the pleadings, under the direction of the Judge at Nisi Prius, than for the Court applying the evidence to the pleadings in Banc after verdict, on occasion of application for a new trial. *Symons* v. *Hearson*, 12 Price, 369.

In an action of trespass, *quare clausum fregit*, it was proved that the defendant had let his land to the plaintiff, under terms reduced into writing. One stipulation was, that the plaintiff should have a right to take two-thirds of the corn sown, and left

y him growing on the land, at his leaving it at Lady-day, the custom of the country being that he should have the whole. It was also proved that the defendant had refused to let the plaintiff cut the corn, but had turned his labourers off the land, and cut and carried all into his own barns. The value of the corn was proved to be about 285*l.*; other trifling trespasses were charged in the declaration, to the whole of which the defendant had pleaded the general issue. The jury found a verdict for the plaintiff, with 315*l.* damages:—Held, that the excess was not so large as not to be covered by the circumstances of the trespass as proved, and that it was certainly no ground for disturbing the verdict; the jury being entitled to take into consideration independently of the trifling damages not attempted to be justified, and for which the Judge had directed nominal damages to be found,) the nature of the case, and were not bound to a minute calculation of value.

Had the damages been very excessive, *semble aliter. Quære*, as to the effect of the agreement, which was for one year only, as evidence of the terms on which the plaintiff continued to hold the land after the expiration of the year, and as to the necessary directions to be given to the jury on such evidence. *Cox* v. *Dugdale*, 12 Price, 708.

(E) Costs.

To an action of trespass for breaking down the plaintiff's wall, the defendant pleaded not guilty, and seven special pleas, justifying under a right of way; the plaintiff joined issue on not guilty, traversed the other pleas, and new assigned. The defendant joined issue on the traverses, and suffered judgment by default on the new assignment. The jury found a verdict for the plaintiff on the plea of not guilty, with 1*s.* damages; and 40*s.* damages were assessed on the new assignment; the parties consenting that the question of costs should not be affected thereby. But a verdict was found for the defendant on one of the special pleas:—Held, that the plaintiff having been obliged to go down to trial on the plea of not guilty, he was entitled to the general costs of the cause. *Vickers* v. *Gallinore*, 7 Law J. C.P. 82, s. c. 2 M. & P. 359, s. c. 5 Bing. 196.

Where, at the time of committing a trespass, the defendant asserts title, the Judge will certify under statute 23 & 24 Car. 2. c. 9, although defendant disclaim title at the trial. *Hamber* v. *East*, Pea. A.C. 237. [Ellenborough]

Where, in trespass, issue is joined on a plea of the general issue, and upon other issues, but judgment goes by default upon a new assignment, and a general verdict is found for the plaintiff, but a new trial granted on the whole record by reason of some one or more issues being improperly found for the plaintiff, the plaintiff will not be entitled to the costs of the first trial in respect of the judgment by default on the new assignment. *Holland* v. *Deakin*, 7 Law J. K.B. 145.

To trespass, *quare clausum fregit*, defendant pleaded, 1st, not guilty; 2ndly, a right of common; 3rdly, a right of way. The plaintiff took issue on the plea of not guilty, and traversed the rights of common and of way; and new assigned to the second and third pleas, that the defendant, on other occasions, and for other purposes than those mentioned in the special pleas, committed the trespasses complained of. Defendant, in his rejoinder, took issue upon the traverse of the right of common, and right of way, and withdrew the plea of not guilty, so far as it related to the trespasses newly assigned, and suffered judgment by default to the new assignment: at the trial, the issue on one of the special pleas was found for the defendant, and the jury assessed the plaintiff's damages on the new assignment at 5*l.*:—Held, that the defendant was entitled to the costs of the trial. *Cross* v. *Johnson*, 9 B. & C. 613, s. c. 4 M. & R. 290.

Two defendants, sued in trespass, defended jointly throughout the cause. On the trial, the plaintiff obtained a verdict against one of the defendants, and a verdict was returned for the other. The Master, on taxation, taking into consideration that the defence was joint, allowed to the defendant, who obtained a verdict, only 40*s.* costs. And held, by the Court, to be sufficient. *Gibbs* v. *Stead*, 7 Law J. K.B. 37, s. c. 8 B. & C. 528, s. c. 2 M. & R. 547.

(F) Malicious Trespass Act.

Where shrubs are cut, upon an unproved allegation that they were likely to be injurious to an adjoining wall, the case is within the Malicious Trespass Act, though the title to the spot on which the shrubs grew be in dispute between the parties.

Where a Magistrate, upon whose property a malicious trespass had been committed, issued a summons, requiring the offender to appear before himself, or some other Magistrate, and purporting that information had been given to him (the Magistrate) on oath, whereas no oath had been taken, and the information had been communicated by the Magistrate to the informer, the Court, in discharging a rule for a criminal information against the Magistrate, refused to give him his costs. *Rex* v. *Whately*, 4 M. & R. 431.

A party using unreasonable violence to beat off a dog which runs at him, is guilty of a wilful trespass, under the statute 7 & 8 Geo. 4. c. 30. s. 24. And if he is seen committing the act, and a constable immediately sent for, who follows him (he having quitted the place) and apprehends him at the distance of a mile, this is an "immediate apprehension" of a person "found committing" an offence under the 7 & 8 Geo. 4. c. 30. s. 28. *Hanway* v. *Boultbee*, 2 M. & M. 15, s. c. 4. C. & P. 350. [Tindal]

A defendant, who fairly and *bonâ fide* believed that the plaintiff was liable to be proceeded against under the 7 & 8 Geo. 4. c. 30, (Malicious Trespass Act,) gave the plaintiff in charge to a constable, by whom he was carried before a Magistrate. The latter, not conceiving the case to be within the act, (nor was it,) discharged the plaintiff. In an action by the plaintiff for false imprisonment,—Held, that defendant was entitled to the notice of action provided for by section 41 of that act; and, such notice not having been given, that the action could not be maintained. *Beechy* v. *Sides*, 8 Law J. K.B. 71, s. c. 9 B. & C. 806, s. c. 4 M. & R. 634.

The plaintiff having brought an action of trespass against the defendant for wrongfully causing him to be apprehended under the Malicious Trespass Act, 7 & 8 Geo. 4. c. 30, obtained a verdict, which was

afterwards set aside, and a nonsuit entered, on the ground of the absence of the notice of action required by s. 41. of the act:—Held, that, under that clause, the defendant was entitled to costs as between attorney and client. *Wright* v. *Wales*, 7 Law J. C.P. 171, s. c. 3 M. & P. 96.

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## TROVER.

(A) Where Maintainable.
(B) Demand and Refusal.
(C) Conversion.
(D) Evidence.
(E) Practice.

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### (A) Where Maintainable.

[See Master and Servant.]

Two persons jointly interested in a chattel, having made a joint demand of it, may, notwithstanding, maintain separate actions of trover in respect of it, against a person who unjustly detains it. *Bleaden* v. *Hancock*, 4 C. & P. 152, s. c. 1 M. & M. 465. [Tindal]

Where a man and woman had been married, and goods, which had been the property of the woman before marriage, were seized and sold under an execution against the goods of the man; and the woman, two years afterwards, discovered that the man had a wife living at the time he professed to marry her:—Held, that she was entitled to maintain trover against the sheriff for the value of those goods, though no blame was attributable to the sheriff or his officers. *Glasspoole* v. *Young*, 7 Law J. K.B. 305.

A, being indebted to B, with a view to secure the payment of his debt, gave him an order on C, a wharfinger, for the delivery to him of goods, then in C's possession, the property of A, to which order C assented. Afterwards, A being indebted to X, gave him an order for the same goods, which latter order C accepted conditionally, subject to X obtaining an order from B, at the same time promising to let X know before giving up the goods;—the debt to B still remaining undischarged, B afterwards gave an order to A for these goods, who thereupon received them from C:—Held, that X had no property upon which trover could be maintained against the wharfinger. *Mellin* v. *Kelshaw*, 9 Law J. Exch. 45, s. c. 1 C. & J. 184, s. c. 1 Tyrw. 109.

An agent sold goods to be paid for by bills. The purchaser gave the bills, and directed the agent to hold the goods for him, unless he could sell them at a certain profit. While the goods thus remained, the acceptors of the bills stopped payment. The agent thereupon applied to the purchaser for further security. The purchaser then gave the agent an order to sell the goods, and pay the bills. Subsequently, and before any sale, the purchaser became bankrupt: his assignees claimed, and brought trover for the goods:—Held, that they were not entitled; that the application by the agent for security must be considered as an application on behalf of the vendor, whose assent to the arrangement might be presumed, it being for his benefit; and whose subsequent assent would relate back to the transaction which required the assent. *Bailey* v. *Calverwell*, 7 Law J. K.B. 19, s. c. 8 B. & C. 448, s. c. 2 M. & R. 564.

Where a person brings an action of trover to recover goods, which have been pawned upon an usurious contract, the plaintiff may recover, although he may not have paid or tendered to the defendant the sum lawfully due.

Where title deeds are deposited as a security for money advanced, before the borrower has had a conveyance made to him, the lender has a right to the possession of the deed of conveyance as soon as it is made.

Where title deeds are so deposited upon a lawful contract, and afterwards, and before the conveyance is executed to the borrower, an usurious contract is made between the parties, such usurious contract will not affect the right of the lender to hold the title-deeds under the legal contract, nor his right afterwards to the custody of the deed of conveyance. *Wood* v. *Grimwood*, 8 Law J. K.B. 192, s. c. 10 B. & C. 609.

### (B) Demand and Refusal.

Where goods are distrained, which are not liable, an action of trover may be brought by the owner, without a demand and refusal. *Ward* v. *Venton*, Pes. A.C. 126. [Kenyon]

The messenger, under a commission of bankrupt against the father, went to the uncle and said, "I am come for some bacon belonging to S D (the father); the uncle replied, "I have none of S D, but I have some of E D;" the messenger answered "It is S D's;" he produced his warrant and said, "Keep it safe; you will hear more of it." The uncle afterwards sent away the bacon, and when the messenger applied again, said, "I have sent it back to where it came from:"—Held, a sufficient conversion and demand and refusal. *Hawkes* v. *Dunn*, 9 Law J. Exch. 184, s. c. 1 C. & J. 528, s. c. 1 Tyrw. 413.

### (C) Conversion.

[See *ante*, B.]

*Semble*, that the attaching by process from the Sheriff's Court in London, of property in the hands of the garnishee, is not such a conversion as will enable the owner to maintain trover. *Mellalieu* v. *Laugher*, 3 C. & P. 551. [Best]

Where, in an answer to a demand of property, the defendant referred the applicant to his attorney, and the applicant did not make any objection to being so referred, and an action of trover was brought, without any application to the attorney, and without any other evidence of conversion by the defendant:—Held (under certain circumstances, in the case, which warranted the inference, that the reference to the attorney was, *bonâ fide*, for communication), that this was not sufficient evidence of a conversion. *Jones* v. *Yates*, 7 Law J. K.B. 217, s. c. 9 B. & C. 538, s. c. 4 M. & R. 613.

A, who was paying his addresses to a lady, lost her letters and two memorandum books, containing remarks of his own; B found them, and kept them on the ground that the books contained matter injurious to him, and also shewed them to others; A sent a person to demand them of B, who at first refused to

give them up at all; but, before the person left, said he would not give them to him, but would to C or D; C went, and B offered to give him the letters and one book, which C, after consulting with A, accepted, saying that he made a sacrifice to obtain the letters:—Held, that there was a conversion of the whole; but the verdict was only for nominal damages. *Clendon* v. *Dinneford*, 5 C. & P. 13. [Patteson]

(D) EVIDENCE.

The servant of a party who had been bargaining for the purchase of a chattel, came to the owner and said that his master desired to look at it, and would keep it if approved of. The chattel was in consequence delivered to the servant, but was neither purchased nor returned. Trover was brought against the servant:—Held, that the master was a competent witness to prove in defence that the message had been delivered by his authority, and the chattel received and kept by him. *Grylls* v. *Davies*, 2 B. & Ad. 514.

In trover for a written document, the plaintiff may prove the nature and description of the document by secondary evidence, though the defendant offers to produce it.

A party has a right to call for and have read, a letter making a demand on the other party, for the purpose of proving the demand, though the counsel for the other party offers to admit the demand. The statement of facts in such letter is not evidence of the facts, but only of their having been communicated to the other side. *Whitehead* v. *Scott*, 2 M. & M. 2. [Tenterden]

The defendant, a wharfinger, having admitted, by parol, that he held certain goods for the plaintiff: in trover for the value—Held, that the defendant was estopped, by such admission, from shewing that the right of property was in another person. *Gosling* v. *Birnie*, 9 Law J. C.P. 104, s. c. 7 Bing. 339, s. c. 5 M. & P. 160.

(E) PRACTICE.

The defendant, a police-officer, in the exercise of his duty, seized certain bank-notes and cash and a watch-seal, found in the possession of the plaintiff, whom he had apprehended on a charge of having forged a cheque on the receiver-general of the Customs, which money was supposed to be part of the produce of the forged cheque. The plaintiff was afterwards tried for the forgery and acquitted, whereupon he brought trover for the money and seal. The defendant was indemnified by the commissioners of Customs, and they directed their solicitor to defend the action, who not being an attorney of the court, the plaintiff, on delivery of a plea of the general issue, treated it as a nullity and signed judgment. The Court, on motion, set aside the judgment, holding that the language of the plea—which stated that the defendant "by J G W, who had been duly appointed solicitor on behalf of his Majesty, under the directions of the commissioners of his Majesty's Customs, and who acted as such solicitor under such directions in that behalf, came and defended, &c."—sufficiently disclosed to the Court that the person defending as attorney was acting in a matter concerning the revenue, within the protection of the 9 Geo. 4. c. 25. It was further ordered, that, on payment of costs, and the delivery up of the seal, the proceedings should be stayed; or (the plaintiff not consenting to accept the seal in discharge of the action) that so much of the declaration as related to the seal should be struck out. *West* v. *Taunton*, 8 Law J. C.P. 129, s. c. 6 Bing. 404, s. c. 4 M. & P. 79.

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## TRUST AND TRUSTEE.

(A) TRUST.
- (a) *Construction.*
- (b) *Creation and Execution.*

(B) TRUSTEE.
- (a) *Appointment.*
- (b) *Power and Duty.*
- (c) *Liability.*

(C) COSTS.

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(A) TRUST.

(a) *Construction.*

[*Stair* v. *Macgill*, 1 Dow. & Cl. 24, Dig. Law J. 524.]

Monies in the English stocks were assigned to trustees upon trust to pay the dividends to the settlor during his life, and after his death to apply them in printing and promoting the circulation of a book in the Latin and French languages, inculcating the peculiar doctrines of the Roman Catholic religion; and the deed contained a proviso, that if any of the trusts should be declared by a court of law or equity to be void, then the trustees should stand possessed of the fund in trust for the executors and administrators of the settlor:—Held,

That the trusts, after the limitation for life to the settlor, were in the nature of superstitious uses, and therefore void.

That the fund was not in the disposition of the Crown, to be applied to some other charitable purpose by the sign manual.

That the settlor was entitled to have the fund transferred to him.

That the Attorney General was a necessary party to a suit for that purpose. *De Themines* v. *De Bonneval*, 7 Law J. Chanc. 35.

G, by trust-deed, disponed lands at his death to trustees, to convey to his first and other sons in succession, and the heirs male of their bodies respectively, and in default of such issue to the first son of either of his daughters, who should first attain the age of twenty-one years, and his heirs; but in case his daughters should both die, and have no such son of either of them, to convey to G and R, his nephews. The residue of his real estate he gave to the same trustees to sell, for the use of his daughters; and he assigned and disponed to the same trustees, for the use of his heirs and substitutes, &c., in the order in the deed mentioned, the charters, &c., and rents, "for now and in all time coming:"—Held, that the rents accruing between the death of the disponer, and the event on which the lands were to vest in a son of the daughter, belonged not to the daughters, as heirs portioners, nor as disponed to them under the residuary clause of the deed, but were to be held in trust for the parties who should become entitled under the dispositions of the deed. *Graham* v. *Templer*, 3 Bligh, N.S. 381.

(*b*) *Creation and Execution.*

[*Leman* v. *Whitley*, 4 Russ. 423, Dig. Law J. 526.]

Words sufficient (standing alone) to create a trust controuled and explained.

A trust in equity, under a will, cannot be set up after the death of the person to whose discretion it had been referred to perfect it, by settling and stating the amount of the benefit to be conferred, because such a discretion is personal. But the case of a charity forms an exception to that rule. *Heneage* v. *Lord Andover*, 10 Price, 269.

Where a debtor, by a deed-poll, directs *inter alia* the receiver of the rents of his estate to keep down the interest of a certain debt, the direction does not create a trust in favour of a creditor, if it be without consideration, and without the privity of the creditor. *Page* v. *Broom*, 4 Russ. 6.

A testatrix appointed A B to be her executor, to see that her will was put in force; the executor is a trustee for the next of kin. *Braddon* v. *Farrand*, 4 Russ. 87.

A mother, entitled to a considerable property under the will of a relation, in a conversation with the executor of that relation, expressed an intention to make a settlement of part of that property which was standing in his name, upon her daughter, and requested the executor to instruct her solicitor to prepare such a settlement; on the prepared settlement being brought to her for execution, she had changed her mind and refused to sign it:—Held, that her intention, expressed in the conversation with the executor of her relation, did not amount to a declaration of trust, although the property was personal estate. *Bayley* v. *Boulcott*, 4 Russ. 345.

A trust for sale vested in A and his heirs, cannot be executed by an assign of A. *Bradford* v. *Belfield*, 2 Sim. 264.

Where a conveyance of property is made to several trustees, it is not necessary that all should execute or assent to it. The property will vest in those who accept the trust. *Small* v. *Marwood*, 7 Law J. K.B. 197, s. c. 9 B. & C. 300, s. c. 4 M. & R. 81.

(B) Trustee.

(*a*) *Appointment.*

Where a sole trustee in a will, to whom a term of 2,000 years was devised, dies in the testator's lifetime, the Court will refer it to the Master to appoint a new trustee, and to settle and approve of a demise for the like term. *Devey* v. *Peare*, 1 Tam. 77.

Where the decree, among other things, refers it to the Master to appoint a new trustee, the certificate of the appointment of such new trustee is to be considered as a separate report. *Harris* v. *Kemble*, 4 Russ. 474.

(*b*) *Power and Duty.*

[Laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, amended, 1 Will. 4. c. 60, 8 Law J. Stat. 120.]

Where an act of parliament gives a power, in relation to a public trust, to a definite number of persons, it is necessary for a majority of that number to attend at each meeting. *Freeman* v. *Meymott*, *Blackett* v. *Blizard*, 9 B. & C. 851, s. c. 4 M. & R. 641, s. c. 8 Law J. M.C. 103.

Authority of trustees to let from year to year—Apportionment of rent. *Monson* v. *Lord Essex*, 8 Law J. Chanc. 162.

It is not the rule of equity that every person to whom the artificial name of trustee applies, is incapable of dealing with his *cestui que trust*, respecting the fund; but the rule is, that the trustee shall not deal with the *cestui que trust*, where the relation between them gives the former any possible advantage over the latter. *Naylor* v. *Wynch*, 7 Law J. Chanc. 6.

A, by will, gave real property to trustees to sell; one of the trustees became the purchaser, the consideration being sums due from the testator's estate to him; the estate descended to his son and grandson.

Bill filed by a person having a reversionary contingent interest in the produce of the sale under the will, forty years after the transaction, and twenty-seven years after she came of age, to set aside the contract:—Held, that the conveyance was void;—that no laches were committed; and that the representative of the purchaser should be allowed the additional value of the estate, caused by the money expended in improvements—a reference being directed to the Master for the purpose of ascertaining it. *Chenuell* v. *Martin*, 9 Law J. Chanc. 208.

*Semble*—a trustee under an old trust, creating successive limitations of equitable interests, some of which had failed, is entitled, before he can be required to convey, to have the equitable title of those who call for a conveyance ascertained by inquiry, and to have the deed of conveyance settled in the Master's office. *Goodson* v. *Ellison*, 3 Russ. 533.

A contracted to sell a freehold estate to B, and by his will gave the purchase-money and the interest to become due in the meantime to trustees, for certain purposes; and if the contract should not be completed, he devised the freehold estate to the trustees upon trust to sell the same, and apply the purchase-money to the like purposes. A died, leaving a son, his heir-at-law, who died, leaving an only daughter, his heiress-at-law, an infant. The Court held, that she was not a trustee within the act 6 Geo. 4. c. 74, and dismissed a petition that the infant might be ordered to convey. *In the matter of Moody*, 1 Tam. 4.

Where a trust estate descended to one who refused to execute a conveyance to the *cestui que trust*, after it had been approved by his solicitor, unless he were paid a sum of money, the Court ordered the conveyance, with costs against the defendant. *Watts* v. *Turner*, 1 Russ. & M. 634.

Plaintiff, in case for an injury to his reversionary interest in copyholds, was a trustee for a person who had demised the premises:—Held, that an allegation that plaintiff was possessed of the reversion was not a variance, as the bringing the action by plaintiff as reversioner was an adoption of the letting by the *cestui que trust*, who was his agent. *Vallance* v. *Savage*, 9 Law J. C.P. 181, s. c. 7 Bing. 595, s. c. 5 M. & P. 576.

A trustee allowed one of his *cestuis que trust* to have the trust fund, with a view to its investment in the foreign funds. The *cestui que trust* went to America, and invested it in his own name; he

afterwards sold out a part, and, remitting the money to agents in London, came home. The trustee impounded the money so remitted, in the Lord Mayor's Court, and this Court granted an injunction, restraining proceedings on the part of the *cestui que trust* to get it out. *Hipkins* v. *Newton*, 9 Law J. Chanc. 227.

A party having purchased land, and signified at the time, that he made the purchase on behalf of the trustee in his marriage settlement, who had money vested in him to be laid out in land, and a bill being filed against him for specific performance, the Court would not allow the cause to proceed, until the trustee was made a party; and the cause stood over for that purpose. *Wynniat* v. *Lindo*, 1 Tam. 512.

(c) *Liability.*

Trustees not affected by notice to their agent, which he did not receive in that character.

Trustees having contracted to purchase land, sell out stock, and deposit the produce at a bankers' when the purchase seems to be near completion: they are not liable to make good the money if the bankers fail. *France* v. *Woods*, 1 Tam. 172.

Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, and that a new trustee should be chosen in the place of the retiring trustee, and there is no power to appoint a sole trustee: then, if a retiring trustee assign the trust property to the continuing trustee alone, and he, in abuse of his trust, dispose of it, the retiring trustee is answerable. *Wilkinson* v. *Parry*, 4 Russ. 272.

On a marriage, a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with consent of the wife. The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at 5*l.* per cent., and with the consent of the husband and wife, requested his co-trustees to execute a power of attorney, to enable him to sell the stock. The co-trustees, without inquiring into the matter, complied: the trustee sold the stock and absconded:—Held, that the co-trustees were liable. *Hanbury* v. *Kirkland*, 3 Sim. 265.

By a marriage settlement, the interest of a trust fund was limited to a wife for life, for her separate use, with power to the trustees, upon her consent in writing, to advance the trust fund to her husband, upon the security of his bond. If the trustees, with consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest. *Cocker* v. *Quayle*, 1 Russ. & M. 535.

Monies directed by a settlement to be laid out in government or real securities, were lent by the trustees to the husband on bond; the trustees were ordered, on motion, to pay the sums into court. *Collis* v. *Collis*, 2 Sim. 365.

Bill for the conveyance of an estate, alleged by the plaintiff to have been purchased and paid for by him, and to have been conveyed to an ancestor of the defendant, as a trustee for the plaintiff, dismissed, but without costs; there being no written agreement or declaration of trust, signed by the defendant's ancestor, and no actual evidence of the payment of the purchase-money by the plaintiff; though there was evidence of constant possession by the plaintiff, and of conversation in which the defendant's ancestor had stated that the plaintiff had purchased the property in his name, with a view of giving him a vote for the county; this evidence was however, rather contradictory. *Groves* v. *Groves*, 3 Y. & J. 163.

(C) Costs.

A person named a trustee without his knowledge, and in that character made a party to the suit, having never accepted the trusts, is entitled to his costs as between solicitor and client. *Sherratt* v. *Bentley*, 1 Russ. & M. 655.

A trustee is not entitled to be allowed, without question, the amount of bills of costs which he has paid *bonâ fide* to the solicitor to the trust; and the Master, without regularly taxing the bills, will moderate their amount. *Johnson* v. *Telford*, 3 Russ. 477.

A trustee, refusing to pay a legacy without the direction of the Court, in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive. *Knight* v. *Martin*, 1 Russ. & M. 70, s. c. 1 Tam. 237.

Where a *cestui que trust*, having a life interest only, is declared entitled to his costs out of the trust property, the Court will not give him a mere lien on it, to be enforced by subsequent proceedings, but will direct an immediate sale for the purpose of defraying them.

Decree varied on appeal, in respect of costs only. *Burkett* v. *Spray*, 1 Russ. & M. 113.

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## TURNPIKE ACT.

[See Tolls and Execution.

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## USE.

[See Settlement and Trust.]

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## USE AND OCCUPATION.

[See Landlord and Tenant.]

Actual occupation is not necessary to a party liable to be sued in assumpsit for the use and occupation of premises. *Pinero* v. *Judson*, 8 Law J. C.P. 18, s. c. 6 Bing. 206, s. c. 3 M. & P. 497.

The putting up of a board for the purpose of letting houses by a person who built them, and agreed to become tenant of them from a certain time, is sufficient to enable the person for whom they were erected, to recover rent on a count for use and occupation. *Sullivan* v. *Jones*, 3 C. & P. 579. [Best]

Where the agreement under which a party holds a house, states, that he "agrees to become tenant by occupying," it will be an answer to a claim of

rent, in an action for use and occupation, if he shews that the house was not in such a reasonable and decent state of repair, as to be fit for comfortable occupation. *Salisbury* v. *Marshal*, 4 C. & P. 65. [Tindal]

Agreement to grant a lease to S, when S should have erected certain buildings on the premises to be demised: no covenant to pay the rent before the execution of the lease. S, after the buildings are erected, holds the premises, subject to the terms in the lease, but is liable in assumpsit for use and occupation. *Banister* v. *Usborne*, Pea. A.C. 76. [Kenyon]

In an action for use and occupation, it is not sufficient that the plaintiff should shew legal title in himself, and occupation by the defendant. He must shew other circumstances, from which the relation of landlord and tenant between the parties may be inferred. *Place* v. *Ashby*, 9 Law J. K.B. 174.

In an action for use and occupation by the reversioner, against a person who had been tenant for years, determinable on three lives, a register of burials of a Wesleyan chapel is not admissible to prove the death of one of the *cestuis que vie*; nor is the evidence of a witness, who heard in the family that another of the *cestuis que vie* was dead. *Semble*, that a copy of an inscription on a tombstone in the burial ground of a Wesleyan chapel, is also not evidence for this purpose. *Whittuck* v. *Waters*, 4 C. & P. 375. [Park]

## USURY.

(A) In general.
(B) Loans.
(C) Discount.
(D) Securities.
(E) Actions for.

### (A) In general.

Where an annuity is granted for a term of years, to be paid half-yearly, and, at the same time, promissory notes are given by the grantor for the payment of each half-year's annuity when it becomes due, and it appears that the several half-yearly payments will repay the purchase-money with interest, exceeding the rate of 5*l.* per cent., the transaction is usurious. *Fereday* v. *Wightwick*, 1 Russ. & M. 45, s. c. 1 Tam. 250.

### (B) Loans.

[See Pawnbroker.]

An agreement on a loan to re-invest the money in stock at a fixed price, or to pay it in money on receiving six months notice from the lender, gives the option of receiving stock or money to the lender, and is, therefore, usurious. *Chippendale* v. *Thurston*, 2 M. & M. 411, s. c. 4 C. & P. 98. [J. Parke]

A contract on a loan of money to add the interest to the principal at the end of each year, and pay interest on the whole sum as principal, is valid in law, and may be inferred from accounts stated by the debtor on that footing. *Newal* v. *Jones*, 2 M. & M. 449, s. c. 4 C. & P. 124. [Tenterden]

Loan of 200*l.*; 300*l.* to be repaid by three instalments, the latest at about a year and a half from the time of the loan, *if both parties should be living*, as the instalments fell due. No fact appeared to shew that this was a mere contrivance to cover usury, and the Court refused to set aside the judgment on a warrant of attorney given to secure the 300*l.* *Flight* v. *Chaplin*, 9 Law J. K.B. 137, s. c. 2 B. & Ad. 114.

A party applied for a loan, which was refused—he then bought of the same person, to whom he applied, goods to the amount of the sum he wanted to borrow, and gave a mortgage, judgment, bond, and promissory note for the amount. On a bill filed, to set aside the transaction, the Court restrained the defendant from taking any steps to enforce the securities, until the hearing of the cause. *King* v. *Hamlet*, 9 Law J. Chanc. 243.

A revolted colony of Spain, not recognized as an independent state by Great Britain, executed bonds at six per cent. interest, as securities for a loan. P, acting in collusion with B, a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser: Held, on demurrer, that the bonds were not usurious, as it did not appear, by the bill, that the contract for the loan was made, or the amount of it to be paid, in this country; that P and B would have been answerable to the plaintiff for losses sustained upon his purchase, but that, as the original contract was made with a government not acknowledged by Great Britain, the Court could not relieve him. *Thompson* v. *Powles*, 2 Sim. 194.

### (C) Discount.

Where, on the discount of a bill, part of the amount was given in cash, and the remainder in goods, legal interest being charged for the money, and an advanced price being charged for the goods for the time the bill had to run, which was the charge usually made in the trade for an extension of credit: Held, not usurious. *Evans* v. *Wade*, 7 Law J. C.P. 205, s. c. 5 Bing. 485, s. c. 3 M. & P. 130.

The defendant being collector of salt duties at Droitwich, and A B being proprietor of salt works there, it was agreed that the weekly payments to be made by A B to the defendant, on behalf of government, should be made by bills payable three days after sight, allowing 2*s.* per cent. to the defendant for discount; which, reckoning the time the bills were going from Droitwich to London, and the days of grace, gave eight days credit, and was not usurious. The defendant, however, by putting the bills into the post at Worcester, gained a day, and thereby got more than five per cent.:—Held, that as the agreement was not usurious, the act of the defendant, in fraud of the agreement, would not subject him to the penalties for usury. *Hart* v. *Gwinnell*, Pea. A.C. 177. [Lawrence]

### (D) Securities.

A bond given to secure 1,000*l.*, which was usurious, is afterwards cancelled, and a new bond is entered into for securing the principal, with legal interest: it was held, that as this last bond was not made to secure the performance of the original usurious contract, it was valid. *Wright* v. *Wheeler*, Pea. A.C. 175. [Lawrence]

Where money is lent professedly on respondentia, and upon the security of a respondentia-bond on a ship bound to the East Indies, the fact of the borrower having no interest in either the ship or the goods does not, by means of the 19 Geo. 2. c. 37. s. 5,

f *necessity* convert the transaction into an usurious ran.

The fact may be used as matter of observation to he jury upon the question, whether the transaction ras really at respondentia, or whether it was a loan ipon usurious terms, and the form of the respondentia used as a contrivance.

(E) Action for.

The time at which the year begins, within which in action for penalties under the 12 Anne, st. 2. c. 16. must be brought, is the time when the usurious nterest is paid; and an action brought after a year rom that period, is out of time; although it be rought within a year after the payment of the principal. *Wood* v. *Greenwood*, 8 Law J. K.B. 252.

A grant of annuity of 120*l.* for four lives, in consideration of 1,000*l.*, contained a covenant by the grantors to insure the last of the four lives, within thirty days after the dropping of the third life:—Held, upon demurrer, that the transaction appearing upon the face of the deed in other respects to be a sale and purchase of annuity, and not a loan—the nature of the covenant did not confer upon it a contrary character; for that during the lapse of thirty days the principal was in hazard.

*Semble*, that the plea should have expressly averred, issuably, the fact that the transaction was in reality a loan, and that the deed was colourably devised to cloak the corrupt agreement. *Holland* v. *Pelham*, 9 Law J. Exch. 139, s. c. 1 C. & J. 575, s. c. 1 Tyrw. 238.

## VARIANCE.

(A) Between Pleadings and Process.
(B) Between Pleadings and Evidence.

### (A) Between Pleadings and Process.

Where, in trespass, the process was against twenty defendants, of whom but eighteen could be served in time, the plaintiff thereupon declared against seventeen only:—Held, by Mr. Justice Bayley and Mr. Justice Parke, that, according to the rule of court, Easter, 1827, the proceedings were irregular.—Contrà, Mr. Justice Littledale. *Beeston* v. *Beckett*, 7 Law J. K.B. 193.

A plaintiff who sues out process generally, not describing himself in any particular character, may afterwards declare specially, describing himself as executor, or *qui tam*, &c.: and this even in a bailable action.

But this rule does not apply *è converso;* and, therefore, a plaintiff who sues out process in a limited character, must declare in that character. *Ashworth* v. *Ryal*, 8 Law J. K.B. 387, s.c. 1 B. & Ad. 19.

In a criminal suit, it is not a fatal variance that the defendant, in the citation, was designated "Harris," and in the articles, "Harris, alias Harry." *Griffith* v. *Reed*, 1 Hag. Ec. 196.

### (B) Between Pleadings and Evidence.

Declaration, in an action of debt on bond, stated, that the defendant acknowledged himself to be bound in the sum of 7,700*l.* Plea—*Non est factum.* On the trial, it appeared, that in the bond the word "pounds" was omitted. The condition was for the payment of several sums amounting to 4,859*l.* 1*s.* 3*d.*:—Held, by Lord Tenterden and Mr. Justice Bayley, that the declaration was well proved by the bond; and that the word "pounds," by necessary intendment, might be supplied. Dissentiente Mr. Justice Littledale. *Coles* v. *Hulme*, 7 Law J. K.B. 29, s.c. 8 B. & C. 568, s.c. 3 M. & R. 86.

In debt on a joint and several bond, the condition set out was for payment by the defendant and R and R, the bond being given in evidence, it was found to have been altered, one H being substituted for R in the condition:—Held, that this was a fatal variance. *Adams* v. *Bateson*, 7 Law J. C.P. 251, s. c. 6 Bing. 110, s. c. 3 M. & P. 339.

The plaintiff, a fruit-broker, was employed by J P to sell a cargo of fruit. The defendant represented to J P that the plaintiff had, with a view to deteriorate the sale, reported in the sale-room "that *there were* three or four vessels laden with fruit between Gravesend and London." In an action on the case for special damage resulting to the plaintiff from this representation, J P having discontinued to employ him, the declaration alleged the representation to have been that the plaintiff had said, "that *he had* three or four vessels laden with fruit between Gravesend and London:"—Held, a material and fatal variance. *Wood* v. *Adam*, 8 Law J. C.P. 156, s. c. 6 Bing, 481, s. c. 4 M. & P. 208.

Tenant from year to year subdemised from year to year. In pleading the latter, it was described as a tenancy from year to year, and so from year to year as long as the parties should respectively please, during the *continuance of the demise* to the party who subdemised:—Held to be no variance, as the description in pleading properly described the legal effect of the subdemise. *Pike* v. *Eyre*, 8 Law J. K.B. 69, s. c. 9 B. & C. 909, s. c. 4 M. & R. 661.

Declaration alleged that the plaintiff was possessed of a messuage, &c., belonging to and supporting which there were certain foundations, which the plaintiff had enjoyed, &c., and ought, &c., to enjoy. On evidence, it appeared, that the plaintiff was only entitled to an easement in the foundations, which belonged to the defendant:—Held, no variance. *Brown* v. *Windsor*, 1 C. & J. 20.

Declaration, stating the consideration of the purchase of a horse to be, "that the buyer would give one hundred guineas": Evidence, that the buyer was to give "one hundred guineas, and 10*l.* more if the horse suited him:"—Held, to be no variance. *Cave* v. *Coleman*, 7 Law J. K.B. 26, s. c. 3 M. & R. 2.

Declaration, "that in consideration, the plaintiff would buy of the defendant a horse, at and for a certain price or sum, to wit, 63*l.*, the defendant undertook, that the horse was sound." Evidence: that the bargain was for sixty guineas, "*and* if the horse was lucky to the plaintiff, he was to give 5*l.* more, or the buying of another horse:"—Held, that there was no substantial variance between the declaration and the evidence. *Gething* v. *Lynn*, 9 Law. J. K.B. 181.

In an action for a libel, the declaration alleged, "that the plaintiff had been appointed the surveyor, &c. of a company or society of persons called 'The

New England Company,' and in such capacity had been and was employed by the said company.'' The name of incorporation of the company was, "A Company for establishing Christianity in New England and the parts adjacent, in America:''—Held, that this was no variance—Held also, that it was not necessary for the plaintiff to prove an appointment *by deed*. *Rutherford* v. *Evans*, 8 Law J. C.P. 86, s. c. 6 Bing. 451, s. c. 4 M. & P. 162.

Where it is averred in the declaration for maliciously procuring the conviction of the plaintiff as a rogue and vagabond, that the conviction was quashed on the 22nd day of April, at the General Quarter Sessions of the Peace held on that day, and the proof by the order for quashing the conviction shewed that it was not a General, but an Adjourned Sessions, the variance was held not to be such as to furnish ground for setting aside the verdict in this case. *Dubitante*, Hullock, B., regarding the point as matter of pleading. *Simpkin* v. *French*, 12 Price, 394.

In an information for a libel, imputing improper conduct to A as town clerk of H, it was alleged that he was town clerk, and that it was his duty to issue his precept for summoning the grand jury. The precept was signed both by the mayor and town clerk: Held, that this satisfied the allegation, that he issued his precept, and the fact that he was an alderman of the borough at the time when he was elected town clerk, made no difference. *Rex* v. *Hatfield*, 4 C. & P. 244. [Vaughan]

Where, upon oyer of a deed, the defendant sets it out untruly, and the plaintiff replies generally, the defendant may take advantage of the variance on *non est factum*. *Gunter* v. *Smith*, Pea. A.C. 1. [Kenyon]

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## VENDOR AND PURCHASER.

(A) Vendor.
(a) *Rights.*
(b) *Lien.*
(B) Purchaser.
(a) *Rights.*
(b) *Duties and Liabilities.*
(C) Sale.
(a) *In general.*
(b) *Particulars and Conditions.*
(c) *Biddings.*
(d) *Where void or set aside.*
(e) *Resale.*
(D) Purchase-Money and Interest.
(E) Title.
(F) Actions and Suits.
(a) *In general.*
(b) *Pleadings.*
(c) *Practice.*

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### (A) Vendor.

#### (a) *Rights.*

Where a person sells goods to another, not knowing at the time that the buyer is an agent, the seller, upon afterwards discovering the principal, may resort to him for payment, although he had debited the agent; and he may recover against the principal, unless the latter has, in the meantime, paid the agent.

But, where the principal in such a case is living abroad, and the seller debits the agent, he will not in general be allowed afterwards to resort to the principal; it being presumed, until the contrary appear, that the seller gave credit to the English agent, and would not have done so to the foreign principal. Whether, for this purpose, the fact of the principal residing in Scotland is to be considered as a foreign residence—*quære*.

Where the seller knows that the buyer is an agent, but does not know the name of his principal, he may afterwards, on discovering who the principal is, compel payment from the principal, unless payment has been made to the agent in the meantime.

Where the seller, with a full knowledge of both facts, that there is a principal, and who that principal is, debits the agent as the person to whom he gives credit, he cannot afterwards resort to the principal, although the latter may not have paid the agent. *Davenport* v. *Thomson*, 7 Law J. K.B. 134, s. c. 9 B. & C. 78, s. c. 4 M. & R. 110.

#### (b) *Lien.*

[*Winter* v. *Anson*, 3 Russ. 488, s. c. Dig. Law J. 535.]

The lien of a vendor upon the land, and upon the title-deeds, until the purchase-money be paid to him, does not apply to a conveyance to the purchaser, executed by some of, but not all, the parties, where the contract has gone off by the vendor's default; and if there be any lien on such conveyance, it is vested in the purchaser as a security for his deposit. *Ozenham* v. *Esdaile*, 3 Y. & J. 262.

A vendor, who has taken, as a security for part of the purchase-money, the bond of the vendees, and a mortgage of part of the property sold, cannot, on the bankruptcy of the vendees, establish a lien on the entire estate. *Copper* v. *Spottiswoode*, 1 Tam. 21.

Where an estate has been sold to a person who has since died, the Court will direct an account to be taken of the personal estate, and decree that the vendor shall have a lien on the land for so much as the personal estate will not extend to pay. *Topham* v. *Constantine*, 1 Tam. 135.

### (B) Purchaser.

#### (a) *Rights.*

[See Parties to Suits.]

Where a party has a privilege given to him to repurchase an estate sold, upon certain stipulations being complied with, and does not comply with them, the privilege is gone. *Davis* v. *Thomas*, 9 Law J. Chanc. 232.

By a deed dated in 1812, the mortgagor assigned to the mortgagee his interest in a policy of insurance. In the year 1813, the mortgagee having advanced a further sum of money, the mortgagor executed a deed, reserving a power of sale in case the mortgage-money remained unpaid on a certain day. In 1822 a further sum was advanced and a new deed entered into, converting the arrears of interest into principal. This latter deed omitted the power contained in the second deed. The mortgagee advertised the policy for sale "under a power." It was purchased by the plaintiff; but, the mortgagor having refused to concur in the conveyance—

held, that the plaintiff was entitled to recover back his deposit. *Curling* v. *Shuttleworth*, 8 Law J. C.P. 13, s. c. 6 Bing. 121, s. c. 3 M. & P. 368.

Under an agreement of exchange between A, who held lands under a college lease, and B, the owner of an adjoining estate, B occupied part of the college lands, and A had occupied, along with the residue of the leasehold, part of B's estate; A having become bankrupt, the college leasehold was sold, and was described in the particulars of sale as "late the residence of A:"—Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange; and that he had a right to recover by ejectment that portion of the leasehold which was in B's occupation. *Miles* v. *Langley*, 1 Russ. & M. 39.

A purchaser entitled to title-deeds having paid his purchase-money into court, the Court will not order the money to be divided, and the deeds to remain in the hands of the Master until the completion of the sale of another lot. *Hobson* v. *Neale*, 1 Tam. 446.

Purchase for valuable consideration without notice, is not available as a defence against a plaintiff who relies upon a legal title.

A rector in 1811, demised his rectory to A for a term of years to secure the due payment of an annuity; in 1814, he, for valuable consideration, demised the tithes of certain lands within the rectory to the occupier B, who, at the time, had no notice of the prior charge: the annuity fell into arrear in 1816, and, in 1817, the rector took the benefit of the insolvent act: B remained in the occupation of the lands, and retained the tithes, claiming to be entitled to them under the deed of 1814; and no step was taken to enforce payment till 1827, when A filed against him a bill for an account; in answer to which, B insisted that he was a purchaser for valuable consideration without notice:—Held, that that defence was of no avail against the legal title of the plaintiff, and that the defendant ought to account for the tithes for the six years before the filing of the bill. *Collins* v. *Archer*, 1 Russ. & M. 284.

### (*b*) *Duties and Liabilities.*

The possession of a client's deeds by his solicitor is so usual, and so much in the ordinary course of transactions, that where a person purchases an estate, and is informed that the deeds are in the hands of the solicitors of the owner of the estate, there is nothing in that circumstance which renders it necessary for him to inquire under what circumstances the solicitor holds the deeds; and, therefore, where a solicitor acquires by contract a different interest beyond what his character of solicitor confers (such as an equitable mortgage), it is incumbent on him immediately to give clear and distinct notice of such interest to all persons in the visible ownership of the estate. And such a case is not within the principle of the cases in which a purchaser of land has been held bound to inquire of the tenant in possession the nature of his interest. *Boton* v. *Williams*, 3 Y. & J. 150.

After a decree has been pronounced for an account, and a reference made to see what proportion of an incumbrance two estates shall respectively bear, and the Master has made his report, which has been confirmed, and nothing remains but to carry the decree into effect, such a state of things is not to be considered as *lis pendens*; and a purchaser not bound to notice it as such. *Kinsman* v. *Kinsman*, 9 Law J. Chanc. 276.

Where the possession is vacant, a purchaser is not bound to inquire of the late occupier, what was the nature of his title. *Miles* v. *Langley*, 1 Russ. & M. 39.

A person who has entered into an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land-tax, is not bound to complete his purchase, when it appears that, upon the prior sale for the redemption of the land-tax, the rector was himself the actual purchaser in the name of his curate. *Grover* v. *Hugell*, 3 Russ. 428.

Where a judgment is entered up against the owner of lands, of which the legal estate is outstanding in a trustee or mortgagee, a purchaser who has notice of the judgment will be bound by it, although the creditor may not have taken out execution on his judgment. *Tunstall* v. *Trappes* (*Lawson's case*), 3 Sim. 286.

Notwithstanding the West Riding Register Act directs that no judgments shall affect lands, but only from the time when the judgment shall be registered, a purchaser, with notice of an unregistered judgment, will be bound by it. *Tunstall* v. *Trappes* (*Gosling's case*), 3 Sim. 301; (*Lawson's case*), Ib. 299.

## (C) Sale.

### (*a*) *In general.*

*Semble*—The solicitor of the plaintiffs, who has the conduct of the sale under a decree, is to be considered, for the purposes of the sale, as the agent of all the parties to the cause. *Dalby* v. *Pullen*, 8 Law J. Chanc. 74, s. c. 1 Russ. & M. 296.

Premises held under distinct leases ordered to be sold in one lot upon the speculative probability arising from the nature of the property, that a higher price would be obtained by that mode of sale, than if they were put up in distinct lots. *Cook* v. *Collingridge*, 3 Russ. 520.

### (*b*) *Particulars and Conditions.*

If land, generally reputed to be water-meadow, is sold by the assignees of a bankrupt by the description of an uncommonly rich water-meadow, whereas, in fact, it is very imperfectly watered, this is not such a misrepresentation as will avoid the sale. *Scott* v. *Hanson*, 1 Russ. & M. 128.

An estate sold under a decree, was described as of a certain annual value; and, by the conditions, compensation was to be made for any error in the particular. The purchaser paid his money into court, was let into possession, and took a conveyance. After he got into possession, he discovered that the rent was overstated in the particular:—Held, that he was entitled to a compensation out of his purchase-money. *Cann* v. *Cann*, 3 Sim. 447.

An estate, consisting of fen land, and so described in the particular of sale, was charged by a local, but public, act of parliament, with drainage and embanking taxes, of which the purchaser had no express notice:—Held, that he was not entitled to a compensation for those taxes. *Barraud* v. *Archer*, 9 Law J. Chanc. 173, s. c. 2 Sim. 432.

An estate sold, and at the auction, eau brink tax stated at a certain amount, and a corporation tax at a certain amount. It was afterwards discovered that the eau brink tax was less than the amount stated, and the corporation tax more: and on a bill filed by the vendors for a specific performance, the defendant claimed compensation for the excess in amount of the corporation tax, after deducting the difference in the amount of the eau brink tax:—the Court allowed the compensation. *Townshend* v. *Granger*, 9 Law J. Chanc. 176.

(*c*) *Biddings.*

A direction for a reserved bidding ought not to be inserted in a decree for sale, but ought to be the subject of a separate order. *Brooker* v. *Collier*, 3 Russ. 369.

(*d*) *Where void or set aside.*

A party having a small interest in possession, and a large one in reversion, expectant on the death of his father, and being greatly indebted, agreed to sell both his interests for a certain sum of money. The purchaser from time to time advanced small sums of money on account of the seller, and, two years after the agreement, the deed of sale was executed, the purchaser with the purchase-money paying off the annuity debts of the vendor.

The Court held, that such a transaction was void, the vendor not having recognized it after he came into possession by his father's death; and that, as the heir was in a distressed situation, it would consider that he had no means of discharging his debts, except by the proceeds of the sale; and that, the interests sold being valued at far more than the sum given, it would hold that the whole value of the interest in possession should be taken as so much of the purchase-money, and the balance of the purchase-money should be the sum supposed to be paid for the reversionary interest, which, being less than the true value, the heir was entitled to relief. *Portmore* v. *Taylor*, 9 Law J. Chanc. 203.

A conveyance to a purchaser for valuable consideration, set aside, on the ground that it proceeded upon an appointment by a father to his eldest son, made in fraud of the power. *Hall* v. *Montague*, 8 Law J. Chanc. 167.

Certain estates were devised to A for life, then to B for life, then to the sons of B in tail male. During the tenancy of A, a bill was filed by a creditor of the testator for a sale of part of the estates. No inquiry into the incumbrances affecting the estates was directed, and the trustees for the tenants in tail were not made parties to the suit. The lands were sold, and a conveyance executed by the officer of the Court and by A, and subsequently (though not till after a compromise had been effected,) by B; and the residue of the purchase-money was ordered to be invested for the benefit of A:—Held, that the bill was defective for want of proper parties; and the whole transaction was properly set aside after the death of the two tenants for life, and at the suit of the first surviving tenant in tail; and that the accounts were properly directed to be taken from the period of the death of the second tenant for life. *House* v. *Townsend*, 2 Dow. & Cl. 430.

A, having contracted for the purchase of an estate, agrees, by deed, to convey it to two partners to whom he was indebted, upon trust to sell, and after paying prior charges, to retain their own debt; and it was provided, that the power of sale might be exercised, by the partners, before any conveyance should be made to them. No conveyance was ever made, or required to be made, to the partners, nor did they attempt to exercise the power of sale, and, one of them having died, the survivor agreed with an agent of A to purchase the estate:—*Held*, that he was not a trustee, but stood in the situation of a creditor, with a security for his debt, and, therefore, was not disqualified from purchasing the estate. *Chambers* v. *Waters*, 2 Sim. 42.

(*e*) *Resale.*

Whether a purchaser is, under any circumstances, entitled to resell (so as to recover the value of his bargain,) until he has been in possession of the property; or unless he can shew *mala fides* on the part of the vendor—*quære*. *Walker* v. *Moore*, 8 Law J. K.B. 159, s. c. 10 B. & C. 416.

A purchaser in this court having resold with a profit before his purchase was confirmed; the person to whom he has sold is to be considered as a substituted purchaser, and must pay the additional purchase-money into court, for the benefit of the parties to the suit. *Hodder* v. *Ruffin*, 1 Tam. 341.

(D) PURCHASE-MONEY AND INTEREST.

[*Jones* v. *Mudd*, 4 Russ. 118, Dig. *Law J.* 540.]

The rule, that the purchaser of a reversion must prove that he gave a full price, has so long been considered as settled, that it can be altered only by the court of appeal. *Hincksman* v. *Smith*; *Smith* v. *Hincksman*, 3 Russ. 433.

Contract for the sale of a piece of land. The contract was, that the seller was not to warrant the title, and the buyer was to take the conveyance with all faults and defects, if any. Before the sale was completed, the buyer asked the seller, if any rent had ever been paid. The seller answered, that no rent had ever been paid by the person through whom he claimed, or by any one through whom that person claimed. The seller *believed* this to be truth at the time, but the fact turned out to be otherwise; and the purchaser was afterwards evicted by title paramount:—Held, that he could not recover back his purchase-money from the seller. *Early* v. *Garrett*, 8 Law J. K.B. 76, s. c. 9 B. & C. 928, s. c. 4 M. & R. 687.

*Semble*—A party purchasing an estate, but not paying the purchase-money, *is*, by the law of Scotland, liable to payment of interest, and can only release himself from that liability by consigning the money into court. *Napier* v. *Lady Gordon*, 2 Dow. & Cl. 461, n.

A purchaser of a reversion ordered to pay interest on his purchase-money from the time of the purchase. *Trefusis* v. *Lord Clinton*, 2 Sim. 359.

Where a vendor agreed to sell an estate, and the title was to be made good on a day certain, on which day the remainder of the purchase-money was to be paid, but if any unforeseen *circumstance* occurred to retard the completion of the contract, interest was to be paid on the purchase-money:—the Court, in decreeing a specific performance of the agreement, gave interest only from the date of the decree, the

ntiffs taking the rents to that time; it appearing he satisfaction of the Court, that the delay which occurred was occasioned by a defect in the intiff's title, of which he could not be presumed orant, and such defect not being such circumnce as was contemplated by the conditions of sale. ggart v. *Scott*, 9 Law J. Chanc. 54, s. c. 1 Russ. M. 293, s. c. 1 Tam. 500.

(E) TITLE.

*Clarke* v. *Vaux*, 3 Russ. 320, Dig. Law J. 540.]

A purchaser is not bound to accept a doubtful e. Where vendors derived title from a trader who s liable to the bankrupt laws, and who had comtted an act of bankruptcy by assigning his estate his creditors:—Held, that the purchaser was not und to accept the title, it not appearing that all creditors had released, or that some one of them d not the power of suing out a commission. *Pott Turner*, 8 Law J. C.P. 282, s. c. 6 Bing. 702, s. c. M. & P. 551.

A purchaser not compelled to take a title depend- upon the words of a will, which were too doubtever to be settled without litigation. *Sharp* v. *lcock*, 4 Russ. 374.

Where a man purchases at an auction two distinct ts which adjoin, and which would more conveently be occupied together, he is not obliged to go with the purchase of either, unless the seller can ake a good title to both. *Gibson* v. *Spurrier*, Pea. .C. 49. [Kenyon]

A purchaser will be discharged from his purchase, ough the vendors have, since the date of the rort against the title, put themselves in a condition make a good title, if the objection, which they ave enabled themselves to cure, was known to their licitor previously, and concealed from the purhaser. *Dalby* v. *Pullen*, 8 Law J. Chanc. 74, s. c. Russ. & M. 296.

As a general rule, where land is agreed to be old tithe free, the right to the tithe is to be conidered so material to the enjoyment of the land, hat a purchaser is not compelled to complete his ontract with a compensation, if a good title cannot e made to the tithe; but this rule admits of exception, where the circumstances manifest, that the right o the tithe did not form any inducement to the purhaser to enter into the contract. *Smith* v. *Tolcher*, Russ. 302.

A testator gave a certain sum in long annuities, after payment of his debts and certain other expenses which he charged upon the fund. After his death, in amicable suit in Chancery was instituted by the egatee against the executor, who admitted assets; and, thereupon, a decree was made, directing the ransfer of the fund into the name of the accountant general, in trust in the cause, subject to the further order of the Court; but no reference had been made to the Master to take an account of the debts:—Held, that the legatee could not make out a good title to the fund, until it reasonably appeared that there was no outstanding claim for debts. *Curtis* v. *Blow*, 9 Law J. K.B. 260, s. c. 2 B. & Ad. 426.

Sale in 1800, by the testamentary guardians of M, an infant, of some lots of his land, to redeem the land tax. H purchases one of the lots, and pays the price into the hands of his own agent, who was agent for the vendors, but the agent neglects to pay it into the bank in the terms of the Land Tax Redemption Act. M comes of age in 1807, and afterwards accounts with the agent as if the agent were his debtor, for the purchase-money paid by H; and the agent not being able to pay, M, in 1825, brought his ejectment, and the appellants, representatives of H, filed their bill in the Exchequer to restrain proceedings in the ejectment, and to compel M to complete the title. Bill dismissed by the Lord Chief Baron (Alexander), and the judgment affirmed by the Lords, principally on the ground that H, all along, knew that the money had not been paid into the bank, and that that was not done which was necessary to give validity to his title. *Hicks* v. *Morant*, 2 Dow. & Cl. A.C. 414.

Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps appeared to have been taken, are no objection to the title. *Causton* v. *Macklew*, 2 Sim. 242.

The generality and vagueness of descriptions of copyhold property, on the court rolls, are so well known, that a vendor is not bound to shew how the description on the court roll is to be applied to the present state of the property, if he prove that the property had actually been enjoyed and passed under that description, for upwards of sixty years. *Long* v. *Collier*, 4 Russ. 267.

A having purchased land, left the investigation of the title to C and D, solicitors, in partnership. They advise that a good title can be made, and the purchase is, thereupon, completed. D, the solicitor, was a trustee in the conveyance to bar dower. A dies, and his devisee sells the property to D, one of the solicitors. D did not object to the title until eight months afterwards; in his answer he said, he had no recollection of the title:—Held, that a solicitor, who had been employed to advise on a title, could not, on purchasing it himself of his client, set up an objection to it, which he did not think of any importance when advising his principal. Decree for specific performance. *Beevor* v. *Simpson*, 1 Tam. 69.

The question of title or no title, being matter of opinion for the Court, the purchaser is bound by that opinion, and cannot object to take the title, on the ground that the difficulty of the question on which it depends, furnishes a sufficient objection to completing the purchase. *Rushton* v. *Craven*, 12 Price, 599.

Houses and lands were devised to trustees in fee, upon trust for sale. The surviving trustee appointed the plaintiffs his executors, but did not make any devise which comprehended trust estates. On the death of the surviving trustee, his executors sold the property in lots. The defendant became the purchaser of four of them, and, just as his purchase was about to be completed, it was discovered that the legal estate was in an infant, the heir-at-law of the surviving trustee. The plaintiffs thereupon presented a petition to the Court under the statute 6 Geo. 4, that the infant might be directed to convey. The plaintiffs apprised the defendant of this proceeding, to which he made no objection. Twelve months elapsed before the Master's report could be obtained, and, a short time previously, the defendant commenced his action for the deposit, and subsequently recovered it; in the meantime,

the dilapidations of the houses purchased had increased:—Held, that, although the defendant might have retired from the contract on the discovery of the defect in the vendor's title, yet, as he did not do so, and acquiesced in the proceedings which were necessary to clothe the plaintiffs with the legal title, and there being no evidence that reasonable diligence was not used in the Master's office, the plaintiffs were entitled to a decree for specific performance:—Held, that the defendant was entitled to the amount of the dilapidations:—Held, that the defendant was entitled to costs:—Held, that the plaintiffs were only entitled to interest from the date of the decree, but that they were entitled to the rents up to that date. *Hoggart* v. *Scott*, 1 Tam. 500, s.c. 1 Russ. & M. 293.

The owner of leasehold property contracted to to sell it "as he then held the same," and the purchaser engaged to buy it "without requiring the lessor's title." He subsequently, at his own expense, examined the lessor's title, and found it to be defective:—Held, that nevertheless he was not entitled to rescind the contract, and receive back his deposit money.

The leases granted in the above case, appeared to have been granted under a power, but the power was not properly pursued; and this was the defect in the leases. But the fact of their having been granted under a power was not known when the contract of sale was entered into:—Held, that for the purpose of such contract, those who professed to grant the lease, and not the donor of the power, must be considered as the "lessor," whose title was not to be inquired into. *Spratt* v. *Jeffery*, 8 Law J. K.B. 114, s. c. 10 B. & C. 249, s. c. 5 M. & R. 188.

### (F) Actions and Suits.

#### (a) *In general.*

In an action to recover back the deposit paid on a purchase at an auction, (for defective title,) the question for a court of common law is, not whether the vendor's title be such as a court of equity would decline to compel an unwilling purchaser to take, but whether it be a legal title. *Boyman* v. *Gutch*, 9 Law J. C.P. 63, s. c. 7 Bing. 379, s. c. 5 M. & P. 222.

In general, a purchaser cannot recover from the vendor any damages for the breach of contract through defect of title, except his deposit-money, interest, and the expenses of investigating the title.

Therefore, where a purchaser, upon receiving an abstract of title, took an opinion upon it, and then entered into a contract of re-sale of part at a considerable profit; and it afterwards appeared, on comparing the abstract with the title deeds, that the former was incorrect and the title was defective:—Held, that the purchaser had been premature in his sub-sale; and that he could not recover, in damages against the vendor, the value of the bargain he had lost by the sub-sale; or even the claims for expenses made upon him by the sub-purchasers. *Walker* v. *Moore*, 8 Law J. K.B. 159, s. c. 10 B. & C. 416.

A having agreed to purchase an estate, and paid a deposit, B, the seller, is unable to make a good title by the stipulated day; A afterwards, upon negotiating a compromise with his creditors, states his apprehension that he may be compelled by B to complete the purchase, and applies to B to cancel the contract, and return the deposit. B refuses to do either, but says that he will never take any steps against A to enforce the contract. Upon this footing, the composition proceeds, C engaging to procure 7*s.* in the pound. It would be a fraud upon the creditors, and upon C, if B were to seek to enforce the contract; and, therefore, A cannot maintain an action against B for the deposit. *Clark* v. *Upton*, 3 M. & R. 89.

If goods be sold on credit, the vendor cannot, before the credit has expired, maintain assumpsit for goods sold, even though he can prove that the goods were not bought in the fair way of trade, but for the fraudulent purpose of being immediately resold at an under price:—*Semble*, that trover is his proper remedy. *Ferguson* v. *Carrington*, 3 C. & P. 157. [Tenterden]

It is no answer to an action at law for non-payment of the remainder of purchase-money agreed to be paid to the vendor on his executing a bond conditioned to cause the title to be completed and the premises to be conveyed to the vendee, that he, the vendor, purchased the estate sold at a sale of the property of a bankrupt, whose assignee he was.

Time is not of the essence of such a contract.

Nor is it an objection to the action, that the bond was not tendered to the obligee till two years after the time when the money was to be paid by him. *Willett* v. *Clarke*, 10 Price, 207.

It is not a ground for arresting the judgment, that such a tender is averred in the declaration to have been made "afterwards—viz. on the (&c.)" two years after the day when the money should have been paid: "afterwards" being the substance of the averment, the time under the videlicet being immaterial. *Willett* v. *Clarke*, 10 Price, 207.

#### (b) *Pleadings.*

To a bill, stating a settlement, under which, after a life-estate to A, the plaintiff was entitled to the estate, and praying the delivery of the title-deeds, the defendant pleaded a purchase for a valuable consideration, without notice, averring that A pretended to be seised in fee, and was in possession, but not averring that he had any title prior to, and independent of the settlement,—whether such a plea is a good defence to the bill—*quere.*

A plea of purchase for a valuable consideration, without notice, must aver, that the vendor pretended to be seised, not merely before, but at the respective times of the execution of the conveyance, and of the payment of the consideration. *Jackson* v. *Rose*, 9 Law J. Chanc. 32, s. c. 4 Russ. 514.

#### (c) *Practice.*

A decree, directing the sale of an estate, is absolute against all the defendants except one, who made default; against him it is only a decree *nisi*; the estates are sold, before it is made absolute; and A B is reported the purchaser: afterwards A B moves, before the Vice Chancellor, to be discharged from his purchase, on the ground that the decree is not binding, and an order discharging him is made; notice of an appeal motion to discharge this order is given before the Lord Chancellor, and before the motion is heard, the decree is made absolute against the defendant making default:—Held, that the purchaser

entitled to be discharged at the time when he e his application; and that his right to be disged could not be affected by the steps taken subiently, to cure the imperfection. *Coster* v. *Turr*. 8 Law J. Chanc. 98, s. c. 1 Russ. & M. 311.

/here the report is in favour of the title, the rt, on allowing exceptions to it, will give the lor a reasonable time within which to remove the ction, although the exceptions and further diions were set down to come on together. *Portr* v. *Mill*, 9 Law J. Chanc. 193, s. c. 1 Russ. & 696.

in estate having been sold, in which the petiers were interested, it was represented to them : a good title could not be made; and they were uced to give a brief to counsel to consent to the chaser being discharged; they subsequently covered circumstances which led them to conclude y had been deceived, and that, in fact, a good e could be made, and thereupon petitioned the urt that the order might be discharged. The Court charged this order, giving the purchaser his ts, and referred it to the Master to inquire wher a good title could be made—the solicitor for petitioner to have the conduct of the inquiry. *tter* v. *Ommanney*, 1 Tam. 344.

Upon the allowance of exceptions to a report proving of a title, the Court will, on the applicaa of the vendor, refer it back to the Master to rew his report, in order to give the vendor an oprtunity of producing evidence to remove the obtion. *Egerton* v. *Jones*, 3 Sim. 392.

## VENIRE.

[See PRACTICE.]

## VENUE.

(A) CHANGING.
(B) RETAINING.

### (A) CHANGING.

The Court will not change the venue on the ere ground that many witnesses reside in the county which it is proposed to change it, if there be also any witnesses on the other side residing at the ace where the venue is laid. *Alcock* v. *Cook*, 8 aw J. C.P. 293, s. c. 6 Bing. 733, s. c. 4 M. & P. 73.

In an action for a libel, the venue cannot be hanged on the common affidavit; but there must be pecial circumstances shewn by affidavit: and this, lthough there be another cause of action—as, for aliciously apprehending the plaintiff. *Murray* v. *Nicholls*, 7 Law J. C.P. 14.

The defendant obtained a rule *nisi* to change the enue from London to Warwick, on the usual affilavit. Cause was shewn on an affidavit, which tated, that the defendant's attorney had declared hat he should change the venue, to postpone the trial ill the Assizes, when Lord Tenterden's Act, 9 Geo. k. c. 14, would have come into operation, and thereby eat the plaintiffs, as they had no promise in writing. The Lord Chief Justice, and Mr Justice Park, were of opinion that the rule should be discharged: Mr. Justice Burrough, and Mr. Justice Gaselee thought that the defendant's attorney should have an opportunity of answering the affidavit; but, as he did not do so effectually, the rule was ultimately discharged. *Amner* v. *Cattell*, 7 Law J. C.P. 78, s. c. 5 Bing. 208, s. c. 2 M. & P. 367.

The venue in an action upon an I O U, may be changed upon the usual affidavit. *Roberts* v. *Wright*, 1 C. & J. 547, s. c. 1 Tyrw. 532.

In the Court of Exchequer the rule *nisi* for changing the venue makes itself absolute, unless cause be shewn on or before the day mentioned in such rule. *Bagnall* v. *Shipham*, 9 Law J. Exch. 81, s. c. 1 C. & J. 377.

Where a rule had been granted for changing the venue, the Court would not discharge it on an affidavit stating that the cause of action arose in two other counties than that in which the venue had been laid; although the affidavit also stated circumstances to shew that fact, and falsify the defendant's (the common) affidavit, where the plaintiff would not undertake to give material evidence in the county of the original venue.

Nor would the Court, under the circumstances, change the venue to the third county, although the declaration laid the *indebitatus* in Stafford, in the first count, and, in the others, "in the county aforesaid."

Statement by the Court of the general principles, and the ground of the practice in this respect, in all cases. *Whitehouse* v. *Hudden*, 10 Price, 171.

### (B) RETAINING.

In an action for a breach of promise of marriage, the defendant having obtained a rule *nisi* to change the venue from L to D, on the usual affidavit, that the plaintiff's cause of action arose in D, and not elsewhere—the Court discharged the rule, on the defendant's undertaking to give material evidence in L, or in the next adjoining county (Middlesex), it appearing that the letters containing the promises on which the action was founded, were written in the county of D, but received by the plaintiff in Middlesex. *Anonymous*, 8 Law J. C.P. 64.

The rule to bring back the venue will be granted, though after the rule for changing it has become absolute, but without discharging the former rule. *Woolley* v. *Boates*, 1 Tyrw. 285.

Proof of a conversation with the defendant in the cause, referring to the matters involved in it, taking place after the writ is sued out, will satisfy an undertaking to give material evidence in the county where the conversation took place. *Gosling* v. *Birnie*, 1 M. & M. 531. [Tindal]

## VERDICT.

[*Powell* v. *Sonnett*, 1 Dow. & Cl. A.C. 56, Dig. Law J. 547.]

The Court of King's Bench will not grant a *habeas corpus* to discharge out of custody a person who has been convicted of libel at the commission of oyer and terminer, at the Old Bailey, on the ground that when the verdict was returned, only one commissioner was present, instead of two, as required by law. But *quære*, whether such a circumstance may

not be assigned as error. *Rex* v. *Carlile*, 4 C. & P. 415. [Knowlys, Rec.]

The Court will not order a verdict to be entered for the defendant, on any given count, after disposal of a motion for a new trial. *Symons* v. *Hearson*, 12 Price, 369.

## VESTRY AND VESTRYMEN.

[See 1 & 2 Will. 4. c. 60, 9 Law J. Stat. 107, entitled 'An act for the better regulation of vestries, and for the appointment of auditors of accounts in certain parishes of England and Wales.']

A select vestry, though immemorial, cannot prevent the operation of the 59 Geo. 3. c. 12.

Accordingly, to a mandamus calling on churchwardens and overseers to summon a meeting for the purpose of establishing a select vestry for the concerns of the poor, pursuant to 59 Geo. 3. c. 12, a return was made, stating, that there was, by custom, an ancient vestry in the parish, which had from time immemorial consulted and deliberated on parochial matters, and acted as a select vestry for the concerns of the poor, and that they had immemorially been accustomed to perform the duties imposed on select vestries by the statute:—Held, that the return was bad, since the statute imposes some duties, as the management of money raised by poor rates, and making orders for the government of overseers, which could not have existed before the statute 43 Eliz. c. 2. *Rex* v. *St. Bartholomew the Great*, 9 Law J. M.C. 135, s. c. 2 B. & Ad. 506.

Where an act of parliament gives a power, in relation to a public trust, to a definite number of persons, it is necessary for a majority of that number to attend at each meeting.

Accordingly, where a select vestry of twenty-six was appointed under the 58 Geo. 3. c. 45. and the 59 Geo. 3. c. 30, for the care and management of a district church, and a number less than fourteen met and made a church-rate:—Held, that the rate was bad. *Freeman* v. *Meymott*—*Blackett* v. *Blisard*, 8 Law J. K.B. 85, s. c. 9 B. & C. 851, s. c. 4 M. & R. 461.

## WAGER.

[See GAMING and STAKEHOLDER.]

Money deposited in the hands of a stakeholder on an illegal wager, may be recovered by the party making the deposit as money had and received, although the stakeholder has paid it over, if such payment over has been made under an indemnity. *Howson* v. *Houseman*, 7 Law J. K.B. 26.

## WAGES.

[See MASTER AND SERVANT, and SHIP AND SHIPPING.]

[Payment of wages in goods in certain trades, prohibited by 1 & 2 Will. 4. c. 37, 9 Law J. Stat. 66.]

## WALES.

[Welch jurisdiction abolished, 1 Will. 4. c. 70, 8 Law J. Stat. 157.]

The Judge at Nisi Prius cannot certify under the statute 5 Geo. 4. c. 106. s. 21, (Welch Judicature Act,) unless the plaintiff prove that the defendant was in Wales at the time of the service of process. *Jones* v. *Kenrick*, 2 M. & M. 179. [Tenterden]

The Court *in banco* have no power to assist a defendant under the 5 Geo. 4. c. 106. s. 21, unless the Judge who tried the cause has certified. Nor will they decide the question whether certain special facts, which are stated in the certificate, bring the case within the act or not. The Judge who tried the cause is himself to decide upon those facts, and is either to grant or refuse the certificate in the terms given by the act. *Jardine* v. *Lewis*, 7 Law J. K.B. 229, s. c. 9 B. & C. 545.

The Court of Exchequer cannot order judgment to be entered up in that court on a warrant of attorney, to confess judgment in the Great Sessions in Wales, given previously by the stat. 1 Will. 4. c. 70. *Williams* v. *Williams*, 1 C. & J. 387, s. c. 1 Tyrw. 351.

The late Court of Great Sessions for the county of Chester, at the Summer Sessions, 1830, issued an attachment returnable at the next Great Sessions, against the attorney in a cause for non-payment of the defendant's costs. Before next Great Sessions, the act abolishing the court (11 Geo. 4. & 1 Will. 4. c. 70.) came into operation; but, previously to that time, the sheriff had taken a bail-bond for the appearance of the attorney, pursuant to the attachment. The sheriff being ruled, in the Easter term following, to return the writ in the Court of Exchequer, returned *cepi corpus*, and that he was ready to have had his body before the Justices of Chester at the return, but that, before the return, the Court was abolished:—Held, that the return was insufficient, and that the applications against the sheriff in Easter term were in time. *Jones* v. *Clarke*—*Finleyson* v. *Same*, 1 C. & J. 447.

The action by *concessit solvere* in Wales, cannot be commenced by notice, but only by *original*.

Where an attorney in Wales delivered a notice, that an action had been commenced, to a bailiff, to be served upon the defendant, who afterwards, and before the notice was served, paid the plaintiff his debt; and the attorney afterwards proceeded by *concessit solvere*, to recover the costs:—Held, that the notice did not operate as the legal commencement of the action, and that the payment was in time. *Phillips* v. *Williams*, 3 Y. & J. 207.

## WARD IN CHANCERY.

[See GUARDIAN AND WARD.]

The husband's costs of the proceedings, in making a settlement of the fortune of a ward, whom he had married without the leave of the Court, were allowed to him out of the fund, he having no property of his own, and there being no circumstances of aggravation in his conduct. *Anonymous*, 4 Russ. 473.

## WARRANT.

[See CONSTABLE and JUSTICE OF THE PEACE.]

## WARRANT OF ATTORNEY.

(A) EXECUTION.
(B) DEFEASANCE.
(C) JUDGMENT.

### (A) EXECUTION.

A prisoner who executes a warrant of attorney while in custody, is entitled to have the benefit of attestation, not merely by a person who is on the rolls of the court as an attorney, but who has a certificate at the time. And accordingly, a prisoner was discharged out of custody, when the warrant of attorney was attested by a person who had not for several years taken out a certificate; although he mentioned it at the time to the prisoner. *Verge v. Dodd*, 8 Law J. K.B. 302.

The statute 3 Geo, 4. c. 39. s. 1. enacts, that within twenty-one days after the execution of every warrant of attorney to confess judgment in a personal action, such warrant must be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments. An affidavit, filed with the warrant of attorney, stating, that the deponent was present, and saw the warrant of attorney, dated the 25th of April 1827, signed, sealed, and delivered by the party in the warrant named, and delivered as and for his act and deed, is not sufficient, inasmuch as it did not set forth the time of the signing, sealing and delivery, within the terms of the statute. *Dillon* v. *Edwards*, 7 Law J. C.P. 110, s. c. 2 M. & P. 550.

### (B) DEFEASANCE.

Whether a warrant of attorney, which is subject to a defeazance, but which defeazance is not written on the warrant of attorney before it is filed, is void, *as between the parties*, as well as against assignees of bankrupts and insolvents, under the 3 Geo. 4. c. 39. s. 4, and 7 Geo. 4. c. 57. s. 33—*quære*.

Held, by Lord Tenterden, Mr. Justice Bayley, and Mr. Justice Littledale, that an omission so to write the defeazance does not avoid the warrant of attorney *as between the parties;* but only as against such assignees.

Held, by Parke, J. (concurring with an opinion previously expressed by Holroyd, J.), that such omission rendered the warrant of attorney altogether void, even as between the parties. *Bennett* v. *Daniell*, 8 Law J. K.B. 190, s. c. 10 B. & C. 500.

### (C) JUDGMENT.

[See WALES.]

The defendant gave a warrant of attorney authorizing I S to enter up judgment against him for 400*l.*, with a memorandum, stating the object of the warrant of attorney to be, to secure to I S, his heirs, executors, administrators, and assigns, the payment of 200*l.*:—Held, that judgment could not be entered up by the executrix of I S. *Henshall* v. *Matthew*, 9 Law J. C.P. 117, s. c. 7 Bing. 337, s. c. 5 M. & P. 157.

Entering up judgment on an old warrant of attorney. *Anonymous*, 8 Law J. C.P. 174.

The Court allowed judgment to be entered up on an old warrant of attorney, upon an affidavit by the plaintiff's agent, that he saw the defendant execute the warrant of attorney, which was given to secure a sum of money due to the plaintiff, which remained due and unpaid. *Huthwaite* v. *Hood*, 5 M. & P. 21.

Where judgment is entered up in debt on a *mutuatus* for non-payment of an annuity secured by a warrant of attorney to confess judgment, it is not necessary to assign breaches under the statute 8 & 9 Will. 3. c. 11. *Shaw* v. *the Marquis of Worcester*, 8 Law J. C.P. 98, s. c. 6 Bing. 385, s. c. 4 M. & P. 21.

Where a warrant of attorney authorizes a judgment to be entered up for double the sum actually due, and the judgment is entered up accordingly, interest will be allowed on the debt. *Tunstall* v. *Trappes* (*Gosling's case*), 3 Sim. 301, (*Lawson's case*), Ib. 299.

## WARRANTY.

As a general rule, whatever a seller represents during the treaty for the sale, respecting the subject-matter, is a warranty.

Therefore, upon the treaty for the sale of a mare, the following dialogue having passed between the buyer and seller:

B. She is sound, of course.

S. Yes; *to the best of my knowledge.*

B. Will you warrant her?

S. I never warrant; I do not even warrant myself."

Held, that this was a qualified warranty; and that upon proof, not only that the mare was unsound, but that the seller knew her at the time to be so, the buyer was entitled to maintain his action upon the warranty.

Where the facts, as between buyer and seller, amount to a warranty, the buyer may maintain assumpsit upon the contract, although the facts amount to deceit on the part of the seller; and might support an action of deceit. *Wood* v. *Smith*, 8 Law J. K.B. 50, s. c. 5 M. & R. 124, s. c. 4 C. & P. 45, s. c. 1 M. & M. 539.

A manufacturer who sells an article for a particular purpose, impliedly warrants it to be fit for that purpose. Where, therefore, the defendants, copper-manufacturers, sold to the plaintiff copper for sheathing the bottom of a vessel, which in a short time became corroded and unfit for use, and the jury found the decay to have arisen from an intrinsic defect in the quality:—Held, that the defendants were liable for the breach of this implied warranty, that the copper was fit and proper for the purpose of sheathing the vessel. *Jones* v. *Bright*, 7 Law J. C.P. 213, s. c. 5 Bing. 533, s. c. 3 M. & P. 155.

Where, in the course of dealing between the buyer and seller of a horse, the seller described him as being "perfectly quiet and free from vice," and afterwards a bargain was struck, nothing being expressly said on either side about warranty:—Held, that the description given by the seller before the

purchase was concluded, amounted to a warranty. *Cave* v. *Coleman*, 7 Law J. K.B. 25, s.c. 3 M. & R. 2.

A receipt on the sale of a colt, contained the following words after the date, name, and sum, "for grey four year old colt, warranted sound in every respect:"—Held, that such part as related to the age was a representation only, and not a warranty. *Budd* v. *Fairmanner*, 5 C. & P. 78. [Tindal]

Defendant warranted sound wind and limb, at the time of the bargain, and sold for 90*l.*, a race-horse which had broken down in training, and was affected with a splint: circumstances which were disclosed to the plaintiff, and but for which the horse would have been worth 500*l.*:—Held, that this warranty did not import that the horse was fit for the purposes of an ordinary horse.

The warranty being restricted to the time of the bargain, *semble*, the plaintiff could not sue in respect of the horse breaking down afterwards.

Defects apparent at the time of a warranty are not included in it. *Margetson* v. *Wright*, 7 Bing. 603, s. c. 5 M. & P. 606.

A warranty of a ship being American, does not mean that she is American built; but that she is the property of an American subject. *Wilson* v. *Backhouse*, Pea. A.C. 119.

Where goods are sold with a warranty, and it appears that they are inferior to the warranty, *semble*, that it is incumbent on the buyer to return them to the seller, in order to his setting up the inferiority as a defence in an action upon the contract for sale. But, at all events, it is not incumbent on the buyer to return articles sold under a warranty, merely because he may have reason to believe that they are inferior to the warranty. He may rely upon the warranty and apply the articles to their intended purpose.

Where goods have been sold under a warranty, and, in an action for the amount, the defence is, that they were inferior to the warranty, although the buyer kept and used them, and the contest on the trial is upon the question as to the alleged inferiority,—whether the plaintiff in such action, if he fail upon the question of warranty, will be entitled to recover in that action, upon the *quantum meruit*, a reasonable compensation for the value of the goods—*quære*: Parke, J. being of opinion that he would; and that the claim to reasonable compensation could be answered only by shewing that the goods were of no value at all. *Poulton* v. *Lattimore*, 7 Law J. K.B. 225, s. c. 9 B. & C. 259, s. c. 4 M. & R. 208.

A person who has purchased a horse warranted sound, sold it again, and then re-purchased it, cannot, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor can he, by reason of the unsoundness, resist an action by such vendor for the price. But he may give the breach of warranty in evidence, in reduction of damages.

*Semble*, that the purchaser of a specific chattel under warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud, or express agreement authorizing the return, or consent of the vendor.

But where the contract is executory only when the chattel is received, as where goods are ordered of a manufacturer, and he contracts to supply them at a certain quality, or fit for a certain purpose, the vendee may rescind the contract if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial, or exercised the dominion of an owner over them, as, by selling them. *Street* v. *Blay*, 2 B. & Ad. 456.

In an action for breach of warranty of a horse, the warranty was not proved, but it appeared that, after it had been returned to him, the defendant had used the horse, and had offered it to a third person for sale:—Held, that by using and offering to sell the horse, the defendant had rescinded the contract for sale of it to the plaintiff. *Long* v. *Preston*, 7 Law J. C.P. 14, s. c. 2 M. & P. 262.

In an action on a warranty of a horse, the vendor of the horse to the defendant, who gave a similar warranty on that sale, is a competent witness for the defendant. *Baldwin* v. *Dixon*, 2 M. & M. 38. [Tenterden]

## WASTE.

Ploughing old meadow land is waste; it alters the evidence of the title, and the land cannot be restored to its original state. On the plea of *nul waste*, evidence that such ploughing was for amelioration, was properly rejected.

Cutting timber-trees is also waste; and if done for repairs, that matter must be specially pleaded to a writ of waste, and cannot be given in evidence under the general issue. *Simmons, demandant; Norton, tenant*; 9 Law J. C.P. 185, s. c. 7 Bing. 640, s. c. 5 M. & P. 645.

Where tenant for life, unimpeachable of waste, cuts and sells timber planted for ornament or shelter, the proceeds of that timber belong to the person having then the first vested estate of inheritance: and parties having intervening estates for life, have no right to an account of the proceeds of the timber so cut, or to have such proceeds invested upon the same trusts with the lands. *Butler* v. *Kinnersley*, 8 Law J. Chanc. 67, s. c. 7 Law J. Chanc. 150.

## WATER AND WATERCOURSE.

Flowing water is *publici juris*. The person first appropriating it, has the exclusive right, in derogation of the primitive right of the public; if he abandon the appropriation, it becomes again *publici juris*. Case will not lie, for lowering the bank of a stream, and erecting a weir, thereby diverting the flow of water from the plaintiff's mill, where the place cut down, &c. was the freehold of the defendant, who at the time had a parol licence, which was afterwards revoked. *Liggins* v. *Inge*, 9 Law J. C.P. 202, s. c. 7 Bing. 682, s. c. 5 M. & P. 712.

A prescriptive right to the use of water flowing through certain closes, for the purpose of supplying a water-mill, is not extinguished by unity of possession of the mill and such closes. *Holland* v. *Deakin*, 7 Law J. K.B. 145.

A person whose land is occasionally liable to injury by the overflow of river water, has no right, in

is mode of protecting himself against that injury, produce injury or damage to his neighbour in respect of the course of the same water. *Rex* v. *Trafford*, 9 Law J. M.C. 66, s. c. 1 B. & Ad. 874.

The plaintiff claimed a prescriptive right to pen back the water of a stream running through the defendant's land. The original mode of enjoying his right had for fifty years been by placing across the stream loose stones, and occasionally a board also; but, on one occasion, the plaintiff had, in addition to these, fixed the board into the bed of the stream by means of two hooked stakes. The defendant, conceiving this to give the dam a character of permanency more extensive than the legal right of the plaintiff, caused both the stakes and the board to be removed. In an action for the removal, the jury having found for the plaintiff, the Court refused to disturb the verdict, on the ground that, although the defendant might have been justified in removing the stakes, he could not justify the removal of the board also. *Greenslade* v. *Halliday*, 8 Law J. C.P. 124, s. c. 6 Bing. 279, s. c. 4 M. & P. 71.

A proprietor of land on the bank of a river, having commenced the building of a mound, which, according to the opinion and report of an engineer, would, if completed, in times of ordinary flood, throw the waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them, was restrained by perpetual interdict from the further erection of any bulwark, or other work, which might have the effect of diverting the stream of the river, in time of flood, from its accustomed course, and throwing the same upon the lands of the appellant. *Menzies* v. *Breadalbane*, 3 Bligh, N.S. 414.

## WAY.

[See HIGHWAY.]

Where A and B are in possession of lands under C, B cannot prescribe for a right of way over the land of A. *Large* v. *Pitt*, Pea. A.C. 152.

A right of way by prescription was claimed in respect of the occupation of a certain close. It appeared that the close was part of an open common which had been inclosed by act of parliament in 1774; and then the close had been allotted to the ancestor of him who claimed the right of way. But the user of the right of way by the commoners was proved to have been before 1774. The jury found a verdict in favour of the right of way. It was then objected, that this right of way, as claimed, could not have existed by prescription; but the Court held that it might, as the fee might have been in the lord, with a right of way for the tenants; to such of whom as took allotments, the right would pass. *Codling* v. *Johnson*, 8 Law J. K.B. 68, s. c. 9 B. & C. 933, s. c. 4 M. & R. 671.

The subsequent vesting, by act of parliament, in commissioners, of a piece of ground, does not take away a general right of way previously exercised by the public.

*Semble*—That an allegation in the declaration, that a way was a general highway for all purposes, is severable, and that plaintiff may recover for an interruption to the footway. *Vollance* v. *Savage*, 9 Law J. C.P. 181, s. c. 7 Bing. 595, s. c. 5 M. & P. 576.

A local act gave power to lay waggon-ways along or across any of the roads specified, on condition that the parties who did so should keep such roads in repair for twenty yards on each side of the waggon-way so laid down:—Held, that where there would not be twenty yards on each side of the waggon-way, there was no power to lay one on that part of the road.

A local temporary act gave power to lay a waggon-way. Whether, on the expiration of such act, the power to continue the waggon-way ceased; or whether, as in the case of a licence executed, the waggon-way, having been legally laid on, might be continued—*quære*. *Rex* v. *Morris*, 9 Law J. K.B. 55, s. c. 1 B. & Ad. 441.

## WEIGHTS AND MEASURES.

Contents of measures not to be proved but by a production in court. *Chenie* v. *Watson*, Pea. A.C. 123.

A sale of goods by the Winchester measure, the agreement not stating what proportion it bears to the imperial measure, is void by the 5 Geo. 4. c. 74. s. 15; the Winchester measure being, for the purposes of that section, a measure established by local custom. *Watts* v. *Friend*, 8 Law J. K.B. 181, s. c. 10 B. & C. 416.

## WILL.

[See DEVISE, LEGACY, and POWER.]

(A) VALIDITY.
- (*a*) *In general.*
- (*b*) *Testator's Capacity.*
- (*c*) *Attestation.*

(B) PROBATE.
- (*a*) *Granting.*
- (*b*) *Recalling.*
- (*c*) *Duty.*

(C) PROOF.
- (*a*) *In general.*
- (*b*) *In the Ecclesiastical Court.*

(D) REVOCATION.
(E) REVIVAL AND REPUBLICATION.
(F) CODICILS.
(G) CONSTRUCTION.
(H) PRACTICE.
(I) COSTS.

### (A) VALIDITY.

#### (*a*) *In general.*

A natural-born British subject may acquire a foreign domicile; nor will the *animus revertendi*, and claim to be considered, and treatment as a British subject, preserve his original domicile; and if domiciled abroad, he must conform in his testamentary acts to the formalities required by the *lex domicilii*. *Stanley* v. *Bernes*, 3 Hag. Ec. 373.

A feme covert having, under certain powers, made a will and codicil in February 1818, (eight months after marriage,) by which, after making provision for husband, and leaving sundry legacies, she be-

queathed the bulk of her fortune to, and appointed executors, strangers in blood, such disposition (except the provision for her husband,) being similar to a will in 1816; made a will on the 9th of March 1827, and a codicil thereto on the 21st of April (she dying on the 8th of May) 1827; which papers, except legacies to three servants, and rings to three friends, left all her property to her husband, and appointed executors him and a total stranger:—The Court, holding that the latter papers were obtained by the husband's undue influence, when her faculties were much impaired, pronounced for the will and codicil of 1818, and condemned the husband (who, though he denied the validity of the papers, and nominally prayed an intestacy, was the real party setting up the latter papers,) in the costs of the executors of the will of 1818. *Marsh* v. *Tyrrell*, 2 Hag. Ec. 84.

Where the will of a married woman—obtained while she was in an extremely weak state, nine days before death, by the active agency of the husband, the sole executor and universal legatee—wholly departed from a former will, deliberately made a few months before, the presumption is strong against the act; and the evidence not being satisfactory, the will pronounced against, and the husband condemned in costs. *Mynn* v. *Robinson*, 2 Hag. Ec. 179.

Where an undue influence is exercised over the mind of a testator in making his will, the provisions in the will, in favour of the person exercising that influence, are void; but the will may be good as far as respects other parties; so that a will may be valid as to some parts, and invalid as to others; may be good as to one party, and bad as to another. *Trimlestown* v. *D'Alton*, 1 D. & Cl. A.C. 85.

If no suspicion of fraud exists, a will, consistent with previous affection and declarations, and supported by recognitions and circumstances shewing volition and capacity, is valid, though made *in extremis*, and though the instructions were conveyed through the party benefited. *Ross* v. *Chester*, 1 Hag. Ec. 227.

Instructions for a will containing the fixed and final intentions of the deceased, are valid, if the formal execution is prevented by death. *Burrows* v. *Burrows*, 1 Hag. 109.

Where there is final intention proved, and execution prevented by the act of God, the mere want of execution does not invalidate an instrument disposing of personalty. The disposition has the same legal effect as if the instrument had been actually signed and attested. *Masterman* v. *Maberly*, 2 Hag. Ec. 247.

A will, made by a joint tenant, is inoperative as to the property in joint tenancy, although he survive his companion. *Doe* d. *Jackson* v. *Hiley*, 8 Law J. M.C. 105, s. c. 10 B. & C. 885.

Letters containing final testamentary intentions, are valid as a will, the deceased considering no further act necessary; nor will they be invalidated by the deceased not having subsequently disposed (as she then purposed) of a small part of her property. *Manly* v. *Lakin*, 1 Hag. Ec. 130.

(*b*) *Testator's Capacity.*

[*Dew* v. *Clark*, 4 Russ. 511, Dig. Law J. 553.]

A will may be pronounced for, though both the attesting witnesses depose to the deceased's incapacity. *Le Breton* v. *Fletcher*, 2 Hag. Ec. 558.

Where there is a great change of disposition, and a total departure from former testamentary intentions long adhered to, it is material to examine the probability of the change, especially if at the time of making the latter disposition the capacity is doubtful; still more, if the person in whose favour the change is made, possessing great influence and authority, originates and conducts the whole transaction.

A person who can understand and answer rationally questions, may still not be capable of making a will for all purposes. The rule of law is, that the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. *Marsh* v. *Tyrrell and Harding*, 2 Hag. Ec. 87, 129.

If there is no evidence of insanity at the time of giving instructions, the commission of suicide three days afterwards will not invalidate the paper, by raising an inference of previous derangement. *Burrows* v. *Burrows*, 1 Hag. Ec. 109.

Supervening insanity is sufficient to account for the non-execution of a paper written shortly before, and consistent with the intentions and affections of the deceased; nor will it so reflect back on previous eccentricity as to invalidate such paper. *Hoby* v. *Hoby*, 1 Hag. Ec. 146.

A testamentary paper cannot be set aside on the ground of monomania, (the deceased's *belief of* an attempt to poison him,) except there be the most decisive evidence that at the time of the *factum* of the paper the belief amounted to insane delusion.

*Semble*, that a will, of personalty only, agreeable to long entertained intentions, prepared two months before, and execution merely delayed for want of witnesses, would be valid as an unexecuted paper, even though the execution finally took place during supervening insanity. *Fulleck* v. *Allinson*, 3 Hag. Ec. 527.

Where the attesting witnesses, disinterested medical men, speak strongly to the sanity, the Court will not set aside a will on proof by interrogatories, but without plea, that the deceased, many years before, had been under an insane delusion. *Kemble* v. *Church*, 3 Hag. Ec. 273.

The clearest and most consistent evidence of capacity and volition, is required to support a codicil conveying bequests of such extent as to be irreconcileable with the character of the deceased, and with her intentions as proved by her affections and former testamentary dispositions: the deceased being at the time within ten days of her death, and in a state of extreme weakness and debility; all her confidential friends excluded or absent, and those only about her who are benefited under or engaged in the preparation or execution of the instrument. *Brydges* v. *King*, 1 Hag. Ec. 256.

The Court will not at once reject an allegation propounding a will, which sounds to folly, when facts are pleaded, shewing that the deceased, up to his death, conducted himself in the ordinary concerns of life as a sane man. *Arbery* v. *Ashe*, 1 Hag. Ec. 214.

The will (executed eight years before death) of a woman, who, though guilty of excessive drinking and great extravagances, managed her own proper-

ty, received her dividends, did various acts of business, corresponded rationally with her friends, and was not shewn to be under any delusion, cannot be set aside on the ground of insanity; and though such will—in total exclusion of distant next of kin (with whom she had quarrelled)—be in the handwriting of, and executed at the office of her attorney (one of the executors, and residuary legatee to a great amount, he and his family having also very large legacies), and the attesting witnesses speak to a bare execution,—documents in her own handwriting, shewing both capacity and knowledge of contents, though not mentioning the residue, will supply the additional proof required by such circumstance.

Where no fixed and settled delusion is shewn, and consequently no decided actual insanity, and extravagant acts are accounted for by the excitement of liquor, while at times the mind was sound,—in order to avoid a will, it must be proved that the deceased was so excited by liquor, or so conducted himself during the particular act, as to be at that moment legally disqualified from giving effect to such act.

Delusion has been generally laid down as an essential constituent of derangement. *Semble*, that insanity has never been held to be established in any case where delusion has at no time prevailed.

*Semble*, that a lucid interval then exists when the mind is apparently rational on all subjects, and no symptom of delusion can be called forth.

Where clear and decisive insanity has been established at a prior time, acts of a doubtful character are of more force in proof of its existence at the time in question: and even subsequent decidedly insane acts may reflect back on acts otherwise equivocal; but when no decided acts, prior or subsequent, are proved,—equivocal acts, however numerous, will not establish insanity. *Wheeler* v. *Alderson*, 3 Hag. Ec. 574—608.

Where the deceased was admitted to have been insane before the execution of two asserted wills, and where there was evidence of delusion and other *indicia* of derangement existing shortly before, as well as subsequent to the acts,—proof of calmness, and of his doing formal matters of business under the sanction of his family, are not sufficient to rebut the presumption against the papers.

Every person is presumed sane till shewn to have become insane: the presumption then changes, and a party setting up any instrument executed after the existence of insanity, has the burthen of proof cast on him, and must shew the mind perfectly restored, and delusion removed.

In civil suits the law avoids every act done during the period of lunacy, even though such act cannot be connected with the influence of the insanity. *Groom* v. *Thomas*, 2 Hag. Ec. 433—6.

When the opinions of persons apparently intending to depose fairly are contradictory as to capacity, particularly if facts shew the deceased was occasionally capable, the Court will infer a fluctuating capacity. The will of a person in such a state, of which probate was taken out four months after the deceased's death, and not called in for two years and a half, pronounced for; there being satisfactory evidence of instructions, and of capacity, at the time of the *factum*; the disposition contained being consistent with his affections, and its variation from a will executed before his mind became impaired being accounted for by a change of circumstances.

The influence to vitiate an act must amount to force and coercion destroying free agency, and there must be proof that the act was obtained by this coercion. *Williams* v. *Goude and Bennet*, 1 Hag. Ec. 577—81.

Where the widow, in opposition to a will, sets up habitual intoxication, weakened capacity, and custody, she may also plead insane dislike, on the part of her husband, to account for their living apart, though the delusion may not be sufficient, *per se*, to invalidate the will. *Reay* v. *Cowcher*, 1 Hag. Ec. 75.

Where the drawer and attesting witnesses of a will (executed ten days before death, by a person of eighty-five, in weak bodily health,) are confirmed as to capacity, volition, and free agency, by adverse witnesses, and the deceased's affections and recognitions,—the general character of the drawer (an attorney employed by the deceased for many years), and slight discrepancies in the evidence of the *factum*, are not material. A will in such a case pronounced for; and the opposer, who had pleaded incapacity, conspiracy, fraud, and circumvention, condemned in the costs incurred since the giving in of his allegation. *Bird* v. *Bird*, 2 Hag. Ec. 142.

Where there is a general competency to devise, the Court will not, but upon strong evidence of fraud or coercion, grant a new trial.

Where the parol evidence is of a very contradictory nature, it is safer to judge by collateral facts, where they are sufficiently strong, as to the competency of a party to make a will.

A long and varied correspondence, carried on by and with the testator for a series of years, and the execution of various deeds by him, and of others to him, involving property to a large amount, is sufficient to shew his general competency to dispose of his property. *Wright* v. *Tatham*, 9 Law J. Chanc. 265.

Where the execution of a codicil was clandestinely, and without previous instructions, obtained from a testator of eighty, only one month before his death, by the son, the person solely benefited, and his associates, the disposition being contrary to the repeated former acts of the deceased, the clearest proof of capacity and free agency is necessary. Codicil pronounced against, and the son condemned in costs. *Mackenzie* v. *Handasyde*, 2 Hag. Ec. 211.

### (c) *Attestation.*

The testator, in his own handwriting, made and executed a devise of his real estates. He afterwards requested two persons to sign their names to it, which they did in his presence, but they did not see the signature of the testator, nor did he inform them that the paper they subscribed was his will. Subsequently this paper was subscribed by a third witness, in the presence of the testator, who informed this last-mentioned person that the paper in question was his will. Above the signatures of the witnesses there appeared, in the handwriting of the testator, these words—"In the presence of us, as witnesses thereto:"—Held, that this was a sufficient *attestation* and subscription of the will within the Statute of Frauds. *The Trustees of the British Museum* v. *White*, 8 Law J. C.P. 73, s. c. 6 Bing. 310, s. c. 3 M. & P. 689.

Will of real estate, wholly a testator's writing, signed by him, but not in the presence of the witnesses, nor did they see his signature; nor did the witnesses sign in each other's presence, but one separately at one time, and two together at another time:—Held valid. *Wright* v. *Wright*, 9 Law J. C.P. 172, s. c. 7 Bing. 457, s. c. 5 M. & P. 316.

Doctrine of presumption as to the attestation of wills in the presence of the testator.

After two verdicts in favour of the due execution of a will, a third trial of an issue was directed, though the question was one, not of direct evidence, but of inference and presumption from probabilities. *The Earl of Winchilsea* v. *Wauchope*, 7 Law J. Chanc. 84, s. c. 3 Russ. 446.

## (B) Probate.

### (*e*) *Granting.*

A person, residing in one diocese, went on business into another, having with him on that occasion property exceeding 5*l.* in value. He there met with an accident, and died in consequence of it. He had no property in the latter diocese, except that which he had with him for the purpose of the journey:—Held, that a probate of his will, granted by the bishop of the diocese in which he resided, and in which his property lay, was sufficient, he having died *in itinere;* and the canon 9, 2 James 1, laying down, that when a man dies on a journey, the goods which are with him at the time of his death, are not *bona notabilia. Doe* d. *Allen* v. *Ovens*, 9 Law J. K.B. 223, s. c. 2 B. & Ad. 423.

In decreeing probate, the Court is usually regulated by the grant of the Court of Probate, where the party was domiciled; i. e. the competent jurisdiction—in this instance the Court of Supreme Judicature at Fort William, Bengal. *Larpent* v. *Sindry*, 1 Hag. Ec. 382.

Probate of the will of a married woman, a native of and domiciled in Spain, granted according to the law of Spain, to one of her sons as executor, on affidavits as to the law of Spain, and the identity of the parties. *In the goods of Donna Maria de Vera Maraver*, 1 Hag. Ec. 498.

The will of a party who died in Scotland, and whose property within the province of Canterbury, was in the diocese of London (some of it in the funds), having been proved in the Consistory Court of London, and the deputy registrar of that court having appeared under protest to a monition to transmit such will, the Court will not overrule the protest, holding a prerogative probate unnecessary, as the Archbishop and Bishop of London have, by practice, a concurrent jurisdiction in such cases: it will, however, in aid of justice, grant an additional probate, if required, limited to the property in the funds. *Scarth* v. *Bishop of London*, 1 Hag. Ec. 626.

*Semble*—That a diocesan probate can give no authority, nor continue any privity, as to a satisfied term in another diocese. *In the goods of Mary Powell*, 3 Hag. Ec. 195.

Probate may be granted in common form of a will written entirely in pencil, by the deceased, who a few days before death, declared she wished it to operate, unless altered. *In the goods of Armine Anne Dyer*, 1 Hag. Ec. 219.

The widow having, after the testator's death, caused his will to be destroyed, probate of the draft of such will granted, and the widow condemned in the whole costs of the suit. *Martin* v. *Larking*, 1 Hag. Ec. 244.

The law presumes *primâ facie*, 1st, that if a paper (a will) be left at a party's house, it comes into his possession; 2ndly, that if it be thus traced into his possession, and be not forthcoming at his death, he destroyed it. A draft will being propounded under these circumstances, the Court pronounced the deceased was, as far as appeared, dead intestate, and condemned the party setting up the paper in costs. *Lillie* v. *Lillie*, 3 Hag. Ec. 184.

A draft of a will propounded, without setting forth how the executed will was lost, pronounced against. *Lillie* v. *Lillie*, 3 Hag. Ec. 189.

The deceased, supposing his will appointing his wife sole executrix, and universal legatee for life, to be lost, made in Peru a nuncupative will, (not in conformity with the Statute of Frauds,) with a general revocatory clause, and appointing two executors and his wife universal legatee absolutely. The executors renounced, and she took probate of that will in Peru. The former will being found (of which fact he was ignorant at the time of his death), probate thereof, at the wife's prayer, granted to her. *In the goods of Richard Moresby*, 1 Hag. Ec. 378.

A testator, while at variance with his relations, having made a will in favour of a stranger in blood, being afterwards reconciled to his family, and his full capacity down to his death being admitted; a subsequent will in favour of his family, (produced shortly after his death from the custody of the drawer, who took nothing under it, nor was acquainted with those benefited by it, the *factum* whereof, though occurring in secret, and in a strange manner, was proved by the drawer and two unimpeached witnesses,) pronounced for; and the executor of the former will condemned in 20*l.* *nomine expensarum*, he having directly alleged the second will to be a forgery, but succeeded in shewing the drawer to be of doubtful character. *Young* v. *Brown*, 1 Hag. Ec. 557.

If there is proof either, in the paper itself, or from clear evidence dehors, 1st, that the writer intended to convey the benefits by it which will be conveyed if the paper be considered testamentary; 2ndly, that death was the event to give it effect, an instrument, whatever be its form, may be admitted to probate. *The King's Proctor* v. *Daines*, 3 Hag. Ec. 221.

Probate granted to a deed, testamentary in its whole purport and effect, and not to operate till after death. *In the goods of Joseph Knight*, 2 Hag. Ec. 554.

Probate cannot be granted of a paper having nothing to give testamentary character, nor intended to operate upon the death of the writer, but to effect a gift *inter vivos*. *Glynn* v. *Oglander*, 2 Hag. Ec. 428.

When a paper is not intended as a will, but as an instrument of a different nature, if it cannot operate in the latter, it may in the former character, for the form does not affect its title to probate, provided it is to carry into effect the intention of the deceased after death. *Masterman* v. *Maberly*, 2 Hag. Ec. 247.

The Court will not (on affidavits of capacity and final intention and on consent,) decree probate in

he common form of a paper written *in extremis*, and confused, where the interest of minors and of an infant is affected. *In the goods of Hugh Ross*, 1 Hag. Ec. 471.

Where minors are concerned, probate in common form cannot be granted of a mere memorandum of doubtful construction, on affidavits shewing that the deceased intended to increase the benefit to certain legatees under a formal will, and was prevented by death from giving his solicitor instructions to that effect. *In the goods of James Gibbs*, 1 Hag. Ec. 376.

A paper commencing "Memorandum of my intended will," but dispositive in terms, signed, and intended to operate if no more formal will was made, is, unless revoked, entitled to probate. Neither instructions, nor a will drawn up therefrom (which, though in the deceased's possession for several months, was not executed nor shewn to be finally determined on), will, either as entitled to probate, or as letting in an intestacy, revoke such a paper. *Barwick* v. *Mullins*, 2 Hag. Ec. 225.

Papers, on the face of them unfinished, with no circumstances to account for such their state, are presumed to be abandoned, and consequently, are not entitled to probate. *Cundy* v. *Medley*, 1 Hag. Ec. 140.

In order to the grant of probate in common form of an unfinished paper, there must be, 1st, affidavits, stating such a case as, if proved by depositions, would establish the paper; and, 2ndly, consent, implied or express, from all parties interested. *In the goods of James Thomas*, 1 Hag. Ec. 695.

When a paper is unfinished, the presumption of law is strong against it, especially when it is to alter an executed instrument; still more when to revoke a disposition of the bulk of the property to the deceased's own family, and transfer it to a stranger. *Reay* v. *Cowcher*, 2 Hag. Ec. 254.

The Court will not grant probate in common form of a paper formally drawn up, but unexecuted, and which the deceased clearly intended to alter, nor of a subsequent paper, in the deceased's hand-writing, but undated, unsigned, and apparently unfinished, and with nothing to ascertain that it was written shortly before the death, or that it embodied the final intentions of the deceased, the deceased being an illegitimate spinster, and the Crown opposing the grant. *In the goods of Elizabeth Robinson*, 1 Hag. Ec. 643.

Without the consent or citation of the next of kin, the Court will not, on motion supported by affidavit of the drawer, (the executor and a legatee) grant probate of the will unsigned, dated some years before, and with an attestation clause and no witnesses, and a recent codicil with a space between the last clause and signature. *In the goods of Elizabeth Adams*, 3 Hag. Ec. 258.

Written and verbal instructions being given, from which a will was prepared, the execution of which was prevented by unforeseen circumstances, and by death; the Court, the widow consenting, will grant probate of the will so prepared, (though never seen by, nor read over to the deceased,) in preference to granting administration with the instructions annexed, to the widow; the deceased's intention being clearly to secure the interests of his children by the interposition of executors. *In the goods of Archibald Bathgate*, 1 Hag. Ec. 67.

Probate in common form, of two papers (one unfinished), granted on a proxy of consent and on affidavits accounting for their state, and shewing that the deceased intended them to operate. *In the goods of Charles Broderip*, 1 Hag. Ec. 485.

Execution being only prevented by death, the Court will decree probate in common form on a proxy of consent from all *in esse* interested, but those not *in esse* will not be bound by the grant. *In the goods of James Taylor*, 1 Hag. Ec. 641.

A paper having an attestation clause in the plural number, but only one witness and the date of the year written on an erasure, (on affidavit of the executor to a recognition, and from the attesting witness to the time and intention of executing,) probate of such paper, in common form, decreed, though one of four persons, entitled in distribution, refused to consent, but had entered no caveat. *In the goods of Thomas Vanhagen*, 1 Hag. Ec. 478.

Probate in common form, decreed of a paper with an attestation clause in the plural number, and only one witness, on affidavit of an implied recognition. *In the goods of George Winkfield Sparrow*, 1 Hag. Ec. 479.

A paper, written by the deceased herself, at least three months before her death, with a blank for the date, an attestation clause—but no witnesses, and unsigned, with other evidence to shew it unfinished; and declarations that she intended to "settle her will in a few days," is not entitled to probate, either as intended to operate in its actual state, or on the ground that execution was prevented by her sudden death the day after such declaration. *Bragge* v. *Dyer*, 3 Hag. Ec. 207.

An engrossed copy of a will having been read over to, and approved by, the deceased who intended to execute it shortly afterwards, but was prevented by death; probate in common form granted, (with consent of the only person interested under an intestacy,) of one of the originally engrossed sheets, and of two fairly copied sheets substituted for, and, except as to some clerical errors, not affecting the disposition, corresponding with the sheets approved by the deceased. *In the goods of Samuel Harvey*, 1 Hag. Ec. 575.

Probate will not be granted to a paper never seen by, nor read over, but only explained to the deceased, who died suddenly, before he saw the solicitor; the answers of the executor (speaking against his own interest,) being the only evidence of instructions, which were verbally conveyed by him to the solicitor, especially when the intentions of the deceased, appeared fluctuating, and when there was a previous paper in his handwriting, clearly entitled to probate. *Maclue* v. *Ewing and Reid*, 1 Hag. Ec. 317.

Where a testator executed a will and two codicils, and afterwards had a new will and certain bonds prepared, which were in conjunction, to dispose of his property on the same principle as his former will, and died when preparing to sign the new will; first, the execution being thus finally determined on and prevented, the new will is entitled to probate; and, secondly, the new will being never intended to operate independent of the bonds, the Court is bound, in order to carry his intentions most nearly into effect, to grant probate of the new will, and of the unexecuted bonds, as together containing

his will, and to revoke a probate of the former papers. *Masterman* v. *Maberley*, 2 Hag. Ec. 235.

On the testator's death, an alteration appearing in a will, which, during his lifetime, was in the custody of the writer (one of the executors), who swore such alteration was made with the testator's concurrence, but gave no further explanation, and declined to propound the will so altered,—the Court will assign the executors to take out probate of the will in its original state, the residuary legatees, on being personally cited to propound the will, or to shew cause, &c., not appearing. *Parker* v. *Hickmott*, 2 Hag. Ec. 211.

When pencil alterations are inferred to be deliberative, probate, in common form, will be granted of the paper, without such alterations; the only party materially injured by such grant having executed a proxy of consent. *In the goods of John Howe*, 1 Hag. Ec. 212.

The *primâ facie* presumption is, that pencil alterations are deliberative, and those in ink final: when they are of both kinds in the same instrument, the presumption is strengthened. A doubt whether a testator intended a particular bequest to form part of his will, and to take effect, will not vitiate the whole will, especially if a strong disinclination to die intestate be sworn. *Hawkes* v. *Hawkes*, 1 Hag. Ec. 321.

The presumption of law, that pencil alterations are deliberative, may be strengthened by circumstances; such as that the paper was originally carefully drawn up, and shews the deceased to have been a very precise man, while the alterations are incomplete and inaccurate, rendering the sense imperfect and the meaning doubtful. *Edwards* v. *Astley*, 1 Hag. Ec. 490.

Ink alterations in a will being carefully made and not improbably final, the Court will not, on the non-appearance after personal service, of executors appointed, and of minor legatees materially benefited, thereby grant probate, in common form, of the paper as originally executed.

Alterations in ink, (in the margin and body of a duplicate will,) carefully made and conformable to long entertained and lately expressed intentions—held, to contain the testator's final intentions, and entitled to probate. *Ravenscroft* v. *Hunter*, 2 Hag. Ec. 65—68.

The presumption being, that a will, when executed, contains the deceased's final intentions, to authorize an alteration on the ground of mistake, there must be, first, an ambiguity in the paper; secondly, clear proof of the omission. Allegation, pleading *omissa*, rejected. *Shadbolt* v. *Waugh*, 3 Hag. Ec. 570.

The deceased having between instructions for, and the execution of, his will, delivered to his solicitor a letter of testamentary import to be put with his will; probate thereof decreed, as, together with the formal instrument, containing the last will of the deceased. *In the goods of John Dunn*, 1 Hag. Ec. 488.

Of wills of the same date, that in the testatrix's possession, and to which she last added codicils, is entitled to probate, together with the codicils found therewith, and unrevoked codicils found with the other will. *In the goods of Elizabeth Crosley*, 2 Hag. Ec. 80.

The will and first two codicils of a British born subject, resident and naturalized in the Portuguese dominions, (the will disposing of effects partly in Portugal and partly in England,) executed and purporting to be executed according to the laws of Portugal, but inferring, that he considered himself an Englishman, admitted to probate; but two later codicils—fully proved as to capacity and intention, disposing solely of money in the British funds, attested by three witnesses, but not executed, nor purporting to be executed, according to the law of Portugal—refused probate by the delegates, reversing a sentence of the prerogative. *Stanley* v. *Bernes*, 3 Hag. Ec. 373.

A person dying in Scotland, having by his will directed that the legatees should appoint two persons to execute his testamentary bequests, probate granted to the nominees as executors. *In the goods of William Cringan*, 1 Hag. Ec. 548.

A testator having appointed two executors, and provided that, on the death of either of them, two others should be substituted: on the death of the original executor, who had proved the will, and on a proxy of consent from the other, probate will be granted to one of the substituted executors, it appearing to have been the testator's intentions that the substitution should take place on the death of either of the original executors, whether happening in the testator's lifetime or afterwards. *In the goods of the Rev. Sir John Lighton, Bart.*, 1 Hag. Ec. 235.

Probate in common form, of a paper with an attestation clause, and no witness, decreed to the only person entitled under an intestacy, on affidavit of recognitions of it, as his will by the deceased. *In the goods of William Holden Jerram*, 1 Hag. Ec. 550.

Probate (as of a codicil) refused to a paper as not testamentary, though found in the same envelope as the will and a codicil, and explanatory to the executors of the nature and value of, and most advantageous mode of managing the deceased's property, but having no dispositive nor revocative effect. *Taylor* v. *D'Egville and Bebb*, 3 Hag. Ec. 202.

### (*b*) *Revalling.*

A married woman living apart from her husband, being joined in the probate of a will (authorizing her "to act as executrix, in all respects, without her husband,") but not having intermeddled: the Court, on the Bank refusing to transfer stock without the husband, will revoke such probate, and grant it to the remaining executors. *Mack* v. Curtis, 1 Hag. Ec. 129.

Probate of a will of a feme covert (supposed at the time of the grant to have been sole,) revoked; and administration granted to her next of kin, the husband having died after her. The administration of a feme covert's goods left unadministered by the husband, having been held, in several cases, to belong, under the 31 Edw. 3. s. 1. c. 11, and 21 Hen. 8. c. 5, to the next of kin of the wife at the time of her death, though the right to the property is in the representatives of the husband. *In the goods of Mary Alicia Gill*, 1 Hag. Ec. 341.

Where capacity and volition are established, a party suing *in formâ pauperis*, who, after a long acquiescence, calls probate in a will, on a suggestion of incapacity, fraud, and circumvention, may be condemned in costs; and the taxation be suspended. *Wagner* v. *Mears*, 2 Hag. Ec. 524.

(*c*) *Duty.*

On proving a will, the executor need not, in the amount for which probate duty is paid, include debts due to the testator, which are either desperate or doubtful; and the executor has a right to exercise his judgment fairly and *bonâ fide*, whether a debt is doubtful or bad. *Moses* v. *Chafter*, 4 C. & P. 524. [Tenterden]

Probate duty is not payable upon such part of the assets of an English testator dying in this country as consists of property in a foreign country at his decease, although it be afterwards brought into and administered in this country by the executors; it not being the administration of the assets, but the local situation of those assets at the death of the testator, which renders the probate duty payable. *Attorney General* v. *Dimond*, 9 Law J. Exch. 90, s. c. 1 C. & J. 356, s. c. 1 Tyrw. 243.

(C) Proof.

(*a*) *In general.*

Parol evidence of declarations made by a testator in his last illness, tending to impeach his will, is not admissible.

Where imputations were cast upon the conduct of the attorney who prepared a will, and who was one of the attesting witnesses, tending to charge him with fraud in the execution of it—the Court held, that witnesses might be called to prove his general good character. *Provis and Rowe, demandants; Reed, tenant*, 7 Law J. C.P. 163, s. c. 5 Bing. 435, 3 M. & P. 4.

In the case of a bill filed by an heir-at-law to set aside a will, on the ground of incompetency, the Court directed an issue *devisavit vel non*, to try the validity of the will:—Held, that it is no ground for a new trial, that the devisee did not call all the subscribing witnesses. *Wright* v. *Tatham*, 9 Law J. Chanc. 265.

(*b*) *In the Ecclesiastical Court.*

A next of kin, contesting a will propounded by an executor, may take out a decree citing all persons interested under the will, "to see proceedings." *Colvin* v. *Fraser*, 1 Hag. Ec. 107.

Where a testamentary paper is asserted to have existed since the death of the alleged testatrix, and to have been subsequently destroyed, these allegations must be proved by the clearest and most stringent evidence. *Huble* v. *Clark*, 1 Hag. Ec. 115.

A testamentary instrument may be established against the evidence of all the subscribing witnesses; but such a case would require to be supported by the whole *res gestæ*, by strong probability arising from the conduct of all parties, and by the improbability of the practice of fraud, circumvention, or undue influence. *Mackensie* v. *Handasyde*, 2 Hag. Ec. 219.

A legatee, whose legacy had been paid him, having been examined without releasing, allowed to be re-produced on his and the executor's giving mutual releases, and on the latter depositing in the registry, to abide the issue, a sum sufficient to cover the legacy. *Cooper* v. *Derrienuis*, 1 Hag. Ec. 482.

Mere evidence of execution of a will and codicil, by a person of weak and inert mind, appointing his attorney and agent sole executor, and almost universal legatee of a large property, is insufficient without proof of instructions by the deceased; instructions for the will being given to the solicitor, who prepared and attested it, by and in the handwriting of the executor's father (also the deceased's co-agent and attorney); the codicil being prepared exclusively for his own benefit by the executor, in whose house the deceased was living, apart from his family; and other circumstances strongly inferring fraud and circumvention. *Ingram* v. *Wyatt*, 1 Hag. Ec. 384.

In a case of perfectly sound mind, and free from any suspicion of imposition, evidence of bare execution is sufficient; but where the deceased's attorney is the drawer of the will, and the person principally benefited, the jealousy of the Court is excited, and demands more than proof of bare execution. *Wheeler* v. *Alderson*, 3 Hag. Ec. 587.

In courts of probate, it is almost a settled principle not to pronounce for disputed papers, on evidence of handwriting alone.

Evidence to the genuineness, not of a mere signature, but of a holograph of some length, is more cogent and weighty than evidence of a contrary tendency. *Constable* v. *Steibel and Emanuel*, 1 Hag. Ec. 60, 61.

The Court will not pronounce for a paper, on the evidence of handwriting alone; but that proof, joined with circumstances of probability, is sufficient. *Headington* v. *Holloway*, 3 Hag. Ec. 280.

Dissimilitude of handwriting is very weak and deceptive evidence, and of slight weight only against evidence of similitude; but against positive evidence of witnesses attesting and depositing to a signature, as actually made in their presence, it can scarcely have any effect. *Young* v. *Brown*, 1 Hag. Ec. 569.

In a case pregnant with appearances of fraud, and resting for support on the attesting witnesses alone, these witnesses must be beyond suspicion; if at all shaken in credit, no part of their evidence can be relied on. *Bridges* v. *King*, 1 Hag. Ec. 288.

Where a will is impeached on the ground of fraud, the parties who seek to establish the will must remove or explain, and so neutralize the facts out of which the suspicion arose.

The relation of client and attorney, between a testator and the party benefited by his will, excites suspicion. *Wyatt* v. *Ingram*, 3 Hag. Ec. 468.

To entitle an unfinished paper to proof, it is necessary, first, to connect it most clearly with the deceased; secondly, to shew fixed and final intention; thirdly, completion prevented. *Jameson* v. *Cooke*, 1 Hag. Ec. 82.

Extrinsic evidence is necessary to make an unfinished paper operative, nor will a proxy of consent from all entitled in distribution, or otherwise, justify the Court in granting probate to such an instrument, unless the affidavits set forth facts, which, if proved in solemn form of law, would sustain a disputed paper. *In the goods of Aaron Hurrill*, 1 Hag. Ec. 252.

A paper manifestly unfinished and imperfect, cannot be proved on mere affidavits of finding, handwriting, and the non-existence of any other testamentary paper. *In the goods of Elizabeth Wenlock*, 1 Hag. Ec. 551.

An allegation repropounding two unfinished papers rejected, the facts not being sufficient to rebut the adverse presumption of law; and the administrator who appeared under protest dismissed with costs.

When an instrument is unfinished, its state must be accounted for, either by shewing completion prevented, or that the deceased, abandoning his intention of finishing it, meant it to operate in that form without any further act. *Wood* v. *Medley*, 1 Hag. Ec. 661—71.

The indorsement "Heads of Will," on a paper fairly written, signed and dated, lets in parol evidence of intention; but the *primâ facie* inference rather is, that such paper was intended to operate, if no more formal instrument were drawn up. An allegation propounding such a paper, with alterations made from time to time, adapting it to the deceased's circumstances, and pleading facts inferring adherence, admitted to proof; but on the parol evidence, the paper pronounced against. *Mitchell* v. *Mitchell*, 2 Hag. Ec. 74.

The Court of Probate does not admit parol evidence, to shew an error in a testamentary paper, unless there be, 1st, some ambiguity on the face of the instrument; 2ndly, the means of obtaining clear and indisputable proof of the deceased's intention. *Harrison* v. *Stone*, 2 Hag. Ec. 538.

In the Court of Probate an ambiguity on the face of a paper, as to the *factum*, *e. g.* whether a revocatory clause was intended to operate as a general or only as a partial revocation, lets in parol evidence. *Draper* v. *Hitch*, 1 Hag. Ec. 677.

In order to the admission of parol evidence in a Court of Probate, to explain an ambiguity upon the *factum* of an instrument, the ambiguity must be on the face of the paper; and the facts to be proved must completely remove that ambiguity. *Draper* v. *Hitch*, 1 Hag. Ec. 678.

The party setting up, as a will, a paper not on its face testamentary, must shew testamentary intention; and as the law in such cases lends its aid only to effect intention, the question is, whether such a paper, if treated as testamentary, will in truth give effect to the deceased's intention, though the Court cannot look at the effect of an instrument clearly testamentary on its face. *The King's Proctor* v. *Daines*, 3 Hag. Ec. 218.

Declarations of testamentary intentions, if unaccompanied by any immediate acts, are always looked upon with great caution, and their weight depends upon all circumstances accompanying and connected with them. *Mynn* v. *Robinson*, 2 Hag. Ec. 187.

### (D) Revocation.

[*Hodges* v. *Green*, 4 Russ. 28, Dig. Law J. 556. *Kirke* v. *Kirke*, 4 Russ. 435, Dig. Law J. 557.]

A will found in the deceased's repositories with the seal cut off, is to be presumed to be cancelled by himself, *animo cancellandi*, and can only be revived by some further act. Costs out of the estate. Administration to the widow refused. *Lambell* v. *Lambell*, 3 Hag. Ec. 568.

An executor having, in pencil, altered a will (by the direction of the testator, who approved of it when so altered,) and then cancelled it, only in order that another might be drawn up, the preparation of which will was prevented by the death of the deceased; probate of the cancelled will, in its original state, will be granted, on a proxy of consent being given by all the persons interested. *In the goods of William Appelbee*, 1 Hag. Ec. 143.

Cancellation of one duplicate a cancellation of both. In deceased's custody, must be presumed to be cancelled by deceased. *Lillie* v. *Lillie*, 3 Hag. Ec. 191.

Testatrix having (without destroying the seal or signature,) partially mutilated a duplicate will, but retained in her own possession, and carefully preserved entire the other duplicate: such mutilation is neither a total nor a partial revocation. On evidence of uninterrupted affection for the parties benefited, will pronounced for. Costs out of the estate. *Roberts* v. *Round*, 3 Hag. Ec. 548.

A will being executed in duplicate, one part of which was proved to have been in, and was never traced out of, the deceased's possession, and was not found at his death, the *primâ facie* presumptions are, first, that the testator destroyed the part in his own possession; and second, if the first be not repelled, that he intended thereby to revoke the duplicate not in his possession. The deceased pronounced dead intestate. *Colvin* v. *Fraser*, 2 Hag. Ec. 266.

A married woman having, under a certain settlement, and also under her mother's codicil, made a will; and under her mother's codicil specifically, and under "all and every other power," &c. generally, made a second will with a general revocatory clause:—the Court of Probate will grant a general administration with the latter will annexed, but not pronounce against the former will, leaving it to the Court of Construction to decide, whether the former will is thereby revoked. *Draper* v. *Hitch*, 1 Hag. Ec. 674.

Deceased having, under a trust-deed, power to dispose of certain effects, by a will attested by two witnesses, such a will is revoked by a subsequent will, containing an express revocatory clause, duly executed, but attested by only one witness; the disposition intended by the deceased being thereby completely effected. *Richardson* v. *Berry*, 3 Hag. Ec. 249.

Marriage and birth of issue, is not an absolute, but a presumptive revocation of a prior will, the law presuming an intention to revoke, arising from a change of condition and new obligations; if such change of condition and new obligations are provided for, and the intention to revoke cannot be presumed, the revocation does not take place. Therefore, a will, in favour of the issue of a former marriage, is not revoked by a subsequent marriage and birth of issue, such marriage and issue having been provided for by settlement. *Talbot* v. *Talbot*, 1 Hag. Ec. 705.

A second marriage, and the birth of issue, is not a revocation of a will made in favour of the children of a former marriage and an illegitimate child, where the second wife has some real property settled on her and her issue, under her father's will, and where the deceased had possession and full knowledge of the existence of such will. *Johnson* v. *Wells*, 2 Hag. Ec. 561.

A man devises freehold and copyhold lands, and surrenders the copyholds to the use of his will: afterwards, by a settlement made previous to his marriage, he conveys the freeholds to trustees and their

heirs to the use of him, the husband, for life; and, after his death, to the intent that his wife may have a yearly rent-charge during her life, with remainder to the husband and his heirs; and he further covenanted to surrender the copyholds to the uses of the settlement:—Held, that the devise of the freeholds was revoked by the settlement: that the devise of the copyholds was not revoked by the covenant to surrender them to the uses of the settlement. *Vawser* v. *Jeffery*, 3 Russ. 479, s. c. 7 Law J. Chanc. 38.

The will of a feme covert, made during marriage, under a settlement, is not revoked by her surviving the husband. *Morwan* v. *Thompson*, 3 Hag. Ec. 239.

A and B, being tenants in common of certain premises, made partition by lease and release; and a satisfied mortgage term, which existed in B's undivided moiety, was assigned to a trustee on trust, as to the premises allotted to A, to attend the inheritance:—Held, that a prior will of A was not revoked by these transactions. *Barton* v. *Croxall*, 7 Law J. Chanc. 188, s. c. 1 Tam. 164.

A testator, in the case of an event which happened after his death, directed a freehold estate to be sold, and the produce applied upon the trusts, intents, and purposes afterwards expressed in his will, as to his residuary personal estate: by a codicil he revoked the gift in his will, of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents and purposes, which were expressed in the will, as to the residuary personal estate. *Francis* v. *Collier*, 4 Russ. 331.

### (E) Revival and Republication.

The destruction of a latter will revives a former will nearly of the same import; the motive, on which the variation was made, having ceased to operate; and reconciliation to, and declarations in favour of, the universal legatee under the former will, just previous to death, being shewn; such revival being always a question of intention, and admitting of parol evidence.

It is not settled, whether the principle of law is, that on the revocation of a latter will, a former will is presumed to revive, or not. *Kirkcudbright* v. *Kirkcudbright*, 1 Hag. Ec. 325, 6.

A widow having, after the death of her husband, delivered a will made during coverture, to her executor, for safe custody, such delivery, coupled with other recognitions, amounts, in a Court of Probate, to a republication, rendering it a new will of which the executors are entitled to a general probate.

A codicil duly attested by three witnesses, referring to the will, and desired by the testator to be taken as part of his will, passes freehold property, acquired between the publication of the will and that of the codicil; unless an intention to the contrary appear.

A testator by his will devised the residue to his wife in fee. He afterwards purchased freehold property, and made a conveyance of part to uses which rendered the conveyance void under the Statute of Mortmain. Subsequently, by a codicil, he gave a life interest to his wife in the whole of the after-purchased property; with remainder to other persons:—Held, that no intention appeared against passing the subsequently-acquired property; and consequently, that the part which, by reason of the void conveyance, fell into the residue, passed to the wife. *Goodtitle* d. *David* v. *Williams*, 8 Law J. K.B. 326, s. c. 10 B. & C. 893.

A testator, by his will, specifically devises an estate to his wife, and, after certain bequests, he gave and devised to her all other his freehold, copyhold, and leasehold estates, not thereinbefore otherwise disposed of. By a codicil, after reciting the devises to his wife, he, in case his wife should die before him, devised all his said estates to trustees upon certain trusts:—Held, that the will was not republished by the codicil, so as to pass estates purchased between the date of the will and the codicil. *Smith* v. *Dermer*, 3 Y. & J. 278.

### (F) Codicils.

Handwriting and finding are sufficient to support a codicil confirming a legacy under a will, which codicil, out of the custody of, and was propounded by, the person solely benefited under it, who had been sworn executor of the will and one codicil, four months before producing this paper, and the validity of whose legacy under the will was, at the time, a question depending in the Court of Chancery. *Constable* v. *Steibel*, 1 Hag. Ec. 56.

The presumption is, that a codicil, disposing of realty as well as personalty, unattested, only signed by initials, and with many interlineations, is unfinished and preparatory; and then it must be shewn, that the deceased thought it would operate in its actual form, or was prevented by a sufficient cause from finishing it. *Reay* v. *Cowcher*, 2 Hag. Ec. 249.

A codicil produced under mysterious circumstances, eighteen months after the deceased's death, there being no evidence of finding, nor of anything directly connecting it with the deceased, cannot be established on evidence of handwriting alone, particularly when such evidence is conflicting, and when other circumstances raise a suspicion of the genuineness of the instrument. *Crisp* v. *Walpole*, 2 Hag. Ec. 531.

A testator having, ten years before his death, when in perfect health, executed a will, and subsequently a codicil, conformable to his ascertained affections, and two and a half years before his death, after a paralytic stroke, producing at least great bodily infirmity, having executed a second codicil, materially departing from those instruments, and six months before his death, a third codicil, revoking the second, and reverting to the former disposition; probate of the will, first and third codicils granted—there being no satisfactory proof of a change of his affections, and the evidence of volition and capacity being at least as strong in support of the third, as of the second codicil. *King* v. *Farley*, 1 Hag. Ec. 502.

### (G) Construction.

[*Croker* v. *Martin*, 1 Dow. & Cl. A.C. 15; Dig. Law J. 561.]

Where it is a question of construction of the meaning of the will, to be determined by intention of the testator, recourse must be had to the general tenor of the whole will. *Heneage* v. *Lord Andover*, 10 Price, 316.

Whether the expression in a will, "in case of death," refers to a death in the lifetime of the testatrix, or to a death at any time, depends upon the context. *Tilson* v. *Jones*, *Tilson* v. *Thornton*, 1 Russ. & M. 553.

The words "personal representatives," are to be understood in the ordinary sense of executors and administrators, unless controuled by the context of the will. *Saberton* v. *Sheels*, 1 Russ. & M. 587, s. c. 1 Tam. 383.

In order to exonerate the personal estate from the payment of debts, there must appear upon the whole will a manifest intention to that effect. *Driver* v. *Ferrand*, 1 Russ. & M. 681.

Parol evidence, when admitted relative to a will, is restrained to what the testator's intention was at the time of making the will. *Whitaker* v. *Tatham*, 9 Law J. C.P. 189, s. c. 7 Bing. 628, s. c. 5 M. & P. 628.

Where declarations to testator's solicitor, at the time of giving instructions for making a will, admissible in evidence. *Guillebaud* v. *Mears*, 7 Law J. Chanc. 136.

A book in the testator's handwriting, not attested so as to pass real estate, expressed to be the book referred to in his will, not admissible in explanation or aid of the will, although proved in the Ecclesiastical Court. *Wilkinson* v. *Adam*, 12 Price, 470.

Collateral circumstances relating to the ages of the several devisees, and to their being married or unmarried, admissible in evidence, for the purpose of ascertaining the construction of a will. *Lowe* v. *Lord Huntingtower*, 4 Russ. 532, n.

Under the description "children" in a will, evidence may be received, to shew that the testatrix knew there were only two such children, and that one of them was illegitimate; and, the parent being dead at the date of the will, that no other persons could answer the description of children:—Held, therefore that they took as *personæ designatæ*. *Gill* v. *Shelley*, 2 Law J. Chanc. 68.

A statuary bequeathed articles used in his business by their technical names, some of which were very obscurely written. Reference directed, to ascertain what was meant, the Master taking to his assistance persons skilled in writing, and acquainted with articles used by statuaries. *Goblet* v. *Beechey*, 3 Sim. 24.

J D having two sons, one of whom, T D, cohabited with a woman called Anne Robinson, in the year 1819, threatened to disinherit him, unless he would break off the connexion; whereupon T D drew up and signed a paper, in the words following: "I hereby solemnly declare, and with due awe and reverence appeal to the great searcher of all hearts, for the truth and sincerity of this declaration, that I am not married, or in any way contracted to the woman I have so long and so imprudently cohabited with, known heretofore by the name of Anne Robinson; and that from this moment to the end of my existence, I will have no kind of communication with her, directly or indirectly; and I am satisfied to be no longer considered by my father as his son, and in the estimation of the world not to have any further claim to that title, than while I strictly adhere to this declaration in the fullest sense, and to the true spirit and meaning of it: and from the moment I deviate from it in any degree, may I be renounced by him and by all. And I hereby call on such trustees and executors as my father may appoint to carry into effect the final distribution of his property, to withhold from me all and every part of whatever bequest he may think proper to make in my favour, and not to consider me as the object he had in view, whenever I cease to support this solemn declaration. Given under my hand, this 15th day of August 1819. (Signed) Thomas St. John Dillon."

Anne Robinson also signed a declaration in the words following: "I do hereby solemnly declare that I am not married, or in any way connected to the above-named Thomas Dillon; and I do solemnly and sincerely promise, that I will not from henceforth have any connexion, communication, intercourse, or correspondence whatever with him, directly or indirectly. Given under my hand, this 5th day of August 1819. (Signed) Ann Robinson." The declarations were attested by a witness, who proved that they were placed in the hands of J D.

J D, by his will, dated November 1819, devised and bequeathed all his property, upon trust, to invest the produce in the public funds or securities, as therein mentioned, and out of the interest thereof, after paying a yearly allowance to his wife, Catherine Dillon, for her life, "upon trust, to permit and suffer my eldest son, Thomas St. John Dillon, to have, receive, and take out of the interest of such stock securities that will remain after payment of said annuity to my said wife, one moiety of such interest to be paid to him by half-yearly payments, whilst he strictly adheres to the solemn engagement he has entered into, never to associate with, or have any further knowledge of Anne Robinson, and which engagement signed by him, I have put into the hands of my said trustees and executors, to be safely kept, so that it may be forthcoming when necessary; and as my said son Thomas has expressed his opinion to me, at present, that, to prevent the possibility of the continuance or renewal of such a connexion, it is necessary for him to absent himself from this country for some length of time, and that he is determined to do so as soon as he conveniently can after my decease; this restriction is not to be considered in full force, or to be acted upon until after his departure for such purpose, provided it be within three months after my decease; and I have allowed this latitude, least she should, while he continued in Ireland, intrude herself on him, and by such another act cause a forfeiture of his claims under this my will; and should it fully appear, that at any time after the said period, he may happen to break through this engagement, then all benefit that it was intended he should derive under this will, shall cease and be done away, and the property so bequeathed to him shall go as hereinafter directed, as in case of his dying unmarried and without lawful issue; and upon further trust to permit and suffer my younger son, James Dillon, to have, receive, and take the remaining moiety of the said interest of the said stocks or securities, to be paid to him, or to his order legally authorised to receive the same, by half-yearly payments; and on this further trust, to give, pay, or cause to be paid to my said sons, Thomas St. John Dillon and James Dillon, on their respective days of marriage, such marriage to be with the consent of my said trustees

d of my executors, or the majority of them, the ll amount of the moiety to each of the monies so nded or secured; and in case either of them marry ithout such consent, or should die without having een married with such consent, then the interest f the moiety to which the person so marrying or ying was entitled, under this my will, to go to the ther or surviving brother during his life, and after is death the principal sum to go to his lawful issue, ' any, in such manner, proportion, and under such estrictions, and at such periods as he, by will or eed may direct or appoint; and in case both of ay said sons should so die unmarried, and without aving lawful issue," then he gave the interest of he estate for life to certain relations, and finally to ertain charitable institutions. The will concluded n these words: "And I do hereby appoint my said rustees and executors to be the sole judges of the nture conduct of my said sons; and they, my said rustees and executors, and they only, are to decide n what may amount to a forfeiture of the benefits to e derived under this my will."

In 1821, T D married Anne Robinson, having aked and obtained the consent of the trustees to a marriage with a person represented by him to be Mary Anne Madden. One of the trustees had iven a general consent to the marriage, but the najority of the executors and trustees had consented, specifically, to a marriage with Mary Anne Madden, described as "only surviving daughter of Andrew Madden, of Dunleary, Esquire;" and it was proved that Andrew Madden, who, upon the marriage, gave away Anne Robinson as his daughter, had a legitimate daughter, whose name was Mary Anne Madden, and who was unmarried.

Half the funds were paid to T D by the trustees and executors upon the marriage.

In 1822, T D filed a bill in the Court of Chancery, in Ireland, against the trustees and executors, and the devisees over, stating the will, and that he had complied with the conditions; that he had not since his father's death had any acquaintance with Anne Robinson, and had married Mary Anne Madden, with the consent of the trustees and executors; and praying that the trusts might be carried into execution.

On the 9th of December 1824, T D died, leaving Anne Madden (Robinson), with whom he had cohabited from the time of his marriage, and to whom, by the name of A. H. Robinson, otherwise Dillon, he bequeathed all his property by will; but he left no issue.

On the 23rd of December 1824, Anne Dillon, otherwise Robinson, as the representative of T D, filed an original bill in the Court of Exchequer, Ireland, against the trustees and executors, containing nearly the same statement and prayer as the bill of T D.

In their answer to this bill, the trustees and executors stated, that they believed that T D had complied with the directions and conditions of his father's will, and that otherwise they would not have consented to his marriage.

James Dillon, the other son of the testator, died before his father, never having been married.

In the court below, a decree was made in favour of the plaintiff, Anne Dillon, otherwise Robinson; but this decree was reversed on appeal, and the following points were decided: 1st, that the declaration of T D was not admissible in evidence, as part of the will; 2nd, that "and" in this will could not be construed "or"; 3rd, *semble*, that the word "associate" in the will, did not prohibit marriage. But 4th, that T D had not contracted a valid marriage, or at least not with such consent as was requisite; and that therefore the estates limited over, on his dying unmarried, and without issue, vested in the devisees. *Dillon* v. *Harris*, 4 Bligh, N.S. 321.

(H) Practice.

On affidavit, that an attesting witness has been diligently sought, and cannot be found, an executor may pray publication; but the other party has a right to a motion against the witness, to attend for cross-examination, if they can discover him. *Mynn* v. *Robinson*, 1 Hag. Ec. 68.

The executor of a former will, deriving all his interest from that will, and if deprived of such interest, being deprived by the act of the deceased, is not entitled, in opposing a later will, to the same indulgence as a next of kin, who has by law a right to the succession, unless ousted by the express directions of the deceased. *Young* v. *Brown*, 1 Hag. Ec. 574.

An original will, disposing of real estate in Scotland, may (certain conditions being complied with) be delivered out of the registry, in order to be proved and recorded at Edinburgh. *In the goods of Alexander Russell*, 1 Hag. Ec. 91.

The Court will not, when a competent party is opposing a will, stay the admission of the executor's allegation propounding such will, till the appointment of a committee of a lunatic next of kin to be confirmed, more especially such committee being already a party to the suit, as curator of other next of kin. *Tyrrell* v. *Jenner*, 2 Hag. Ec. 72.

A party entering a caveat, and alleging himself to be an executor in the last will of the deceased, without inserting the date, has a right to call for an affidavit of scripta, without swearing as to his belief that he is an executor in some paper left by the deceased; and *semble*, without being liable to costs. *Antrobus* v. *Leggatt*, 3 Hag. Ec. 616.

(I) Costs.

A next of kin declaring "he proceeds no further" in contesting a will, the Court will dismiss, and not condemn him in costs, because it is pleaded "that he attempted to suborn an attesting witness," nor allow affidavits, in proof of the attempt. *Meek* v. *Curtis*, 1 Hag. Ec. 127.

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## WITNESS.

(A) Attendance.
(B) Competency.
(a) *Relative Situation.*
(b) *Interest.*
(c) *Waiver, and Removal of Objection to.*
(C) Credit.
(D) Commission to examine.
(E) Examination.
(a) *At Law.*
(b) *In Equity.*
(c) *In the Ecclesiastical Court.*
(F) Interrogatories.

(G) Depositions.
(H) Protection and Privileges.
(I) Expenses.

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(A) Attendance.

In a criminal case, a person, who is present in court, when called as a witness, is bound to be sworn, and to give his evidence, although he has not been subpœnaed. An indictment for stopping a way, is a criminal case for this purpose. *Rex* v. *Sadler*, 4 C. & P. 218. [Littledale]

Time for subpœnaing a witness domiciled in London, to give evidence in a town cause. *Postan* v. *Rose*, 4 C. & P. 271. [Tindal]

In order to bring a party into contempt, for not attending at a trial as a witness, at the Sittings, in obedience to a subpœna, the writ must specify the place at which the cause is to be tried, viz. Westminster Hall or Guildhall. *Milsom* v. *Day*, 3 M. & P. 333.

On a motion for an attachment against a witness for non-attendance at the trial of a cause in pursuance of his subpœna:—Held, that the affidavit should state the party to be a material and necessary witness. *Taylor* v. *Willans*, 8 Law J. C.P. 121, s. c. 4 M. & P. 59.

An attachment for non-appearance to a subpœna served in Guernsey is irregular. *Fernandez* v. *Corbin*, 2 Sim. 544.

(B) Competency.

[See Insolvent Debtor, Evidence (H).]

(*a*) *Relative Situation.*

A woman who was married to a man, but whose marriage to him was void, by reason of her having a former husband living, who had been supposed dead, may be examined against him, to prove his declarations made while she lived with him as his wife. *Wells* v. *Fisher*, 2 M. & M. 99, s. c. 5 C. & P. 12. [Patteson]

Where the question was as to a settlement by marriage, and the marriage was disputed on the ground of a prior marriage of the man, who had been called as a witness, but not to any fact relating to the marriage:—Held, that the supposed first wife was a competent witness to be called by the other party to prove the marriage; there being no direct charge against the husband; and the evidence of the wife not being directed to the contradicting of him in any fact deposed to by him. *Rex* v. *the Inhabitants of Bathwick*, 9 Law J. M.C. 133, s. c. 2 B. & Ad. 639.

(*b*) *Interest.*

Where one of two defendants in trover, suffers judgment by default, he may be called as a witness to prove the other not guilty. *Ward* v. *Ventom*, Pea. A.C. 126. [Kenyon]

A witness is not inadmissible merely on the ground of his being a party to the suit. Therefore, where one of three defendants suffered judgment by default in an action of debt on bond,—Held, that he might be examined for the plaintiff (he not objecting), his evidence being against his own interest. *Worrall* v. *Jones*, 9 Law J. C.P. 70, s. c. 7 Bing. 396, s. c. 5 M. & P. 241.

Where a bill is filed on behalf of a class, a person belonging to that class, and who would have the benefit of the decree if the plaintiff succeeded, is not a competent witness for the plaintiffs. *Williams* v. *Smith*, 7 Law J. Chanc. 129.

On a plea in abatement, of the non-joinder of other joint contractors, one of the parties named in the plea is not a competent witness for the defendant. *Hare* v. *Munn*, 1 M. & M. 242. [Tenterden]

A witness admitting himself to be jointly liable with the defendant, was held to be incompetent, inasmuch as he, being liable to contribution, was interested in defeating the action or lessening the damages. *Hall* v. *Cecil*, 7 Law J. C.P. 242, s. c. 3 M. & P. 273, s. c. 6 Bing. 181.

A witness called for the defendant stated, on the *voir dire*, that he was bail to the sheriff in the action, but did not justify, and that he had not done anything to get the recognizance he had entered into discharged. He added, that other bail justified, but it appeared that he did not see them do so:—Held, that he was not a competent witness. *Hawkins* v. *Inwood*, 4 C. & P. 148. [Tindal]

Where a party is interested in the destruction of a particular custom, or has himself acted in breach of it, he is not a competent witness to disprove the existence of such custom.

In an action on a charter-party, the attesting witness having subsequently, by agreement with the plaintiff, acquired an interest in the proceeds of the voyage:—Held, that he was not a competent witness to prove the execution of the charter-party, nor was evidence of his handwriting admissible. *Hewitt* v. *Stephenson*, 7 Law J. C.P. 209, s. c. 3 M. & P. 146.

The inhabitants of a parish are admissible witnesses in an action by the surveyor of the highways against his predecessor for penalties for not accounting, and for the balance of monies in his hands. *Heudebourck* v. *Langston*, 2 M. & M. 402, s. c. 3 C. & P. 566. [Tenterden]

In an action against the surety of a collector of rates, to recover sums received and not paid over by the collector, an inhabitant of the place is admissible *ex necessitate* to prove payments to the collector, although, in the event of the surety's failing to make good the deficiency, he would be liable to a fresh assessment. *Middleton* v. *Frost*, 4 C. & P. 16. [Tenterden]

On an objection to a title on account of the estate sold, being subject to a right of common, which was not disclosed, a person claiming a right of common is a good witness. *Gibson* v. *Spurrier*, Pea. A.C. 50. [Kenyon]

On an issue directed by the Court, to try the validity of certain deeds of lease and release, and an accompanying trust-deed, the Court held, that the attorney who prepared them was a competent witness to prove the circumstances under which they were executed; notwithstanding his claim for costs, which, it was contended, gave him an interest in supporting them; and notwithstanding he was a party to the trust-deed, under which he was appointed receiver, in which character he had defended an action of trespass brought against him by the present defendant, for breaking and entering a chapel on the estate. *Hudson* v. *Revett*, 7 Law J. C.P. 145, s. c. 5 Bing. 368, s. c. 2 M. & P. 663.

The evidence of the remainder-man in tail is not

missible on the part of a prior tenant in tail, in an ejectment brought by him for the purpose of trying the validity of a recovery suffered by a former tenant in tail. *Doe* d. *Lord Teynham* v. *Tyler*, 8 Law J. C.P. 100, s. c. 6 Bing. 290, s. c. 4 M. & P. 29.

In a *quare impedit*, the father of the defendant was called as a witness for him, and it appeared that the witness himself claimed a right of presentation to the vacant rectory, as tenant by the courtesy, in right of his late wife, who was seised of the estate of inheritance:—Held, that his evidence could not be received; although it was contended that his right (if any) had been forfeited by his having neglected to present within six months after the vacancy happened, which would give the bishop a right to present,—it appearing that the bishop had not acted upon that right. *Gully* v. *the Bishop of Exeter*, 7 Law J. C.P. 50, s. c. 2 Bing. 171, s. c. 2 M. & P. 266.

A woman who claims dower in respect of property, the subject of an ejectment, is a competent witness on behalf of the party whose case is founded upon the same alleged facts as her own; because her claim to dower could not be affected either way by the result of the ejectment. *Doe* d. *Nightingale* v. *Macey*, 9 Law J. K.B. 2, s. c. 1 B. & Ad. 437.

Action for goods sold by the plaintiffs to the defendant, at the sale of which, according to the plaintiffs' evidence, A was present. Defence, that the goods had been bought by A of the plaintiffs, and by him sold to the defendant, who had paid him. To prove this defence, A was tendered as a witness. Held, to be competent, for it was not to be assumed, in the first instance, that he had been guilty of fraud upon the defendant, so as to be liable to him for the costs of the plaintiff's action then depending. *Larbalestier* v. *Clark*, 9 Law J. K.B. 159, s. c. 1 B. & Ad. 899.

An insolvent debtor is not a competent witness for the plaintiff, in an action brought by his assignee, though he release his interest in the surplus, because his future property is liable to the payment of the debts in the schedule, and therefore he is interested in procuring the recovery of as much money as possible. *Delafield* v. *Freeman*, 8 Law J. C.P. 70, s. 6 Bing. 294, s. c. 3 M. & P. 704, s. c. 4 C. & P. 67.

If it be sought to shew the incompetency of a witness by reason that the plaintiffs on the record have become bankrupts, that the action is prosecuted by the assignees in their names, and that the witness is a creditor of the bankrupt plaintiffs; the commission of bankrupt must be produced, although the witness be examined on the *voir dire*. *Hunter* v. *Leathley*, 8 Law J. K.B. 201, s. c. 10 B. & C. 858.

### (c) *Waiver, and Removal of Objection to.*

In equity, an objection to the competency of a witness is not waived by cross-examination. *Harrison* v. *Courtauld*, 1 Russ. & M. 428.

In an action on a bill of exchange against two partners, one of them pleaded in bar his bankruptcy and certificate. A *nolle prosequi* was thereupon entered as to him:—Held, that this made him a competent witness. *Afflalo* v. *Fourdrinier*, 8 Law J. C.P. 33, s. c. 6 Bing. 306, s. c. 3 M. & P. 743.

Several persons having agreed to bear equally the expenses of a joint undertaking in an action brought against one of them, another of the contractors is a competent witness for the defendant, if released by him, though the rest do not join in the release. *Duke* v. *Pownall*, 1 M. & M. 430. [Tenterden]

An insolvent debtor is not a competent witness in an action brought by his assignee, notwithstanding he release his interest in the surplus of his estate. *Delafield* v. *Freeman*, 8 Law J. C.P. 70, s. c. 6 Bing. 294, s. c. 3 M. & P. 704.

In a suit by the assignee of an insolvent to impeach a sale, which a former assignee had made, of an equity of redemption, the insolvent is not rendered a competent witness for the plaintiff by releasing his interest in the residue of his estate. *Waldron* v. *Howell*, 3 Russ. 376.

The bail for the defendant may be made a competent witness for him, by the defendant's depositing at the trial, in the hands of the officer of the court, a sum equal to the sum sworn to and the costs of the action, and the Judge's making an order thereupon to strike the name of the bail off the bail-piece. *Baillie* v. *Hole*, 1 M. & M. 289, s. c. 3 C. & P. 560. [Tenterden]

In assumpsit, where one defendant pleads a plea operating only in his personal discharge, a verdict may be taken for him on that plea, and he may then be examined as a witness for his co-defendants.

*Quære*, whether in an action of contract against several defendants, some of whom plead matter negativing the action with respect to all, and the other pleads his bankruptcy only, on which the jury find a verdict for him, he is a competent witness, after that verdict returned, to prove the plea of the other defendants. *Bate* v. *Russell*, 1 M. & M. 332. [J. Parke]

## (C) Credit.

If a witness is, on cross-examination, asked a question on some collateral matter, in order to affect his credit, he cannot be contradicted by calling another witness for that purpose. *Rex* v. *Rudge*, Peo. A.C. 232. [Lawrence]

It is not admissible to impeach a witness by shewing he has made a particular statement, unless the witness denies having made such statement. It is not enough that he states he has no recollection of making such statement. *Pain* v. *Beeston*, 2 M. & M. 20. [Tindal]

It is not essential that the witnesses who state that they would not believe another person on his oath, should have ever heard such person give evidence upon oath; as the real question is, whether the witnesses have such a knowledge of the person's character and conduct, as enables them conscientiously to say, that it is impossible to place any reliance on any statement that such person may make. *Rex* v. *Bispham*, 4 C. & P. 392. [J. Parke]

In order to discredit a witness by proof of a contradictory statement, it is not enough to ask him generally whether he has ever made such a statement; but particulars must be specified to him. *Angus* v. *Smith*, 1 M. & M. 473. [Tindal]

## (D) Commission to examine.

[Courts of common law enabled to examine witnesses on interrogatories. 1 Will. 4. c. 22, 9 Law J. Stat. 21.]

The defendant had obtained a rule under 1 Will. 4. c. 22. s. 4, for a commission to examine witnesses on

interrogatories in France. Cause being shewn on section 1, alleging want of jurisdiction, Lord Tenterden said, there could be no doubt but that a distinction existed between sec. 1 and sec. 4; and that it would be limiting the commission too much to make it part of the order, that it should be returned in three weeks. The commission was directed to issue, and, if not returned in a proper time, the plaintiff to apply that the cause shall go on. The witnesses intended to be examined, and the time, place, and manner of examining them, were named in the order, which directed the commission to be returned by Michaelmas term, at all events: as it was a London cause, no trial could be lost. *Reynard* v. *Cope*, 9 Law J. K.B. 326.

The powers of the 4th section of 1 Will. 4. c. 22. to grant commissions for the examination of witnesses abroad, are vested discretionally in the courts of common law, and are applicable to places out of the king's dominions. *Ducket* v. *Williams*, 9 Law J. Exch. 177, s. c. 1 Tyrw. 502, s. c. 1 C. & J. 510.

A commission to examine witnesses in the West Indies, on a bill filed for a discovery, in aid of an action at law brought by the plaintiff, and after a commission, (not praying any relief),—ordered, on motion, although the defendant's answer had not come in, where his time for answering had expired. *Hibberson* v. *Cambridge*, 13 Price, 797.

### (E) Examination.

#### (a) *At Law.*

[See Practice and Rape.]

A person bringing papers under a *subpœna duces tecum*, may be compelled to produce them without being sworn. *Davis* v. *Dale*, 1 M. & M. 514, s. c. 4 C. & P. 335. [Tindal]

Where a witness remains in court, after an order for the witnesses to withdraw, the Judge may still allow him to be examined, subject to observation on his conduct in disobeying the order. *Rex* v. *Colley*, 1 M. & M. 329. [Littledale]

A witness was asked whether he had not been imprisoned on a conviction for forging coal-meters' certificates:—Held, not bound to answer. *Millman* v. *Tucker*, Pea. A.C. 222. [Ellenborough]

A witness is not excused from answering a question, on the ground that the conduct inquired into on his part would subject him to a penalty, if the time limited for proceeding for such penalty is past. *Roberts* v. *Allatt*, 2 M. & M. 192. [Tenterden]

An attorney's clerk is not privileged from answering whether he has received a particular paper from the client. *Eirke* v. *Nokes*, 1 M. & M. 303. [Tenterden.] See *Bevan* v. *Waters*, *ib.* 235.

If a witness objects to answer questions, on the ground that they may subject him to criminal proceedings, the counsel on the opposite side cannot argue in support of the witness's objection. *Rex* v. *Adey*, 2 M. & M. 94. [Tenterden]

#### (b) *In Equity.*

A witness may demur to answer an interrogatory which seeks for information come to his knowledge in professional confidence. *Parry* v. *Watkins*, 9 Law J. Chanc. 63.

*Quære*—whether an order to examine a witness *de bene esse* in a suit, merely to perpetuate testimony, and not for relief, can regularly be obtained before answer, or without notice to the other side. *Ellis* v. *Sinclair*, 3 Y. & J. 182.

#### (c) *In the Ecclesiastical Court.*

After publication, the Court will not allow witnesses to be re-examined in the ordinary mode, on a suggestion that the examiner, from a misconstruction of the plea, has improperly rejected evidence: but, if essential to justice, it may direct a *viâ suæ* re-examination in open court. *Ingram* v. *Wyatt*, 1 Hag. Ec. 100.

### (F) Interrogatories.

Interrogatories not being ready, and twenty-four hours having elapsed after notice to the adverse proctor, of the production of a witness,—the witness has not, under all circumstances, a right to be dismissed. *Ingram* v. *Wyatt*, 1 Hag. Ec. 94.

### (G) Depositions.

Where a mandamus for the examination of witnesses in India is obtained on the application of one party, and the other takes no part therein, the latter is nevertheless entitled to copies of the depositions at his own cost. *Davis* v. *Nicholson*, 9 Law J. C.P. 114, s. c. 7 Bing. 358, s. c. 5 M. & P. 185.

Under suspicious circumstances, the deposition of a witness, not cross-examined, may be sealed up; but, on a subsequent satisfactory explanation, may be delivered out subject to all objections at the hearing. *Ingram* v. *Wyatt*, 1 Hag. Ec. 95.

### (H) Protection and Privileges.

[See Production of Deeds, Books, and Papers, (B).]

A broker in an illegal stock-jobbing transaction is not compellable to give evidence of it, though he is only liable to a pecuniary penalty. *Raines* v. *Toogood*, Pea. A.C. 105. [Kenyon]

A man served with a *subpœna duces tecum*, cannot be compelled to produce an instrument by virtue of which he committed a trespass. *Miles* v. *Dawson*, Pea. A.C. 56. [Kenyon]

A was served with a *subpœna duces tecum*, to produce a deed in his possession, which was to be proved by the subscribing witness, but he refused:—Ordered, that he should produce the deed at his own expense, and that he should pay all the other expenses caused by his refusal. *Bradshaw* v. *Bradshaw*, 3 Sim. 285.

A witness, who comes from the country to London, in obedience to a subpœna, to testify in a suit in equity, is protected from arrest during the whole of the time he remains in London *bonâ fide* for the purpose of giving evidence.

But a witness who does not remain in London for the purpose of giving evidence, and who, after being served with the subpœna, has had it notified to him that he is to attend to be examined on the 22nd of October, is not protected from arrest on the 19th of October.

A witness is not protected from arrest in going to the office of the solicitor of the party, in order to prepare himself for his examination. *Gibbs* v. *Philipson*, 8 Law J. Chanc. 43, s. c. 1 Russ. & M. 19.

A witness attending an arbitrator upon a reference, is protected from arrest, in the same manner as a witness who is attending a court in obedience to a subpœna. *Wansell* v. *Southwood*, 7 Law J. K.B. 227, s. c. 4 M. & R. 359.

(I) EXPENSES.

A successful party is entitled to the expense of a foreign witness material to his cause, although such witness be not accessible by subpœna.

He is also entitled to the expense of detaining such witness in this country to await the trial of the cause, although opportunity is afforded of examination upon interrogatory. *Lonergan* v. *the Royal Exchange Assurance*, 7 Bing. 725, s. c. 5 M. & P. 447.

Allowance may be made in costs for loss of time to a foreign witness necessary to the success of the cause, who is not accessible by subpœna, and refuses to attend without compensation. *Lonergan* v. *the Royal Exchange Assurance*, 7 Bing. 729, s. c. 5 M. & P. 805.

No action for loss of time can be maintained by a witness, for his attendance in that character, although the party who compelled his attendance has promised to pay him for loss of time. *Collins* v. *Godefroy*, 9 Law J. K.B. 158, s. c. 1 B. & Ad. 950.

## WORK AND LABOUR.

If A agrees to serve B, as an apothecary's assistant, at such salary as C shall think reasonable, and it appears that no application has been made to C to fix any salary, A cannot recover anything for his services, in an action for work and labour. *Owen* v. *Bassen*, 4 C. & P. 93. [Tenterden]

In an action for work and labour, when it is shewn that the work was commenced under a written agreement, such agreement ought to be produced. And the plaintiff cannot recover without it for extras, although a particular item was proceeded on after an admission by the defendant, that it was an extra. *Vincent* v. *Cole*, 2 M. & M. 257, s. c. 3 C. & P. 481. [Tenterden]

If, in an action for work and labour, surveyors be called for the defendant, to prove that, in the year 1831, they surveyed the work, and that, in their judgment, the charges were 100*l.* too much,—Held, that a letter from the defendant's attorney, stating that the work had been surveyed in 1829, and that the charges were considered to be 60*l.* too much, is not admissible as evidence in reply. *Knapp* v. *Haskall*, 4 C. & P. 590. [Tenterden]

## WRECK.

To constitute "wreck," it is not necessary that no person should have escaped alive to land from the vessel.

The grantee of wreck has such a special property in the goods wrecked, as to entitle him to maintain trespass against a wrong-doer, for taking them away; although the grantee had not seized them. *The Corporation of Dunwich* v. *Sterry*, 9 Law J. K.B. 167, s. c. 1 B. & Ad. 831.

Parol evidence cannot be resorted to, to support a prescriptive right to wreck, where it appears that the property where wreck was claimed was in the Crown in the reign of Charles I.; for the jury could not infer that it was in those under whom the party claims, from time of legal memory. *Alcock* v. *Cooke*, 7 Law J. C.P. 126, s. c. 5 Bing. 340, s. c. 2 M. & P. 625.

# ADDENDA:

*The following Cases have been accidentally omitted.*

## COSTS.

The Court will not exercise any supposed power they may have at common law, to tax an attorney's bill, independent of the power given by 2 Geo. 2. c. 2. s. 23. *Dagley* v. *Kentish*, 9 Law J. K.B. 183, s. c. 2 B. & Ad. 411.

## DEED.

The defendant, by deed of lease and release, and an accompanying deed of trust, conveyed his property to the plaintiff, in trust for the benefit of his creditors; the deeds of lease and release containing a covenant for the defendant and his wife to levy a fine to enure to the uses of the trust-deed. At the time of the execution of the deeds, blanks were left in the trust-deed for the amount of a debt due to one of the creditors, which was not then ascertained. These blanks were on the following day filled up in the presence, and with the assent, of the defendant; and he afterwards joined with his wife in levying the fine, and wrote to the tenants on the estate, desiring them to pay their rents to the plaintiff's agent:—Held, that the subsequent filling up of the blanks did not avoid the deeds. *Hudson* v. *Revett*, 7 Law J. C.P. 145, s. c. 5 Bing. 368, s. c. 2 M. & P. 663.

## HIGHWAY.

The lessee for years, or other person receiving the benefit of tithes, is liable in respect of them to the

highway rates; although he compound with the tithe payers for the amount, and the tithe is not, in fact, severed. *Chanter* v. *Glubb*, 7 Law J. M.C. 114, s. c. 4 M. & R. 374, s. c. 9 B. & C. 479.

## MALICIOUS AND VEXATIOUS ARREST.

The plaintiff, who had lent to the defendant, at various times, 500*l.*, conceiving her to be a feme sole, arrested her for that amount. Upon the trial it appeared, that during the greater part of the advances, she was a feme covert, and plaintiff recovered only 38*l.* 10*s.*, lent after her husband's death. —Held, that the plaintiff, being at the time of the arrest ignorant of the defendant's coverture, had reasonable or probable cause for the arrest. Had he been aware of it, the defendant would have been entitled to costs. The 43 Geo. 3. c. 46. s. 3. throws upon the defendant the proof, that there was no reasonable cause.

*Semble*, that "the defendant's undertaking not to bring any action for an excessive arrest," contained in a Judge's order, for reducing the amount of bail, does not extend to an application for costs, under 43 Geo. 3. c. 36. s. 3. *Spooner* v. *Danks*, 9 Law J. C.P. 221, s. c. 7 Bing. 772, s. c. 5 M. & P. 701.

## POOR.

The interest of a remainder-man, after an estate for life, will not entitle him to a settlement, by reason of forty days' residence during the continuance of the particular estate. *Rex* v. *Ringstead*, 7 Law J. K.B. 197, s. c. 9 B. & C. 218, s. c. 4 M. & R. 67.

## PRACTICE.

A subpœna tested the 9th of May, and served on the 19th, required the defendant to appear "on Monday the 21st day of March instant;" the Court refused to set aside the service. *Page* v. *Carew*, 1 C. & J. 514.

## PROHIBITION.

[Proceedings in, improved and regulated by 1 Will. 4. c. 21, 9 Law J. Stat. 20.]

## REPLEVIN.

The Court will allow money to be paid into court by the plaintiff in replevin, upon a special application for that purpose. *Alderson* v. *Gadsden*, 7 Law J. K.B. 89.

## SPECIAL CASE.

When the Sessions, on determining an appeal, have granted a case, but none has been stated, the Court will, under some circumstances, direct a mandamus to the Justices who heard the appeal, to state a case; but not where it is clear that such a proceeding could lead to no result; as, where the chairman, in consequence of his own opinion, and that of the Court, upon the facts, refused to sign any statement but one which would have excluded the point of law relied upon by the party demanding a case. *Rex* v. *the Justices of Pembrokeshire*, 2 B. & Ad. 391.

## STAMP.

Where, by deeds of lease and release, and an accompanying deed of trust, property is conveyed for the benefit of creditors exceeding five, the whole forming but one assurance, an *ad valorem* stamp is not requisite, as they fall within the exception in the 55 Geo. 3. c. 184, schedule, part 1, title "Mortgage." *Hudson* v. *Revett*, 7 Law J. C.P. 145, s. c. 5 Bing. 368, s. c. 2 M. & P. 663.

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